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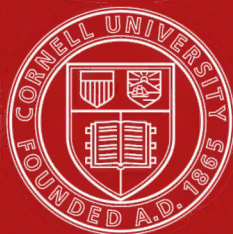
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PROBATE AND GENERAL LAW CODIFIED

COMPRISING THE

PROBATE AND RELATED GENERAL LAW
APPLICABLE TO PROBATE AND OTHER COURTS
VOLS. 1-3 PINNEY AND VOLS. 1-164 WISCONSIN
1837-1917

By A. G. ZIMMERMAN
OF THE WISCONSIN BAR

CHICAGO
CALLAGHAN AND COMPANY
1917

METHOD OF GETTING INFORMATION

The plan or scheme on which this book is made is unique—therefore, **READ THE AUTHOR'S EXPLANATORY FOREWORD.**

All points are developed chronologically in the order of their presentation through court decisions.

The entire judicial history of every point may be traced at a glance.

The application, extension and modification of principles are disclosed as indicated through decisions.

It not only is a codification of all questions covered: it is a compendium of the judicial history of every point.

There are three methods of getting at the wealth of detailed information:

(1) If the investigator dislikes indexes, the titles being alphabetically arranged, he can readily find the proper title, and with most subjects he can ignore the indexes and get the points of the whole title in a very short time;

(2) He can get a quite complete line on the legal points and paragraphs he wants by using the title index at the head of the title;

(3) For more exhaustive information, he has the exhaustive General Index at the end of the volume at his service.

If he is preparing a brief he can bodily sequester the paragraphs with citations on the point being briefed, and thus have a complete brief on the subject, largely in the language of the court.

However, for the plan, purpose, scope, method of compilation, and the why and wherefore

READ THE AUTHOR'S EXPLANATORY FOREWORD.

EXPLANATORY FOREWORD

It has been well said on the authority of Coleridge,—presumably the poet and philosopher, not the jurist,—that “there are three questions which the critic should ask concerning any author: What did he undertake to do? Was it worth doing? Has he done it well?” The plan of this volume differing from that of law books in general, the writer may be permitted, and perhaps even expected, to express his own views upon the first of these pertinent questions, providing he passes lightly over the second, and with becoming modesty is discreetly silent as to the third.

Generally stated, the undertaking here was to encompass in one complete volume all the advantages of the customary text-book, along with the accompanying benefits of the voluminous reference books or reports containing, intermingled with other matter, the detailed and authoritative law on the subject.

The purpose, primarily, was to set forth and systematize the substantive probate law in detail, and the related general law so far as feasible, for every-day practical desk use by the legal profession throughout the state; with the incidental idea that this might be of value outside the state independent of, rather than supplemental to, the Wisconsin reports on the subjects considered; and, finally, with the ambitious thought that, if the work were well done, it might be of more or less permanent value as time so multiplies the reports as to make a detailed examination and use of them more and more laborious and impracticable.

It was deemed that the Wisconsin reports, covering a period of about eighty years in the development of the law, contained in authoritative form and in great detail practically all the legal points and precedents involved in probate court work; but that much of this material was now practically lost to the profession because not in workable and convenient shape for everyday immediate application.

Moreover, as the general principles of probate law are applicable with like effect in all the states, and as the innumerable Wisconsin decisions, except so far as specifically affected by local statutes, are based upon the court's interpretations of the established decisions throughout the country, such adjudications may be said to outline in great detail the general probate law of the entire country with the judicial authority of a great court to substantiate the same in connection with the numerous justices as the instruments thereof.

With the view therefore of conscripting such justices as a combined entity and requiring them to do duty as authoritative authors of a text book on probate and related general law, the material herein contained was compiled in the language of the court itself so far as feasible. In so doing the work was begun with volume one of Pinney and, in the nature of original research work, disregarding digests and syllabi, each and every case involving anything relating to probate law was read, studied, and attempted to be absorbed, and in this manner the work proceeded through all the 167 volumes of the Wisconsin reports, with an endeavor to condense, systematize and codify the legal points concerning the subjects involved.

The cases developed the titles as the work progressed. The aim was to put the legal points under the titles which practical experience indicated would be the ones most likely to be examined for them. If the same point might be looked for under two or more titles, the aim was to place under the most likely title the most complete and quotable statement of the legal point; then to state the point in more condensed form under the other likely title or titles, with specific cross-reference to the title stating the same point from the same case but more fully and usually with a more direct quotation from the opinion. All cross-references within the body of the text are to specific citations.

The predominating purpose was to dig out and by quotation, where feasible, authoritatively state the law itself, not a mere reference to it; to endeavor satisfactorily to enlighten the user and the court, generally speaking, without necessitating going back to the reports.

The intent all through has been to state the law as it exists at this time, and to indicate the changes and distinctions. All codified cases are given chronologically as to time and the titles arranged alphabetically, so that the development of the law may be noted, and to enable easy finding of the cases indicated in the cross-references.

The purpose has been to make the strictly probate titles complete and exhaustive, but not the related general law topics, as a rule. There are, however, numbers of more or less exhaustive titles equally, or perhaps more generally, applicable to practice in all courts. Some of the more important and more complete general law titles may be mentioned, as follows:

Accounts, Admissions, Attorney and Client, Authentication, Bond for Maintenance, Charitable Trusts, Commissions of Brokers, etc., Concurrent Jurisdiction, Consideration, Contracts, in general, Creditors' Actions, Curtesy, Custody and Commitment, Deeds, Delivery, Depositions, Discovery, Domicil, Dower, Escrow, Expert Testimony, Fixtures, Foreign Judgments, etc., Guardian ad litem, Handwriting, Homestead, Husband and Wife, Impeachment of Witnesses, Implied Trusts, Incompetents, Infants, Insane Persons, Interest, Joint Tenancy, Judgments, Judicial Decisions, Jurisdiction, Kin, Land Contract, Landlord and Tenant, Legitimacy, Limitation of Actions, Marriage Contracts, Married Woman, Marshalling Assets, Mistake, Money, Mortgages, Necessaries, Novation,

Nunc Pro Tunc, Officers, Omissions, Parent and Child, Parol, Parties, Part Performance, Paupers, Payments, Permanent Improvements, Perpetuities, Personal Estate, Power, Precatory Trusts, Presumptions, Presumption of Death, Principal and Agent, Privileged Communications, Promissory Notes, Quantum Meruit, Real Estate, Services, Set-off, Settlement, Sunday, Sureties, Surviving Partner, Tender, Title, Transactions with Deceased Persons, Trustees, Trust Funds, Trusts, Undue Influence, Vacating Judgments, Vesting of Estates, Waiver, Widow, Witnesses, Writings.

Much pains-taking labor has been expended on a double index system with the view of facilitating the use of the material. At the head of each general title appears a detailed alphabetically arranged index of the title contents with references to the numbered paragraphs thereunder; and at the end of the work appears a similarly compiled but somewhat more exhaustive General Index of the whole contents, the references here being to the pages of the volume.

The labors herein involved have extended over a number of years, and great effort has been made to make the results reliable. In the interest of greater accuracy and to facilitate condensation, the initial text of the entire work including the indices, was first painstakingly written out in long-hand and subsequently revised and dictated in detail and then verified and re-verified with infinite care. Yet, doubtless, there is error, for which indulgence must be asked.

With the foregoing epitome of the scope, purpose and manner of the undertaking, the work is respectfully submitted to the kindly consideration of the legal profession.

A. G. ZIMMERMAN.

MADISON, WIS., June, 1917.

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PROBATE AND GENERAL LAW, CODIFIED

(Vols. 1-3, Pin.; Vols. 1-164, Wis.; A. D. 1837-1917.)

ABBREVIATIONS.

See PARTIES. WORDS AND PHRASES.

ABUTTERS.

Compensation for taking, 3.
Own to center of street, 1, 4.

Railroad cannot appropriate, 2.
Street not in exemption, 4.

1. "The proprietor of the adjacent lot owns to the center of the street, subject only to the right of the public to occupy and use the land as an ordinary highway";

2. And "a railroad company cannot appropriate and occupy it with the track of its road without the consent of such proprietor, or without compensation made to him";

3. And "neither the legislature nor the municipal authorities have any power to dispense with such compensation".

—*Ford v. C. & N-W. Ry. Co.*, 14 W. 609, 616.

4. "In this state the law is well settled that the owner of the adjoining lot takes to the center of the street. That is, the fee is in him to the center of the street, subject to the public easement". But the land in the street is not to be reckoned as part of a homestead exemption.

—*Weisbrod v. Daenicke*, 36 W. 73, 75.

ACCORD AND SATISFACTION.

See also COMPROMISE. PAYMENTS. SETTLEMENT.

Accepting another contract, 4.

Absolute payment, 5.

Conditional payment, 6.

Accord defined, 15.

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Keeping part payment, 2.

Mere promise, part payment, 3, 24, 26.

Mortgage, notes, by notes, 10.

New promise in satisfaction, 8, 9.

Receipt in full, 23.

Satisfaction, no reservation, 14.

Waiver of bankruptcy law, 22.

1. It was held "competent for the plaintiffs", "after execution had been issued and returned nulla bona, to compromise the judgment by receiving a draft on New York for an amount equal to fifty cents on the dollar, and bind themselves to a discharge of the judgment by an acknowledgment of satisfaction".

2. "While there are numerous cases going to show that a debt is not discharged by the payment of a sum less than that which is due, yet", it is indicated, there are no cases "where the creditor has been permitted to hold on to, and enjoy the fruits of, a compromise of his claim, and yet reject the compromise, and further prosecute his debtor".

—*Reid v. Hubbard*, 6 W. 175, 190.

3. It is "the settled law, that a bald promise by a creditor, for no other consideration or benefit than the mere payment in money of a part of an admitted debt, to accept such part in satisfaction of the whole, was void for want of consideration".

—*Otto v. Klauber*, 23 W. 471, 473.

4. "In *Eastman v. Porter*, 14 W. 39, and in *Blunt v. Walker*, 11 W. 334, it was in effect decided that 'a subsisting simple contract is discharged and extinguished by the acceptance of another contract of the same nature given to the same party, and founded upon the same consideration, if it be so expressly agreed by the parties'".

5. "In *Story on Promissory Notes*, 104, it is said: 'If a note be given for a preexisting debt, and it is received as an absolute payment thereof, the original contract is extinguished, and no liability thereon any longer exists;

6. And if such note was received as conditional payment only, then, if duly paid and discharged, the original consideration is equally extinguished.

7. It is true that the usual rule is that accord without satisfaction is no bar to an action. This is so except where the new promise or contract itself is the satisfaction of the debt or broken contract, by the accord agreement'."

8. "The party holding the claim may agree to receive a new promise of the other in satisfaction of it, or he may agree to receive a new undertaking when the same shall be executed as a satisfaction. In either case he will be held to his bargain." 2 Pars. on Con., 681.

9. In *Babcock v. Hawkins*, 23 Vt. 561, this doctrine is fully sustained by the opinion of Judge Redfield, in a very able review of the whole subject."

10. "Holding this to be the law, it follows that if the notes, to secure which the mortgage was given, were paid and satisfied (by the new notes), the mortgage was also satisfied and is discharged."

—*Jaffray v. Crane*, 50 W. 349, 353.

11. The "facts would seem to make a very strong case of accord and satisfaction. The language approved in *Grannis v. Hooker*, 31 W. 474, is as follows: 'Acquiescence in the sale, although tacit, after discovery of the fraud, will be considered as an election to confirm it;

12. And this will not be affected by the fact of subsequently discovering a new incident in the fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.' 1 Benj. Sales, 336.

13. This principle has application to this case. The defendant claims to have discovered the fraud before the time of this adjustment of it. His action, then, should be held conclusive.

14. Here was 'a satisfaction agreed upon, without reservation between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account,' and this is accord and satisfaction. (Many citations)''

—*Woodford v. Marshall*, 72 W. 129, 132.

15. "The legal meaning of an accord is that 'it is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions on this account'. 'It must be advantageous to the creditor, and he must receive an actual benefit therefrom'. 'Everything must be done which the party undertakes to do.' 2 Greenl. Ev. 28; 3 Bl. Comm. 15; Bouy, Law Dict. tit. 'Accord', and cases cited; (and cases).

16. 'An accord not followed by a satisfaction is no bar'. *Palmer v. Yager*, 20 W. 91; *Barnes v. Admr., v. Lloyd*, 1 How. (Miss.) 585. 'To constitute a good accord and satisfaction, it must be accepted as such.'"

—*Sieber v. Amunson*, 78 W. 679, 682.

17. "It is well settled that a mere accord without satisfaction is not binding. (Many cases)''

—*Ball v. McGeoch*, 81 W. 160, 172.

18. "Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement', and 'forms a complete bar to any further action on the original claim'. 1 Am. & Eng. Ency. of Law, 94."

19. "It may be said, in a general way, that where there is some new or independent consideration, or the creditor receives some additional benefit or legal possibility of benefit or advantage to which he would not have been entitled except for the new agreement, then the acceptance of a lesser sum in full payment of an admitted, liquidated debt will operate as an accord and satisfaction";

20. And hence, in the absence of fraud or mutual mistake, the same is conclusive upon the parties. Bishop, Insolvent debtors, 591, 480; Jaffray v. Davis, 124 N. Y. 164; Allison v. Abendroth, 108 N. Y. 472". See also COMPROMISE.

—*Continental Nat. Bank v. McGeoch*, 92 W. 286, 312.

21. The giving of "absolute title to property held by the assignee as security only", however slight an advantage,

22. And waiver of the right "to the benefit of the federal bankruptcy laws," are each held "sufficient to make a good accord and satisfaction," and "to support the settlement" between the parties.

—*Herman v. Schlesinger*, 114 W. 382, 400.

23. A finding that the payment of the sum admitted to be due, for which plaintiff "gave to the defendant a receipt 'in full settlement of claim under policy', was a complete accord and satisfaction",—such amount being but a part payment,—is not sustained.

24. "It is well settled in this and other states that part payment of an admitted debt is no consideration for an agreement not to enforce the collection of the balance of such debt. (Many cases)".

• —*Weidner v. Standard L. & A. Ins. Co.*, 130 W. 10, 15.

25. "There must be both accord and satisfaction". "In this case the jury found the substituted agreement (to pay \$600 upon delivery of a note) was unperformed—hence it constituted no satisfaction and no bar to an action founded upon the original contract.

26. Had the jury found, as contended by defendant S., that plaintiffs accepted the mere promise of S. to pay \$600 in full accord and satisfaction, then only an action upon such substituted agreement could be maintained".

—*Morgenthaler v. Somers*, 164 W. 159, 161.

ACCOUNT BOOKS. ACCOUNTS.

See also ACCOUNTS OF EXECUTORS AND ADMINISTRATORS. ACCOUNTS OF GUARDIANS.

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- Setoff after decease, 2.
- Settlement: defined, 8.
 When set aside, 28, 53.
- Subsequent entries, 68, 69, 70.
- Surecharging stated account, 15, 17, 27.
- Verification of account, 1, 14, 16.

1. Books of account, verified by the party as the statute prescribes, become prima facie evidence of the contents. Parties so verifying cannot be impeached, the statutes changing the general rule. (Approved in *Winner v. Bauman*, 28 W. post. —*Winne v. Nickerson*, 1 W. 1.

2. Accounts accruing subsequent to decease cannot be set off in an action for assets. See SETOFF. —*Armstrong v. Pratt*, 2 W. 299, 307.

3. Judgment on part of the items of a running account which were due, is a bar to a subsequent action on the omitted items; however, there may be two or more running accounts on which separate suits might be brought. —*Borngegger v. Harrison*, 12 W. 544.

4. Account entries are "admissible, notwithstanding a mistake in the name of a party, or in some addition to his name, if such mistake is fairly and satisfactorily explained by other competent evidence. * The intrinsic value of such entries as written evidence of the facts stated in them must be the same whether they are made under one name or another; and if there was a mistake in the name, and that is explained so as to leave no doubt or suspicion, we think they should be received."

5. "If the books were not admissible as evidence" they may be "sufficient as memoranda to assist the memory of the witness."

6. "Within all the authorities, if the witness after having inspected

the memorandum, is able to state the facts as upon his present recollection, his testimony is admissible."

7. "If the witness can swear positively that the memoranda or entries were made according to the truth of the facts, and consequently that the facts did exist, that is sufficient, though they may not remain in his memory at the time he gives his testimony. He may testify from the entries, and when he does so he swears positively to the truth of the facts stated in them."

—*Schettler v. Jones*, 20 W. 412, 415.

8. The word "settle" implies adjustment and agreement upon the balance. See SETTLEMENT.

—*Baxter v. State*, 9 W. 38, 44.

9. "Merely presenting his bill for services, without its appearing that the defendant ever accepted it or admitted its correctness, and offered to pay it, so as to make it a stated account," would not preclude the plaintiff "from recovering more than" the amount of the bill, "if the testimony showed that the services (physician's) were worth more than this amount. Toland v. Sprague, 12 Peters, 300; Lockwood v. Thorne, 11 N. Y. 170".

—*Nauman v. Zoerhlaut*, 21 W. 466, 469.

10. "The correctness of the entries (in a book of accounts) being thus established by a living witness to them, it was competent for such witness, or any other, to state their contents to the court. And the fact that the entries were made by the wife of the witness from memoranda furnished by him can make no difference."

—*Riggs v. Weise*, 24 W. 545-546.

11. Accounts of purchases properly proven under the statute "are not evidence" that "no other goods" were purchased.

12. Such accounts are not proper evidence of cash payments in amounts "exceeding five dollars".

13. May be received as memoranda "to refresh" witness' recollection of payments.

14. It was held in *Winne v. Nickerson*, 1 W. supra, "that where an account book had been received in evidence, testimony to impeach the character of the party whose book was so received and who had made the preliminary oath required by the statute (sec. 4186), and which testimony was offered for the purpose of impeaching such account book, was inadmissible".

—*Winner v. Bauman*, 28 W. 563, 566.

15. "The evidence to surcharge a stated account should be clear and satisfactory"; and when "the testimony is about balanced", the account should not be disturbed.

16. "The book is not evidence of the correctness of the charge" where "not verified as required by the statute".

—*March v. Case*, 30 W. 531, 534.

17. "On the principle that he who asks equity must do equity, the plaintiff cannot be allowed to open the account and surcharge it, by reason of errors committed against his interest, without at the same time being held to corrections of the account where errors have intervened in stating it, which are in his favor and against the interest of the other party thereto. *Floyd v. Priester*, 8 Rich. Eq. 248".

—*Grace v. Newbre*, 31 W. 19, 24.

18. A stated account "upon an original illegal contract", may be allowed on showing a demand therefor, "which was acceded to by the defendant". See CONSIDERATION.

—*Melchoir v. McCarty*, 31 W. 252, 256.

19. "An open unliquidated demand", with no account rendered or "demand of payment made, does not carry interest". See INTEREST.

—*Marsh v. Fraser*, 37 W. 149, 153.

20. Where the "plaintiff really gave no credit to the E. T. Co., but rendered his services, and furnished his goods and materials, solely on the credit and promise of the defendant (E.), then it is plain that the defendant is liable for them", though the account appeared in the books under the name of the E. T. Co.

21. "The caption or heading on the pages of the account", was held not conclusive, and testimony was properly allowed to show the real facts as to the credit given.

22. Where "the plaintiff, on his side, rendered labor and services, and furnished materials of various kinds for the use of the defendant, as required; and the defendant, on the other hand, made payments in cash, sold the plaintiff lumber and slabs, and in one instance gave a buggy, carriage and \$400 in exchange for another carriage", it is held to show "a system of mutual dealings", making "a mutual and open account current", in which the "statute only began to run from the date of the last item charged".

23. "Says Mr. Angell, in his work on Limitations: 'The rule that items within six years draw after them other items beyond that period, is by all the cases strictly confined to mutual accounts, or accounts between two parties which show a reciprocity of dealing'. Sec. 148.

24. Again he says: 'Mutual accounts are made up of matters of set-off. There must be a mutual credit, founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts'. Sec. 149 (cases)".

25. The court may apply payments to earlier items, to leave the balance not "within the bar of the statute". See also PAYMENTS.

—*Hannan v. Engelmann*, 49 W. 278, 281.

26. Charging the account on the books "to the agent is not conclusive that the credit was given to him, but might be explained". See PRINCIPAL AND AGENT.

—*Bentley v. Doggett*, 51 W. 224, 232.

27. "When parties have mutually stated an account of their dealings with each other, and have adjusted balances on the basis of it, nothing short of clear and satisfactory evidence of fraud or mistake will justify the falsifying or surcharging of such account. *Marsh v. Case*, 30 W. supra; *Klauber v. Wright*, post, herewith decided".

—*Hoyt v. McLaughlin*, 52 W. 280, 283.

28. In the absence of mistake or fraud in stating an account between two parties, a creditor of one of the parties cannot have the settlement set aside, though the party may have "made an improvident settlement—one which diminished his ability to pay his debts".

—*Klauber v. Wright*, 52 W. 303, 312.

29. "'Account' means an account in fact, kept by one party or the other".

30. "A long account is a series of charges made at various times as the transactions occurred. *Freeman v. Atl. M. Ins. Co.*, 13 Abb. Pr. 124. One bill of goods which were delivered at one time is not such an account. *Swift v. Wells*, 2 How. Pr. 79".

—*Druse v. Horter*, 57 W. 644, 648.

31. "Where the items in the account are all charged against the one party and in favor of the other, as here, it is not a mutual account. It lacks the very element essential to make it such—mutuality", under sec. 4226.

32. "The claim presented, not being a mutual account, does not come within 'the rule that items within six years draw after them other items beyond that period', for that rule is 'strictly confined to mutual accounts'." *Hannan v. Engelmann*, 49 W. 282. See also *Butler v. Kirby*, 53 W. 188. —*Fitzpatrick v. Est. of Phelan*, 58 W. 250, 254.

33. "Books of original entry", "properly verified may" "be presumptive proof of the delivery of the articles charged, although no price is therein specified. In such case the party producing them would be required to give other proof of values."

—*Jones, Admr., v. Orton, Admr.*, 65 W. 9, 14.

34. In an "equitable action for an accounting" either party "is entitled to an affirmative decree", though no counterclaim is interposed. See also DISCONTINUANCE.

—*Hutchinson, Admr. v. Paige*, 67 W. 206, 209.

35. An instruction that "an open, that is, unsettled, and mutual account current, is an account consisting of credits as well as debits, charges and credits, between the parties," and an account which "has no credits, is not a mutual account current between the parties," is held to be in harmony with previous rulings and cases supra.

36. And an instruction that "the burden is upon the plaintiff to convince you that there was such open, mutual account, and if there was, then to satisfy you of the balance due him, to entitle him to recover thereon," is held proper. —*Dunn v. Est. of Fleming*, 73 W. 545, 547.

37. In an action as to a balance of account it is said, that "treating it merely as an account stated, it was conclusive upon both parties, and was impeachable only for fraud or mistake. *Martin v. Beckwith*, 4 W. 219; *Orr v. LeClair*, 55 W., 93; *Hill v. Durand*, 58 W., 160. But this was more than a mere account stated, the correctness of which had been assented to. There was an unconditional promise to pay the amount".

38. "That promise was based on a good consideration, and was a good cause of action in itself. It could be avoided only by proof that the defendant was induced to make the promise by fraud. *Miller v. Chipewa Co.*, 58 W., 630". —*Hawley v. Harran*, 79 W., 379, 381.

39. "Statements of account sent" and kept, "constituted accounts stated, binding on both parties". See also INTEREST.

—*Ryan Drug Co. v. Hvambsohl*, 92 W. 62, 63.

40. As to the evidentiary value of a memorandum of a contract in an account book. See WRITINGS. —*Hazer v. Streich*, 92 W., 505, 508.

41. Entries in defendant's bank journal for a day "were only evidence in so far as they showed transactions with the plaintiffs",—two items bearing on the question in dispute.

—*Kuenster v. Woodhouse*, 101 W., 216, 220.

42. As to two loose sheets with "some twenty items" of account, and a stub book of promissory notes, it is held that "neither is an account book," under sec. 4186, or admissible as such;

43. And "whether such fugitive sheets of paper may ever be deemed to be in such permanent form as to be admissible", they were not specifically proved under sec. 4189,

44. Which "gives admissibility to documents which by the common-law rules of evidence would be excluded, and it is to take effect only upon reasonably strict compliance with all of the requisites which it prescribes". —*Kelley v. Crawford*, 112 W., 368, 371.

45. While an action for a balance unpaid on a sale for a certain price per ton of ore, "delivered by team from day to day", covering "no definite or ascertained quantity of ore", the contract being "an open one as to the amount to be furnished"; was properly held to be "an account between the parties, in the strict sense of the term", in *Nimmick v. Mathiesson*, 32 W. 324,—

46. Yet, where "there was a definite contract on one side to sell, and on the other side to buy, eleven certain tubs of cheese already in exist-

ence, and known to both parties, at eleven cents per pound", weighed and delivered in installments,—an action for a balance unpaid, was one "to enforce an express contract", "and not properly an action 'founded upon an account', within the terms of" subd. 4, sec. 3572.

47. And it is held (in effect overruling *Barker v. Baxter*, 1 Pin. 407, and *Woodward v. Garner*, 2 Pin. 28), "that the words 'balance due' in" subd. 1, sec. 3572, do not "mean a balance agreed on by the parties" "upon settlement of accounts", but "that it has been the universal practice to treat the words as used in their ordinary and common signification, namely, as meaning the remainder after deducting proper credits".

48. Acceptance of a check with "the words 'paid in full today, eight hundred, etc.'", is held "a mere acceptance by the creditor of a part of the amount due on an undisputed claim", with nothing "which can stand as a consideration for the release of the balance of the claim. *Herman v. Schlesinger*, 114 W. 382 (See CONSIDERATION).

—*Prairie Grove C. M. Co. v. Luder*, 115 W. 20, 24.

49. "If by express or tacit consent two parties agree to the entry upon a mutual account between them of a charge against one, and that one proceeds to make payments in amounts sufficient to cover that item, together with all preceding ones, it constitutes payment of that item, at least as against protest by any third party".

—*Nat. Cash R. Co. v. Bonneville*, 119 W. 222, 224.

50. Where "the statement presented in writing" "showing the debits and credits with respect to the items embraced therein was admitted by the defendant to be correct", "the same thereupon became an account stated".

51. Notwithstanding the defendant at the time "asserted a counterclaim growing out of another transaction."

52. "Wharton v. Anderson, 28 Minn., 301, gives a clear statement to the effect to be given to an account stated:"

53. A 'stated account' 'is only prima facie evidence of the correctness of the balance', unless it 'is the result of a compromise', or there is a forbearance, 'in consequence of the accounting', bringing "the case within the principle of an estoppel in pais.

54. A stated account, not affected by such new consideration or estoppel, may be impeached for mistake or error in the law or in fact with respect to the items included in it, or for omission of items'.

—*Segelke & K. M. Co. v. Vincent*, 135 W., 237, 240.

55. Under sec. 4186, the "entire absence of any evidence 'that such entries are just, to the best of his (plaintiff's) knowledge and belief'," renders the books "inadmissible. *Kelley v. Crawford*, 112 W. supra. *Brown v. Warner*, 116 W. 358".

56. "When a demand in the form of a bill or account is delivered to the debtor, his conduct with reference thereto may be significant;

57. And his failure to object within a reasonable time be construed prima facie as an admission that such bill or account is correct;

58. Not at all conclusive either on the fact of admission or on the fact of correctness, but prima facie, subject to be overcome by other evidence. (Many cases)".

59. And this being the sole evidence on the question, it is held that, "silence and retention of the bills without protest" is "an admission" "that the price therein named was that at which the" article "had been purchased,

60. And therefore that the finding" as to "value or price had" sufficient "evidence in its support". Judgment sustained.

—*Jones v. DeMuth*, 137 W. 120, 121.

61. A claim against an estate "for two items of \$150 each for money loaned", depending on claimant's testimony and his account books containing such items entered by him, and properly proved as such under sec. 4186, they containing "original entries of charges for goods or other articles delivered",—was disallowed in each of the three courts.

62. "As to the items in question they fell within the exception of sec. 4187, because the entries related to items of money delivered at one time exceeding \$5", and were properly excluded.

63. Being "incompetent to testify to transactions or communications personally had with" "deceased, the plaintiff could not use the books as memoranda to refresh his memory and then testify to the transaction".

64. "The books could not come within both sections" 4186 and 4189. "Sec. 4189 renders competent only 'entries in a book or other permanent form other than those mentioned in secs. 4186 and 4189b'. Any book of the kind mentioned in sec. 4186, produced as there provided, is not made competent by sec. 4189", but "were expressly excluded".

65. A claim that one of the items "represented by a written order drawn upon another party indebted to the plaintiff, which was given to the deceased and cashed by him", is considered but "another mode of delivering money to the deceased similar to payment by check, and within the statute", sec. 4187, as to the books not being admissible as to items "exceeding \$5".

66. "It is not intended to commit this court to the view that books of account mentioned in sec. 4186, properly verified, would in any case be evidence of a loan of money as a separate transaction, but that question is left undecided". —*Dohman v. Est. of Blum*, 137 W. 560, 562.

67. Where plaintiff made entries under an agreement "for acquiring a stock of" logs, "manufacturing them into lumber, paying therefor, selling the lumber,"—"the fact that the entries" in his books "were made whenever reported as paid or received is substantial compliance with the requirements for making them competent evidence".

—*Lemma v. Blanding*, 139 W., 156, 159.

68. The rule respecting "advancements" is held "in harmony with the rule respecting book accounts. In *Marshall v. Coleman*, 187 Ill. 556, the court said: 'Book accounts are only admissible in favor of the party who keeps them when the entries are made contemporaneously with the transactions recorded,

69. And the same rule applies to books and entries of deceased persons. (Citations)

70. 'Declarations or book entries of the donor subsequent to the transaction are inadmissible unless they are of the *res gestae* or against interest'. 2 *Woerner*, Adm'n. (2nd Ed.) § 558.''' (Cases).

—*Arthur v. Arthur*, 143 W. 126, 134.

71. "Mere delay for a limited period without returning or objecting to accounts rendered merely raises a presumption or inference of acquiescence. Such presumption or inference is more or less strong according to circumstances.

72. The neglect to return or object may be for such a length of time as to render such presumption conclusive of acquiescence so as to make an account stated''.

73. Where "it appears only that from month to month while work was going on tentative monthly statements were rendered", it is held that this "could at most constitute only *prima facie* evidence of correctness", and that such accounts have not "become stated within the technical meaning of the term 'account stated'".

—*Gurnett v. J. H. Flick Const. Co.*, 163 W. 574, 576.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

See also ADMINISTRATION EXPENSES. COMPENSATION OF ADMR., ETC. EXECUTORS AND ADMINISTRATORS. JUDGMENTS. RENTS AND PROFITS. SETTLEMENT. TRUSTEES. TRUST FUNDS.

Advances to minors, 6.
No objection thereto, 8.
Personal against heirs, 9.
Protection therefor, 7.
Amendment on appeal, 18, 19, 20.
Charged by himself, 3.
Co-executor may appeal, 30.
Commissions allowed, 10, 26.
Executor also as trustee, 16.
Division of expenses, 29.
Executor's own debt, 17.
Executrix of deceased extr., 11, 12.
Extraordinary services, 15, 16.
Function of guardian, 5.

Interlocutory account, 13.
Conclusive on notice, 14.
Extraordinary services, 15.
Items properly credited, 2.
Judicial discretion, 25, 26.
Maladministration, 24, 25, 27.
Not allowed as of course, 21.
Evidence introduced, 23.
Specific objection made, 22.
Objections to account, 21, 22, 23.
Personal chattels delivered, 1.
Rent advanced to decedent, 28.
Support, etc., of heirs, 4.

1. Executors are not accountable for "personal chattels" delivered to the life beneficiary as a specific legacy, where the same are afterward lost or destroyed.

2. In an action on his bond, the executor having died and not rendered his account, was held properly credited with, funeral expenses, monument, debts paid, "lumber for fence and repairs of," house, taxes paid on real estate though it was in "the possession and enjoyment" of the widow as life beneficiary, widow's allowance before probate of the will, and administration expenses. See also *LIFE ESTATES*.

—*Golder v. Littlejohn*, 30 W. 344, 352.

3. Where, "in his account the executor charged himself at the rate of two dollars per acre, annually, as a reasonable rent" for the farm devised to him, of which the widow was entitled "during life, the use, income and profit of one third", and "did not claim that he had been in possession as devisee", and was "personally liable"; and "having treated it as a matter connected with the estate, which he was bound to settle and adjust in his trust capacity", and "having, in fact, invoked the jurisdiction of the court to examine into it",—he cannot now object to so doing, and "has clearly waived all objection by the course he has taken."

—*Baker v. Baker*, 51 W. 538, 546.

4. "It was not the duty of the administrator, and he had no authority to furnish out of the estate of the intestate in his hands the means to support and educate the heirs of such intestate."

5. The court having made no direction, "in so doing, he assumed the functions of a guardian of those minor heirs and acted entirely upon his own personal responsibility."

6. "In substance and legal effect, by advancing money to them he did not charge the estate of his intestate, but only made himself their creditor for the sums so advanced".

7. It is not determined, whether the probate court, "might or might not protect him by allowing him to reimburse himself for such advances out of the estate before distribution".

8. But, the heirs not objecting, such properly proven advancements are here allowed.

9. But such disputed advances, being "mere personal claims against the heirs", "it seems very clear to us that the statute (sec. 3927) providing for the examination of the administrator on oath concerning his account does not include such charges".

10. "The statute seems to be imperative that the prescribed commissions shall be allowed" the administrator, notwithstanding "his neglect of duty", "and it gives the court no discretion to withhold them. Sec. 3929". (An amendment by Chap. 660, L. 1907, inserts the words, "unless derelict in his duty".)

—*In re Fitzgerald*, 57 W. 508, 513.

11. An executrix of a deceased executor "might apply to the county court for a settlement of the accounts of" the latter, "but, if she declines to make the application for a settlement, we are of the opinion that the county court cannot compel her to do so." See also *DISCOVERY*.

12. "The rule of the English law that an executor of an executor is the executor of the first testator, and must execute the will of the first testator, is abolished by statute in this state. See Secs. 3258, 3800".

—*Reed v. Wilson*, 73 W. 497, 503.

13. "We have no doubt of the right of the county court to settle and allow an executor's or administrator's account at any time before the rendition of his final account, upon notice as provided in the statute (sec. 3931),

14. And that when thus settled and allowed it will be final and conclusive as to all matters embraced in it, and can be impeached or reopened only for fraud or mistake. *Woerner*, Admin. Secs. 504, 505".

15. An allowance of such an account including extraordinary services as executor, "having been made contrary to sec. 6, rule 17, (now sec. 3, rule 15), of the county court rules, but it is none the less conclusive. It cannot now be avoided for mere error of practice".

16. Such allowance for "extraordinary services" were held proper where the executor continued for seven years performing trustee duties and enhancing the value of the estate, the matter being in the "sound discretion" of the court. "The question is 'What does the court, in view of the evidence and its own knowledge of the facts, judge reasonable?' *Ford v. Ford*, 88 W. 131". See also *ADMINISTRATION*.

—*Schinz v. Schinz*, 90 W. 236, 248.

17. Executor's own debt to the deceased, when and how chargeable to him. See *EXTRS. & ADMRS.*

—*Est. of Robinson v. Hodgkin*, 99 W. 327, 330.

18. "Sec. 4034, governing the subject of trials in" appeal cases from the county court, "permits the exercise of some discretionary authority in granting leave to amend within the scope of the (admr's) account presented to the county court;

19. But since the theory of such an appeal is that only matters passed upon by the court of first instance are to be reviewed, it would be an abuse of discretion, at least, to allow an entirely new claim to be first presented to the appellate tribunal".

20. "The mere change by amendment", in the circuit court as to a claim "for extraordinary services" of the administrator, "in the particulars of the service and how the same came to be rendered or included originally in the account was within the legitimate field for amendments." See also *COMPENSATION OF ADMR., ETC.*

—*Sloan v. Duffy*, 117 W., 480, 483.

21. As on appeal from county court "the trial in circuit court is a trial de novo", (Sec. 4034) and as under sec. 3, county court rule 15, "even in case of no contest a final account shall not be allowed of course", "but the court shall be satisfied of its correctness",—

22. "A fortiori must this be the case when specific objection is made", under sec. 4, rule 15. And as to such items so objected to, "we think there can be no doubt that evidence should have been introduced by the executor to show their correctness before they could be properly allowed";

23. And for failure so to do we must "reverse that part of the judgment which affirms the judgment of the county court as to these two items". "There was evidently a misapprehension in the trial court as to where the burden of proof rested on these items".

—*Fitch v. Huntington*, 125 W. 204, 209.

24. Where the account of an administrator, includes "charges for disbursements and expenses against the estate of over \$1100, to collect a claim which was legitimate only" "to the extent of \$28.57", "incurred in pursuing the real estate", "lasting over six years", involving much litigation, also being twice in the supreme court (Will of Madden, 104 W. 61, see ADMINISTRATION, EXPENSES; and *Mackin v. Hobbs*, 116 W. 528, see SALE OF REALTY), there being "most reprehensible mal-administration" and "bad faith and inexcusable improvidence and laches characterized the litigation",—such charges were disallowed, "except the small amount of \$25.40", being per diem, printer's and appraiser's fees.

25. "Expenses dependent upon judicial discretion should always be rejected where they are the result of bad faith or inexcusable negligence".

26. "There are some allowances to an administrator which are entirely beyond the reach of discretionary interference. In re Fitzgerald, 57 W. supra; Sec. 3929 (Since amended by ch. 660, L. 1907, inserting after the words 'he shall be allowed', the phrase 'unless derelict in his duty',—submitted by the writer).

27. "Courts should set a pretty high mark for the judicial test of the business conduct and fidelity of trustees, whose administration they are in duty bound to supervise". "Severe judicial, mere opinion, condemnation", should not be "followed by awarding the recreant officer substantial compensation", "where there is judicial discretion".

—*Mackin v. Hobbs*, 126 W. 216, 222.

28. As to rent paid in advance to decedent by note, being payable to the widow as life tenant. See RENTS AND PROFITS.

29. As to accounting division of expenses and fees, where the executor as such acts also as trustee. See TRUSTEES.

—*Est. of Hemphill*, 157 W. 331, 337.

30. A co-executor may appeal from the allowance of an account "without the consent" of his co-executor. See also APPEAL.

—*Will of Hyde*, 157 W. 462, 465.

ACCOUNTS OF GUARDIANS.

See also GUARDIAN AND WARD. TRUSTEES. TRUST FUNDS.

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| <p>Action before settlement, 11.
 After ward's decease, 10.
 Heir and guardian, 55.
 Without administration, 54.
 Annual accounts: appeal, 15, 23.
 Allowance not final, 1.
 Court rule authoritative, 23, 24.
 Not an estoppel, 22.
 Prima facie correct, 2.
 Annual rests, 8, 52, 53.
 Attorney: employed, 46.
 Funds turned over by, 49.
 Guardian is not, 48.
 Negligence of attorney, 45.
 Effect of court's order, 23.
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 Funds: invested at interest, 31.
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 Interest: compound when, 3, 9, 33.
 Annual rests, 8, 9, 52, 53.
 From filing of petition, 30.
 Simple interest, when, 4, 5, 25, 33, 34.
 When to commence, 6, 7, 32, 34, 50.
 Investment: what is, 41, 42.
 Attorney as agent, 47.</p> | <p>Investment—continued
 Duty to invest, 45.
 Negligence of attorney, 46.
 On guardian's security, 43, 44.
 Judgment: conclusive, 36.
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 Laches not applied, 28, 29.
 Limitation statute, 28, 29.
 Neglect by guardian, 48, 50.
 Support: as charged, 18.
 Aunt in loco parentis, 51.
 Before appointment, 16, 17.
 Beyond annual interest, 19.
 Living in guardian's family, 20.
 No claim made therefor, 26, 27, 39, 51.
 Out of body of estate, 21.
 Widowed mother, to, 37.
 Without court order, 21.
 Sureties: right to credit, 40.
 Liable for negligence, 47.
 Settlement: by county court, 12.
 After ward's decease, 10, 54.
 By court of equity, 13, 14.
 Conclusive on parties, 36.
 Direction effect of judgment, 35.</p> |
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1. "The allowance of the accounts, although a judicial act, was not in the nature of a final adjudication between the parties. The accounts were rendered by the guardian, and acted upon by the probate court, during the minority of the wards, and ex parte".

2. The accounts rendered from time to time, "as allowed, are presumed to be correct until the contrary appears. But they are only prima facie correct, and wherever they are erroneous the ward may have them corrected. They are only partial accounts, and do not bind him in any particular when he is able to show they are erroneous".

—*Willis v. Fox*, 25 W. 646, 650.

3. "The result of all the authorities seems to be that only in cases of fraud or flagrant breach of trust should the guardian be charged with compound interest.

4. But if he fails to invest the trust fund in his hands so as to derive an income from it when he should have done so, he should be charged with simple interest at the legal rate, although such failure may not have been the result of any fraudulent intent or wilful disregard of duty.

5. These are believed to be just and salutary rules, and we do not hesitate to adopt them as the law of this case and other cases like it".

6. "There are cases which hold that the computation of interest should

not commence until a reasonable time has elapsed after the trustee receives the fund, to enable him to invest it properly.

7. Many of the cases name six months as such reasonable time. This is not an absolute, unvarying rule. There may be considerations which render it inapplicable to a given case", and it rests "in the sound discretion" of the court. (Followed in *Abrams v. U. S. F. & Guaranty Co.*, 127 W. post.).

8. "For the purpose of deducting the sums allowed for maintenance of the ward, the rests and deductions should have been made annually; and on the balance remaining in the hands of the" guardian, "simple interest should have been computed to the date of the findings and judgment".

9. In this case, charging interest from the beginning is approved, and an erroneous computation of compound interest by semi-annual rests, is not set aside, because of liberal allowances to the guardian, and "an enormous overcharge, evincing an entire disregard to the rights of the ward", and a small difference of only \$11.35, under "the maxim de minimis non curat lex".
—*In re Thurston*, 57 W. 104, 108.

10. "The general question", "Can the accounts of a guardian be adjusted by the county court after the decease of the ward, in a proceeding to which the guardian and the heir of the ward are the only parties, without any administration of the estate of the deceased ward," is not determined, but it is said,—“as at present advised, we all incline to the opinion, that it must be answered in the negative”. (So decided in *Glasspoole by Gdn. v. McGuine*, 143 W. post.).

—*Israel v. Silsbee*, 57 W. 222, 232

11. "An action at law to recover money in the hands of the guardian should not be maintained by the ward before the guardian's accounts have been settled in the county court". So held on demurrer.

12. The county court "has full power to compel the guardian to settle his accounts, and can possess itself of all the facts necessary for an intelligent settlement of such accounts more readily than a jury possibly can do, and with less expense to the parties".

13. "*Willis v. Fox*, 25 W. supra, was an equitable action, and it was said that courts of equity should not exercise jurisdiction over guardians and compel them to account,

14. Except where some special reasons were shown for withdrawing the matter from the county court. In that case it was thought that the question as to the alleged mismanagement of the ward's estate was a sufficient reason", and it seems questioned whether this "was well founded or not".
—*Kugler v. Prien*, 62 W. 248, 249.

15. As to the adjudication of the annual account of minors, reconsidered on appeal from a final accounting, it is said, there having been

no appeal, that "perhaps no appeal was allowable, or necessary to protect the rights of either party".

16. Where "the evidence shows that the guardian was the husband of the sister of the mother of the minors, and it tends to show at least that, when the children were taken into the family of the guardian, it was understood between the mother and the guardian that there was to be no charge made by him for their board," a minor of tender years having lived with him for about two years before the appointment and for like time after the appointment and after receiving a small legacy from a grandparent,—it was held that there was "nothing in this case which entitles the guardian to any such allowance" for support previous to the appointment.

17. "Such charges for support previous to the guardian's appointment are only allowed when there are the strongest equities in favor thereof. In *re Besondy*, 32 Minn., 385; *Villard v. Robert*, 49 Am. Dec., 654, and cases cited in a note on p. 660".

18. An allowance at the final accounting of only fifty cents a week for board, for each of two minors, by the court below, was not disturbed; as "the allowance was probably fixed at that amount because the guardian" in his prior annual account "charged at that rate for their board."

19. Under many of the authorities, no allowance should have been made to the guardian for the support of his wards beyond the annual interest upon the estate in his hands. See *Villard v. Roberts*, 49 Am. Dec., 654, and *Beeler v. Dunn*, 49 Am. Dec., 761, 3 Head., 87.

20. And when the guardian claims for the board of his infant wards when they are living in his family, without first obtaining an order from the court to use the principal of their estate to pay for such board, he must make a case which appeals strongly to the equity powers of the court."

21. "Although we are of the opinion that in a proper case the court might allow for such support out of the body of the estate without first obtaining an order for that purpose, we are not satisfied that the facts in this case would justify such an allowance, and, had the trial court refused to allow anything beyond the interest of the estate in payment for their board in this case, we should have felt constrained to affirm such decision."

22. While the orders of the county court on the annual accounts "were not an estoppel against the defendant" guardian, "we think they were properly received in evidence for the purpose of showing the character of the claims made by the defendant".

23. Whether or not passing upon an annual account "as required by sec. 3972, would be conclusive upon the guardian or ward if not appealed from", the old court rule sec. 10, rule 10, "must be held to be an authoritative declaration as to the effect which shall be given to the orders of the county courts made under said sec. 3972. See also, *Willis v. Fox*, 25 W., 646".

24. (Part of sec. 3, rule 8, of the present rules, substituted for the old

sec. 10, rule 10, as to sec. 3972, provides: "Upon such hearing any errors in such account may be corrected upon the principles applicable to the settlement of guardians' accounts, and the account so corrected shall be prima facie correct". This is apparently pursuant to and in harmony with the principle approved in *Willis v. Fox*, 25 W., supra.)

25. The guardian was charged with legal simple interest on the sums in his hands from the time of receipt thereof until paid (less expenditures allowed with interest considered thereon), which was approved. "There can be no doubt but that the guardian should be charged with interest on the balance of the estate in his hands. In re *Thurston*, 57 W., supra." (On this point, approvingly cited in *Taylor v. Hill*, 87 W., post.).
—*Olsen v. Thompson*, 77 W. 666, 669.

26. Where a widow and three minor children were held each entitled to one-fourth of receipts from a life insurance policy, receipted for as a whole by the widow and guardian of the minors as such, in 1870, and the guardian permitted the widow to retain the entire fund, and no demand was made on the guardian for the money or an accounting until 1891;

27. And the widow supported the children gratuitously, "never made any claim for such support, and now refuses to make any such claim", it is held, on proceedings for an accounting by the children,—That the guardian cannot "be credited with the support of the wards" so furnished;

28. That there has been no "laches which will bar a recovery". "As between the trustee of an express trust and his cestui que trust, the statute of limitations does not apply,

29. Nor does any bar in analogy thereto, unless the full period of limitations has elapsed since the denial or repudiation of the trust. Laches is a bar in analogy to the statute of limitations. *Fawcett v. Fawcett*, 85 W. 332", (cited under LACHES. IMPLIED TRUSTS);

30. That the judgments of the county and circuit courts, requiring the guardian to account for the full amount of such wards' funds, with interest from the date of filing petition for accounting, less fees, commissions, and counsel fees, were proper, and are affirmed. (As to interest, see *Taylor v. Hill*, 87 W. post.).

—*Taylor v. Hill*, 86 W. 99, 105.

31. "The rule that it is the duty of a guardian to invest the funds of his ward so that interest may be derived therefrom is as old as the common law itself, and needs no citation of authorities.

32. That he must be charged with interest if he fails within a reasonable time to invest his wards' funds is also a well-established principle.

33. If such failure to invest results from fraud or wilful breach of duty, the guardian will be charged with compound interest. If, however, there be simply neglect of duty, without fraud or intentional misconduct, he will be charged with simple interest. These rules were

recognized and applied in *In re Thurston*, 57 W. supra. See also *Olsen v. Thompson*, 77 W. supra."

34. "The guardian, therefore, must be charged with simple interest upon the funds in his hands after the expiration of a reasonable time from his receipt of the funds. This reasonable time is generally held to be six months after their receipt, and that seems entirely reasonable in the present case". See the facts in *Taylor v. Hill*, 86 W. supra.

—*Taylor v. Hill*, 87 W. 669, 671.

35. "No doubt, the direction of the county court upon the settlement of the accounts of the guardianship has the force and effect of a judgment,

36. And is conclusive of the rights of the parties, for the judgment of a county court as to matters within its jurisdiction is as conclusive and final as the judgment of any other court. *Barker v. Barker*, 14 W., 131, 147 (See JUDGMENT); *Brook v. Chappell*, 34 W., 405 (See JURISDICTION); *Appeal of Schaeffner*, 41 W., 260 (See CONSTRUCTION OF WILLS). —*O'Connor v. Decker*, 95 W. 202, 204.

37. "The propriety of the allowance to a widowed mother, whether she be or be not guardian, for reasonable expenses incurred by her in the support of her minor children, out of their estate, need not be impugned or questioned.

38. She has the unquestioned right, if she chooses, to support those children voluntarily and out of her own means; and, if she so elects, it lies not in the mouth of anyone else to complain. *Taylor v. Hill*, 86 W. supra."

39. Having in her account as guardian, filed six months before her decease, stated that "she will make no charge at this time on account of" such support, "we cannot say that at the time of her death she could have successfully demanded, as a right, credit for the support of the children.

40. We cannot accord to her sureties a right which she did not have.

41. Doubtless, after receiving her ward's money, the guardian might have discharged her liability by a safe and legitimate investment of the guardianship funds upon proper security".

42. But notes secured by a third mortgage, "in a loan to herself", being "inadequate as security" is not "an investment at all".

43. "Guardians must not confuse their trust capacity and their personal capacity in dealing with trust funds. No matter how good might have been the security given by the guardian upon the borrowing of guardianship funds from herself, it cannot serve as a credit further than moneys are actually realized therefrom. (Cases)". See also GUARDIAN AND WARD. —*Hutson v. Jenson*, 110 W. 26, 39.

44. As to guardian crediting individual notes payable to himself, and note and mortgage executed by himself, and bond liability therefor. See BONDS. —*Brehm v. U. S. F. & Guaranty Co.*, 124 W. 339, 349.

45. "The guardian (of minors) was a trustee of the funds of the wards. It was her duty, on receiving such funds, to keep them for her wards, and to invest so much of them as was not required for immediate and necessary use, as soon as she could do so with reasonable diligence.

46. She could employ an attorney to collect them, and, if she exercised reasonable care and prudence in the choice of an attorney, doubtless she would be protected from loss occurring by the fraud or negligence of the attorney in the course of his duty as collecting agent;

47. But when she had received the funds by draft or in cash the functions of the attorney for collection ended, and if she then placed the funds in his hands to invest he became simply an agent to whom she had attempted to delegate her duties as trustee", and she and her bondsmen are responsible for loss resulting by the default of the attorney. *Lewin, Trusts. Vol. 1, p. 252. So held.*

48. "The guardian has not undertaken to act as an attorney, but the care and investment of the funds which reach his hands is one of the very things which the guardian has agreed to attend to", and "he cannot delegate to others" such duties.

49. Where the attorney collected the funds, and turned over to the guardian checks and drafts therefor, and she "endorsed them and handed them back to the attorney, to be invested by him for her as guardian", she and her surety are liable for loss incurred by the attorney's handling thereof.

50. Where "the guardian absolutely neglected her duty and made no attempt to invest the funds, we cannot say that there was an abuse of discretion" in allowing only "about two months upon a part of the funds, and three months upon the balance, during which time no interest was charged". *In re Thurston, 57 W. supra.*

51. The guardian, an aunt, was allowed credit "for food furnished", but "neither the guardian nor the surety has any right to" credit "for lodging or services", as "she voluntarily stood in loco parentis to these children and never intended to charge them anything" therefor. *Hutson v. Jenson, 110 W. supra.*

52. While it "was not the proper plan of accounting", to allow "the guardian interest on her disbursements at six per cent per annum from a period midway between the time of her appointment and the time of her resignation", but, being "more favorable to the appellant, there was no prejudicial error".

53. "Annual rests should have been made, and the amounts expended for the preceeding year deducted, and the interest computed on the balance up to the next annual rest". *In re Thurston, supra.*

—*Abrams v. U. S. Fidelity & G. Co., 127 W. 579, 583.*

54. As "intimated" in *Israel v. Silsbee, 57 W. supra*, it is now decided that "the accounts of a guardian of" a deceased ward cannot "be adjusted by the county court" between "the guardian and the heir", or without "administration of the estate of the ward".

55. Nor can the "court render judgment directly in favor of the heir and against the guardian for the amount found due by the guardian to his ward's estate". —*Glasspoole v. McGuine*, 143 W. 294, 295.

ACCOUNTS OF TRUSTEES.

See ACCOUNTS OF EXTRS. & ADMRS. ACCOUNTS OF GUARDIANS. TRUSTEES. TRUST FUNDS. TRUSTS.

ACKNOWLEDGMENT.

Agent or deputy, 5.
Denial and withdrawal, 3.
Formula, no prescribed, 1.
Object of acknowledgment, 4.

Valid acknowledgment, 2.
Without the state, 6.
Clerk's additional certificate, 7.

1. "There is no prescribed formula of the acknowledgment of a conveyance. It is sufficient if the grantor, after being fully informed of the contents of the instrument, declare to the officer taking his acknowledgment that he executed the same.

2. In this case Mrs. D. knew the contents of the mortgage, declared her approval thereof, and acknowledged that she executed the instrument. This is a valid acknowledgment.

3. True, she afterward denied, in the presence of the justice, that she executed it freely, but she did not attempt to cancel or recall the acknowledgment previously made; and it may be doubted whether she could withdraw her acknowledgment after having once made it".

—*Lefebvre v. Dutruit*, 51 W. 326, 331.

4. "The object of an acknowledgment is to verify the fact that the person whose name is subscribed to the deed did in fact subscribe the same as his deed;

5. Or, if he signed it as deputy or agent, that he subscribed it for his principal."

—*Ward v. Walters*, 63 W. 39, 42.

6. An acknowledgment, of a deed "outside of this state, before a notary public, who certified to the same substantially in the form prescribed by our statutes, and made the impression of his official seal as such notary public upon the instrument", was held "sufficient,

7. And hence that such deed was properly admissible in evidence without having annexed thereto an additional certificate to the effect that such notary was such officer. Secs. 2216-2219".

—*Washburn L. Co. v. Swanby*, 131 W. 1, 3.

ACTIONS.

See also ACTIONS AGAINST EXTR. OR ADMR. ACTIONS BY EXTR. OR ADMR. CREDITORS' ACTIONS.

Accrual, as to decease, 18.
 Actionable form, when, 7.
 Against debtor and trustee, 20.
 Agreement not to begin, 1.
 Amendment, law to equity, 14.
 Character, determined, 9.
 Creditors against heirs, etc., 8.
 Ex delicto, ex contractu, 6.
 Filing claim, 3.
 Heirs: for their shares, 2.
 Creditors against heirs, 8.
 Cumulative bond remedy, 2.

Incompetent: bring in person, 15.
 Adjudged insane person, 16.
 Proper course to pursue, 17.
 Money had and received, 12, 13.
 Equitable in nature, 19.
 Implied repayment, 21.
 Payor bring on judgment, 10.
 Proceeding, when action, 5.
 Surety on bond, notice, 11.
 Title, estate of deceased, 4.

1. Agreement not to commence does not defeat action. See AGREEMENT.
 —*State Bank v. Corwith*, 6 W. 551, 578.

2. Heirs have a right of action against the administrator for their shares. Also on the bond as a cumulative remedy. See LIABILITY.
 —*Williams v. Davis*, 18 W. 115.

3. Filing of a note for allowance, held, "the commencement of an action".
 —*Boyce v. Foote*, 19 W. 199, 204.

4. The title may be the claimant v. "Estate of M. deceased". See APPEAL.
 —*McNight v. Estate of McNight*, 20 W. 446, 447.

5. "The word 'action' " as used in change of venue statute is held "to include this proceeding for the probate of a will", on appeal in circuit court. See also VENUE. —*Jackman Will Case*, 27 W. 409, 412.

6. The distinction between an action ex delicto, as conversion, and an action ex contractu, as for money had and received, "is not merely technical or formal, but is a substantial one". In the former "execution goes against the body, in the other, against the property only".
 —*Anderson v. Case*, 28 W. 505, 509.

7. A cause of action must be "in a perfectly actionable form at the time suit was commenced". See also SET-OFF. COMMON LAW.
 —*Orton v. Noonan*, 29 W. 541, 545.

8. May be brought by a creditor against heirs, devisees or legatees, where the will was probated but no further proceedings were had. See HEIRS.
 —*McGonigal, J. v. Colter*, 32 W. 614, 625.

9. The character of an action is determined by the relief demanded. See PRAYER FOR RELIEF.
 —*Lowber v. Connit*, 36 W. 176, 182.

10. The real party who pays, may bring an action to recover on a judgment. See PARTIES. VACATING JUDGMENT.

—*Mann v. Aetna Ins. Co.*, 38 W. 114, 117.

11. Notice or demand on surety is not necessary to obtain leave to sue on the bond. See BOND. —*Elwell, Judge v. Prescott*, 38 W. 274, 278.

12. "An action for money had and received is maintainable whenever the defendant receives money which, in equity and good conscience, he ought to pay to the plaintiff. *Lockwood v. Kelsea*, 41 N. H., 185.

13. In the language of Lord Ellenborough, C. J., in *Hudson v. Robinson*, 4 M. & Sel., 475-478, 'an action for money had and received is maintainable whenever the money of one man has, without consideration, got into the pocket of another' " See also PLEADINGS.

—*Wells v. Am. Ex. Co.*, 49 W. 224, 230.

14. It is "clearly error" to allow an amendment against objection "changing the action from one at law to an action in equity".

—*Kavanagh v. O'Neill*, 53 W. 101, 106.

15. "At common law, and in the absence of a statute to the contrary, a weak and feeble-minded person of full age may bring an action in his own name, and appear by attorney, and not by guardian ad litem. (many cases)"; and so held in an action to set aside a fraudulent trade of lands, there being no statute to the contrary.

—*Menz v. Beebe*, 95 W., 383, 389.

16. Following *Menz v. Beebe*, 95 W. supra, it is held that one "adjudged to be insane by the county court", may properly commence and prosecute an action in his own name,—the statutes, sec. 2613, providing "that an infant must appear by guardian, but omit any such requirement with reference to the insane plaintiff".

17. But "the proper course for courts to pursue when it becomes apparent that a plaintiff, by reason of his insanity, cannot safely protect his rights in the litigation, is illustrated by *Wiesmann v. Daniels*, 114 W. 240, where, upon suggestion of such a situation, this court" "appointed a guardian ad litem and directed the case to proceed".

—*Wiesmann v. Donald*, 125 W. 600, 602.

18. As to conditions when a cause of action accrues before and after death. See CLAIMS.

—*Barry v. Minahan*, 127 W. 570, 573.

19. Although an action "for money had and received" "is legal in form, the right to recover is in its nature equitable, and can only be enforced where the defendant has received money which in equity and good conscience he ought to pay to the plaintiff. (Cases)".

—*Steuerwald v. Richter*, 158 W. 597, 602.

20. An action in equity "against the debtor personally", and including a trustee as defendant also, was held proper to compel a transfer of the debtor's interest in the trust. See TRUST VARIATION.

—*Mangan v. Shea*, 158 W. 619, 625.

21. An action "for money had and received" "arises from the implied agreement to return the part" paid, on failure to convey title. See also PRINCIPAL AND AGENT.

—*Jensen v. Miller*, 162 W. 546, 548.

ACTIONS AGAINST EXECUTOR OR ADMINISTRATOR.

See also ACTIONS. CONCURRENT JURISDICTION.

Against deceased stockholders, 4.

Executors and personally, 5.

Good will conversion, 6.

Claim filing expired, 7.

Joint wrongdoers, deceased, 8.

Remedies of claimants, 2, 3.

Surety for contribution, 1.

1. An action by a surety against an executrix of a deceased co-surety for contribution, cannot be maintained, where the time limited in which to present claims has been fixed and notice given, and no claim for such contribution has been filed.

2. Sec. 3868, providing "that 'the claimant may also have a remedy by any proper action'", "is clearly limited to such actions as are expressly authorized by the chapter in which that section is contained,

3. And not to such as are therein expressly prohibited, and in lieu of which other remedies are therein provided", as under sec. 3858 and sec. 3860. See CONTINGENT CLAIM. —*Ernst v. Nau, Extra.* 63 W. 134, 139.

4. Suit to establish a claim against executors of deceased stockholders of an insolvent bank, though no claim filed in the county court, held proper. See CONCURRENT JURISDICTION.

—*Gianella v. Bigelow*, 96 W., 185.

5. Causes of action against executors, etc., and against them individually, cannot be joined in the same action.

—*Crowley v. Hicks*, 98 W. 566, 572.

6. An action "for wrongful appropriation of the good will by" a deceased survivor in the nature of a trustee of a bank corporation which expired by limitation, and for "wrongful appropriation of the assets", is held to survive under sec. 4253, as "one for an injury to personal estate". (Cases);

7. And such action may be maintained, though "the time for filing claims against" the estate has not expired, and it is in process of

administration, as results can "be most effectually and efficiently accomplished in an action for winding up the bank's affairs".

—*Lindemann v. Rusk*, 125 W. 210, 225.

8. Judgment against the executor of a joint wrongdoer, separately, is held proper,—such defendant having "died pending the litigation". See also BOND FOR MAINTENANCE.

—*Borchert v. Borchert*, 141 W. 142, 144.

ACTIONS BY EXECUTOR OR ADMINISTRATOR.

See also ACTIONS. CONCURRENT JURISDICTION. CREDITORS' ACTIONS. DAMAGES.

Accounting in specie, 28.

Remedy at law, 29.

Circuit court relief, 46.

Barred in county court, 47.

Rights previously fixed, 49.

Subrogation of claims, 48.

Conversion after death, 41.

Disbursed in good faith, 42.

No damage been done, 43.

No damage defense, 45.

Preferred claims paid, 44.

Rights previously fixed, 49.

Subrogation: of claims, 48.

Conversion before death, 35, 37.

Demand not required, 40.

Money conversion, 39.

Payment by check, 38.

Death damages: personal, 12.

Brought by administrator, 13, 14.

Brought by widow, etc., also, 15.

Proceeds to widow, etc., 13, 15.

Evidence of competency, 36.

Of check payments, 38.

Fraudulent transfers, 16.

Accounting in equity, 28.

Burden upon administrator, 33.

Cestui que trust, 29.

Constructive trust, 27.

Fraudulent transfers—continued

Deficiency of assets, 17.

Estoppel not found, 34.

Future creditors, 30.

Payment of wife's debt, 32.

Property in specie, avails, 25.

Rescission of contract, 26.

Sec. 3832 covers all, 31.

Implied contract, 20, 21.

Limitation statute, 24.

Pleading: counterclaim, 23.

Limitation statute, 24.

Preferred claims paid, 42.

Barred in county court, 41.

No damage done, 43.

Resulting trust, 21.

Setoff: against deceased, 3, 4.

Confirmed by sec. 4260, 11.

Mutual claims, 8, 9, 10.

Nonresident administrator, 22.

Nonresident relatives, 18.

On executor's contract, 1.

To recover assets, 2.

Under sec. 3847, 6, 7.

Where claims not barred, 5.

Trust enforcement, 19, 21.

Constructive trust, 27, 28.

Widow applies estate funds, 41.

1. "The rule seems to be well established that in an action brought by an executor or administrator upon a contract made by such executor or administrator himself, after the death of the testator or intestate,

2. Or to recover assets belonging to the estate in the hands of a third person,

3. A claim due from the deceased to the defendant cannot be set off or counterclaimed.

4. The reason of the rule is that in all such cases the allowance of such set-off or counterclaim would necessarily destroy the equal and just distribution of the assets belonging to the estate among the creditors in every case where the assets were insufficient to pay all the debts of the deceased. ("Many cases"). See also ADMINISTRATION EXPENSES. CLAIMS. LIABILITY.

5. It is indicated, but not decided, that "if any assets of the intestate", "other than a debt due to the estate from the defendant upon a contract made with the intestate in his lifetime, can be appropriated to the satisfaction of a debt due from the intestate to such defendant, it can only be done in a case where it is made to appear affirmatively that" the estate is solvent, and that "the claim of the defendant against the estate had not been barred, because not presented for allowance within the time prescribed by law. (Cases)".

6. Actions under sec. 3847, "in which such setoff may be made, are actions to recover a 'debt or claim' due from the defendant to the intestate in his lifetime,

7. And not an action to recover upon a contract made with his administrator after his appointment, or an action to recover the assets belonging to the estate which have come to the hands of the defendant after the death of the intestate".

8. "Where there are mutual claims between the intestate and one of his creditors, there are two ways of adjusting such claims:

9. First, under sec. 3841, when the creditor presents his claim for allowance", the county courts "pass upon both claims, and strike the balance in favor of the largest claim.

10. Or, under sec. 3847, the administrator, instead of waiting for the presentation of the creditor's claim" in the county court, "may bring an action against such creditor on the claim due to the intestate, and then the creditor may, if he choose so to do, set off his claim against the estate in that action.

11. This construction of this section is confirmed by the provision of sec. 4260, in relation to setoff".

—*McLaughlin v. Winner*, 63 W. 120, 124.

12. The right of recovery of the widow under the statutes, secs. 4255-56, for damages for causing the death of the husband "is personal, and dependent upon pecuniary loss", and does not survive to her administrator.

13. "Moreover the action must be brought by and in the name of the personal representatives of such deceased person." (But, see par. 15, post.). "Such damages do not go to the estate of the deceased, but to the beneficiary named in the statute. *Gores v. Graff*, 77 W. 174".

—*Schmidt v. Menaska W. Co.*, 99 W. 300, 301.

14. An action to recover for the death of the intestate, under secs. 4255-56, must be brought by the personal representative, for the benefit

of the beneficiaries, as given in the statute, only. *Brown v. C. & N. W. R. Co.*, 102 W. 137.

15. "The right of action, therefore, is purely statutory, and in this case is given solely for the benefit of such children", "and constituted no part of" the intestate's estate, and "hence the final settlement of that estate", "cannot operate as a bar to their right of action by" a properly appointed administrator de bonis non. (By amendment of ch. 186, L. 1913, to sec. 4256, the husband, widow or parent, may also now bring such action). See also *ADM. DE BONIS NON*.

—*Hubbard v. C. & N. W. R. Co.*, 104 W. 160, 164.

16. "There is no right on the part of the administrator to attack alleged fraudulent transfers of property made by his intestate except under the provisions of sec. 3832. (In effect over-ruled in *Borchert v. Borchert*, 132 W., post).

17. Under this section it must appear, in order to entitle the administrator to maintain it, that there is or will be a deficiency of assets to pay creditors existing at the time of the transfer." (Over-ruled in *Sawyer v. Metters*, 133 W. post, the statute not being limited to "creditors existing at the time of the transfer".)

—*Eckler v. Wolcott*, 115 W., 19, 20.

18. Secs. 4255-56 "do not give to nonresident alien relatives" such right of action. (By Amdt. of ch. 35, L. 1915, to sec. 4256, now "a non-resident alien surviving wife and minor children shall be entitled to the benefits"). —*McMillan v. Spider, L. S. M. & L. Co.*, 115 W. 332, 340.

19. On demurrer, an action in equity is held properly brought by an administrator (the heirs being joined) against the intestate's fiduciary agent "in a position of special trust and confidence" having control of known and unknown "amounts of his principal's money", for an accounting, and payment, and for moneys improperly invested in realty, and for reconveyance of the same to defendant.

20. "Whether it be viewed as an action to enforce a trust or to recover on implied contract, the cause of action survives at common law, and no support for such result is needed from sec. 4253.

21. The cause of action arising from deceit and fraud, which did not survive at common law, and which we have held not to be given survival by that section, is the recovery in tort for the damages suffered by the plaintiff. (Cases)." Here the attempt at recovery is "only defendant's gains, upon implied contract or resulting trust."

—*Sommervail v. McDermott*, 116 W. 504, 509.

22. An administrator appointed in another state, where the deceased and his relatives were all residents, may bring an action under secs. 4255-56 for wrongful death in this state.

—*Robertson v. C. St. P. M. & O. R. Co.*, 122 W. 66.

23. While "in case of a defendant, in an action brought against him by an executor, counterclaiming under sec. 3847, he must, in order to succeed, have a demand not barred by sec. 3844" in the county court,—a claim "enforcible there" (*Carpenter v. Murphey*, 57 W., 541, see CLAIMS),—

24. Yet, he is not "required to plead affirmatively the facts showing that the demand is not affected fatally by any statute of limitations. That is a defense under the general rule stated in *South Milwaukee Co. v. Murphy*, 112 W., 614". —*Rust v. Fitzhugh*, 132 W., 549, 555.

25. Contrary to *Eckler v. Wolcott*, 115 W. supra, it is held, that an administrator may proceed for the "recovery of property in specie or the avails thereof", obtained by a fraudulent transfer from the intestate "and to the prejudice of the heirs", though the rights of creditors are not involved.

26. "The right to sue for rescission of a contract secured through fraud and to recover property obtained under such contract, or the proceeds thereof, survives, on principle, as the authorities abundantly show. *Coon v. Dennis*, 111 Mich. 450; *Sharon v. Terry*, 36 Fed. 337".

27. "An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its converted form, still remains in the possession of the wrongdoer."

28. In case of a constructive trust an action lies in equity for its establishment and for an accounting,

Even though the property wrongfully obtained is personal and, in specie or in some new form into which it can be definitely traced, is within the reach of a plain remedy at law, where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation. (Citation).

29. This court quite recently held that the better rule is that the cestui que trust may always sue in equity for an accounting. *Harrigan v. Gilchrist*, 121 W. 127, 252". —*Borchert v. Borchert*, 132 W. 593, 596.

30. Overruling *Ecklor v. Wolcott*, 115 W. supra, "so far as out of harmony with the doctrine laid down here", it is held, "that an action can be maintained by an administrator under sec. 3832, to set aside a conveyance fraudulent as to future creditors whose claims arose after the conveyance and who were in the contemplation of the grantor at the time of the conveyance and who were intended by the grantor to be defrauded by such conveyance."

31. The statute "was manifestly intended by the legislature to cover all conveyances made by decedent in his lifetime and which 'by law are void as against creditors'," "where there is a deficiency of assets". (Cases).

32. Where the conveyance was to the wife "in payment of a bona fide debt, meritorious in character, and quite adequate to the value of the

property conveyed in payment of it", the deed was upheld as against creditors of sixteen months thereafter.

33. There being a "valuable consideration", and the deceased otherwise having "no debts at the time", "the burden was upon the appellant (administrator) to show that the deed to defendant was fraudulent".

34. Where the wife was not present when deceased represented that he owned the land, she is not estopped by his claims.

—*Swayer v. Metters*, 133 W. 350, 355.

35. A complaint by an administrator charging "that the defendant had decedent's money in his possession at the time of her death and that he retains the same in his possession and has converted it to his own use", sufficiently alleges "a taking and conversion of the money before her death".

36. Where the defendant obtained decedent's money in her lifetime, from her bank deposit with her checks, "evidence of decedent's mental capacity" and of her incapacity of "transacting any business" "at the time the checks were given", is held erroneously refused.

37. So obtaining "the checks and the proceeds thereof" would be wrongful, and "this would operate as a fraud upon the decedent and would not vest in defendant any right to the checks or the proceeds", and the bank's payment "rendered him liable to her for his wrongful conversion of it".

38. "True, in a bona fide transaction the giving of a check is presumptive evidence of the payment of a debt (citations), but this presumption is not conclusive and may be wholly overcome by other evidence."

39. For the wrongful conversion of money the defendant "will be held to the same liability as if he had wrongfully converted some other of her personal property. (Many cases)".

40. "An averment of its wrongful taking is sufficient without demand, if sustained by proof of its original wrongful taking or subsequent wrongful appropriation".

—*Meyer v. Doherty*, 133 W. 398, 402.

41. In an action by an administrator, appointed about eight years after the decease of the intestate, for conversion under sec. 3824, against the widow, and the time for filing claims having expired, and there being claims, and no other assets, and the widow having filed no claim,

42. And her answer showing that she "in good faith" disbursed the estate funds sued for, in payment of "necessary and reasonable expenses" of funeral and last sickness,—on overruling a demurrer to the answer, it is held:

43. That "the answer shows no damage has been done to the estate or to the administrator in this capacity",—"as trustee for the creditors and heirs",—and "there is no legal wrong under sec. 3259", or at common law.

44. "Having applied the assets of the estate in payment of these pre-

ferred claims, neither creditors of the second class nor heirs were aggrieved by such payment". *McKeigue v. C. & N. W. R. Co.*, 130 W. 543 (See **SETTLEMENT**).

45. "In those cases in which the law does not conclusively presume damages, it is always a defense to an action for tort or wrong to show that the plaintiff sustained no damage.

46. This case being properly in the circuit court, that court has jurisdiction to administer complete relief without referring the defendant to a useless proceeding in the county court, where it must be conceded that no relief could now be given her."

47. "The fact that the defendant's claim against the estate, if she had one, would be now barred by reason of her failure to present it in the county court,

48. Does not affect either her equity to be subrogated to the claims of the preferred creditors or her right to resist the recovery here sought.

49. The rights of the parties were fixed by the transaction long anterior to the time for filing claims, and the administrator" "never had a right of action against the defendant".

—*Merrill v. Comstock*, 154 W. 434, 436.

ACT OF GOD.

Excuse entire contract; 2.

Sickness so regarded, 1.

1. Sickness "is regarded as the act of God", and will excuse delay or even non-performance of contracts, for personal services. See **SICKNESS**.

—*Green v. Gilbert*, 21 W. 395, 400.

2. Will excuse the performance of an entire contract. See **ENTIRE CONTRACT**.

—*Jennings v. Lyons*, 39 W. 553, 557.

ADDITIONAL BOND.

See **BONDS**.

ADEMPION.

See **LEGACIES**.

ADMINISTRATION.

See also **DESCENT AND DISTRIBUTION**. **KIN**. **PROBATE OF WILLS**.

Administration: purpose, 18.

Creditors right, 26.

Effect of strangers, 2, 42.

Administration—continued

Necessary facts, 43.

Next of kin, limited, 25, 28.

Administration—continued

- Right is statutory, 23.
- Right under sec. 3807, 24, 27.
- Appeal: new evidence, 11.
- Jury, improper, 11.
- New petition filed, 12.
- Application: of strangers, 1, 22.
- All heard, one petition, 7.
- Irregular, not void, 2, 41.
- Nonresident applicants, 5, 6.
- Petition defective, 38, 39, 41.
- Revocation, proper, 3.
- Without notice, 1.
- Circuit court, 11, 12.
- Creditors right to, 26.
- Discretion of court, 9.
- Executor as trustee, 19.
- Until qualified trustee, 20.
- Executor, trustee of widow, 14.
- Federal jurisdiction, 16.
- Guardian, administrator, 4.
- Intestate estate and will, 13.
- Irregular, not void, 2, 41, 42.
- Jurisdiction, 31, 33.
- Absence of estate, 49.
- Appointment conclusive, 37.

Jurisdiction—continued

- Decease and residence, 31, 43.
- Existence of estate, 45.
- Hearing on petition, 44.
- Petition defective, 38.
- Prima facie showing, 46, 47.
- Proceeding in rem, 36.
- Property, death out of state, 43.
- Property in other states, 35.
- Status at death, 48.
- Stranger to proceedings, 42.
- Limitation of administration, 21.
- Next of kin: meaning, 10.
- Absolute within thirty days, 28.
- Right to, limited, 1, 25.
- Nonresident: applicant, 5, 6, 27.
- Administrator, 8, 9.
- Proceeding in rem, 15, 16, 36.
- Revocation, 3.
- Stranger applying, 1, 22.
- Vested at the death, 17.
- Will afterward found, 29.
- Administration revoked, 32.
- Effective until revoked, 34.
- Settlement effective, 30.

1. The decedent died "leaving a wife, who survived him only a few hours, and two infant children, who are still living. He had no other kindred within the territory of Wisconsin". "The father and uncle of the late" wife, were on their petition "appointed administrators" without notice "to the next of kin, as the statute requires, and the thirty days, within which it was the absolute right of the next of kin to appear and claim letters of administration, had not expired.

2. This appointment was, in the highest degree, irregular, though not perhaps entirely void". (In *Steinberg v. Saltzman*, 130 W., post, it is said, as to this paragraph,—“That decision has stood without criticism for over fifty years”, and that “the suggestion that such an appointment is probably erroneous only” and not “wholly void”, has become established.)

3. “The order of revocation” “on the petition of” the brother and husband of the sister of the deceased, was held properly made. “The authority” “to revoke or reverse orders entered in the course of probate proceedings”, “must be regarded as incident to the general powers of the court, and indispensable to a right exercise of those powers”.

4. It is indicated that “after the renunciation of the next of kin”, that while “the appointment of administrators” “is wholly confided to the discretion of the judge of probate”, subject to fitness and competence; that the selection of “the general guardian of the infant heirs” “has often been deemed proper, where no special objections existed”. See also *KIN*, pars. 24, 25. —*Brunson v. Burnett*, 2 Pin. 185, 188.

5. As to granting administration on the separate petitions of two sole heirs, "the fact that both are non-residents may not absolutely disqualify them for the appointment, though it is the manifest policy of the statute not to favor the appointment of a non-resident as administrator.

6. This is plain from sec. 3803, which expressly authorizes the county court to remove an administrator who 'shall reside out of the state' for that cause alone".

7. On the petition of one heir, "all persons interested in the estate had the right to appear before the court at the hearing of this application and have their wishes in the premises considered", without other application being made.

8. On the applications of two non-residents, one for a resident and the other for a non-resident administrator, "the fact that" the latter "was not a resident of the state when administration was asked for, was a sufficient reason for not appointing him".

9. "The statute gives the court a discretion in the matter, and its judgment and discretion must be guided by personal fitness, and various considerations affecting the appointment and the best interests of the estate".

10. The court does not determine whether 'next of kin' means all kindred, or those 'next of blood'. See *KIN*, pp. 24, 25.

11. On appeal to the circuit court on the question of appointment, "it was not a case for a jury trial, or where the introduction of new evidence would have been proper", especially where "there was no dispute about the real facts which controlled the decision of the case".

12. "The circuit court properly disregarded the petition" filed there, "requesting the appointment of Daniel F. Brown", not considered in the county court, "because not regularly before it".

Est. of Sargent, 62 W. 130, 133.

13. "Under our system the executor of the will, to whom letters of administration with the will annexed are issued, takes possession of all the personal estate of the testator, whether the same be disposed of by the will or not, and it becomes his duty, as such administrator with the will annexed, to settle the estate and distribute the same in the manner prescribed by law. See Subd. 6, Sec. 3935.

14. The executor, after he knew the widow had elected not to take under the will of her husband, became her trustee as to her share of the personal estate, and must be held to an honest discharge of his duties as such trustee". See also *WIDOW*.

—*Beem v. Kimberly*, 72 W. 343, 367.

15. "The settlement of estates in courts having probate jurisdiction is essentially proceedings in rem; and not 'civil suits commenced and prosecuted', within the meaning of the constitution.

16. It is upon this theory that the federal courts have uniformly

disclaimed jurisdiction in probate matters; since such jurisdiction is not conferred by the words: "The judicial power shall extend to all cases in law and equity, arising", etc. Sec. 2, art. 3, const. U. S."

17. While an estate becomes chargeable at once for debts (*Union Nat. Bk. v. Hicks*, 67 W., 191, cited under DEBTS), yet "the rights of heirs, devisees, and legatees, in a certain sense become vested at the death of such testate or intestate.

18. The administration of estates is to preserve the same until the claims of creditors are ascertained and provided for, when the residue may be effectively transmitted to the respective parties entitled".

—*State ex rel. Sanderson v. Mann*, 76 W. 469, 476.

19. "The executor (as such) was entitled to hold the estate upon the trusts implied by law from the will (*Ford v. Ford*, 70 W. 19) to collect and pay over such income from time to time to the widow during her life, and to hold the bequests in favor of Z. upon the express trusts specified in the will. These trust duties would continue for the contemplated period, although his duties as executor might be sooner terminated.

20. He would, however, continue to hold the estate as executor until he should qualify as testamentary trustee, and as it does not appear that he had so qualified, he held the estate by his title as executor until he settled his final account. Sec. 4025; *Newcomb v. Williams*, 9 Met. 525, 534". So held, and that he was entitled to compensation and expenses. (Followed in *Walber v. Wilmanns*, 116 W. 246, 250). See also ACCOUNTS OF EXTRS. & ADMRS.

—*Schinz v. Schinz*, 90 W. 236, 246.

21. As to the power and jurisdiction to grant administration after seven years absence, and as to inconsistent statements in the petition. See PRESUMPTION OF DEATH.

—*Wis. Trust Co. v. Wis. M. & F. Ins. Co. Bank*, 105 W., 464, 467.

22. "A mere stranger, having no interest in the estate or its administration, cannot move the court for the appointment of an administrator. Secs. 3807, 3808. This is elementary". See also ADMINISTRATOR DE BONIS NON.

—*Wiesmann v. Daniels*, 114 W. 240, 243.

23. "The right of administration while a very valuable one, is not inherent, but statutory. It may be given or withheld in the wisdom of the legislature".

24. Sec. 3807, specifying administration rights, "is clearly mandatory, and in itself declares its only exceptions." "Disobedience thereof" constitutes "error subject to review". (Cases.)

25. "By subd. 2 of the same section, this right of the next of kin is limited to the case where he applies within thirty days after the death, and when he or the person nominated by him is suitable.

26. When those conditions fail, and not till then, do the creditors acquire any right over the nomination of an administrator; hence the appointment of" the public administrator "as permanent administrator cannot be justified by the request of certain creditors."

27. Nor is sec. 3807 limited "to the case of relatives resident in the state", though the public administrator was appointed under "sec. 3819, which obviously provides merely for a temporary situation, and authorizes appointment of the public administrator only until those having lawful rights under sec. 3807 shall make proper application.

28. Hence we conclude that when the next of-kin, within thirty days after the death of this intestate, made due application for the appointment of a competent and suitable person resident in this state he was absolutely entitled thereto."

—*Welsh v. Manwaring*, 120 W. 377, 378.

29. Where complete administration was had, the judgment assigning all the estate to the widow as sole heir, and the widow and the deceased's mother "supposed that he left a will dividing the property between them" and "being still uncertain whether a will might not yet be found, met and agreed", to a settlement and division of realty, in writing, including "all claims of the mother as to the property (whether any will afterwards was found or not)",

30. And a "will was afterwards found and probated", providing for a mutual division,—held in an action to quiet title, that "the settlement so made is effective", both on the ground of estoppel and on "compromise of doubtful rights." *Kercheval v. Doty*, 31 W. 476. (See COMPROMISE).

31. "Residence" and "decease" are necessary, but jurisdiction "does not depend upon the presence or absence of a will".

32. On such erroneous administration, "the letters of administration will of course be revoked, and all acts of the county court inconsistent with the due administration of the estate under the terms of the will will doubtless be revoked upon motion,

33. But such action will not be based on the idea that all such acts have been void for lack of jurisdiction, but rather on the ground that they have been erroneous". (Citations).

34. "Until set aside, however, the (final) decree was effective upon the parties, because it was within the jurisdiction of the court, and was rendered upon due notice to all parties of the application for such decree. *Appeal of Schaeffner*, 41 W. 260".

—*Perkins v. Owen*, 123 W. 238, 241.

35. Where "an intestate person leaves property located in different states", "there can be no doubt that the appropriate court of each state where such property is located may, upon proper proceedings being had, grant letters of administration of so much of the estate as is therein located".

36. The county court having "jurisdiction to determine whether the deceased left any property in the state of Wisconsin", "in such proceeding in rem, its determination could not properly be treated as a nullity nor be open to collateral attack". (Cases).

37. And it is held that the appointment of an "administrator was conclusive, on the defendant in this action" for damages for decedent's wrongful death, and that the question of fact as to whether deceased in fact had property to give jurisdiction for the appointment of an administrator, could not be inquired into. See also PUBLIC ADMINISTRATOR. —*Jordan v. C. & N. W. R. Co.*, 125 W. 581, 589.

38. Following *Brunson v. Burnett*, 2 Pin., supra, it is held, "that mere failure to state in the petition for administration all facts requisite to entitle the person named as administrator to the appointment,

39. Sufficient being shown to indicate that a cause for administration exists and that the application is in the proper jurisdiction,

40. Or failure to appoint as administrator a person designated by the statutes,

41. Is not such a defect as to render the administration proceedings initiated by the petition wholly void". Kan., N. Y., U. S., Minn. and other cases. Contra.: Mich., Ky.

42. Here held that administration on petition of a half-brother, not an heir, and appointment thereon of a stranger,—is voidable merely, and not to be attacked collaterally.

—*Steinberg v. Saltzman*, 130 W. 419, 426.

43. Secs. 2443 and 3806 "confer jurisdiction upon the county court to act" in granting administration in the two cases, where "the jurisdictional facts are (1) domicile and death", and (2) "the existence of an estate within the county to be administered, and death without the state.

44. In each case such jurisdictional facts may be controverted upon the hearing of a petition for letters testamentary or of administration, and they must be established before the court acquires jurisdiction to act.

45. Not so, however, as to the existence of an estate in the case of the death of a resident of the county. A prima facie showing that there is an estate, or a bona fide claim that deceased left property to be administered,

46. Or the prima facie showing of any other statutory ground for the granting of letters of administration, is all that is necessary". *Perkins v. Owen*, 123 W. supra.

47. Though it is alleged that the intestate transferred all his personalty and realty before his decease, "a bona fide claim that there is an estate to administer will support the granting of letters, and the court should not proceed to adjudge the validity of the claim. That must be left for future litigation in the proper forum and between the proper parties. (Citations).

48. Moreover, in this case the court found that deceased left \$36. The fact that it was afterward used, and properly so, for funeral expenses, is immaterial. The status at the time of death governs". (Cases).

49. The intimation of Lyon, J., in *Flood v. Pilgrim*, 32 W. 376 (See JURISDICTION), "that a local grant of letters, where there is no estate, is absolutely null and void",—is obiter, and "it cannot be said that the act of appointment is beyond the jurisdiction of the court". Administration sustained.
—*Barlass v. Barlass*, 143 W. 497, 498.

ADMINISTRATION EXPENSES.

See also COMPENSATION OF ADMR., EXTR., GRDN., & TRUSTEE. COSTS AND FEES.

Administrator insolvent, 5.

Application to court, 5.

Attorney: not creditor, 14, 20.

Action on bond, 27.

Beneficiary; attorney, 36, 39.

Collateral action, 25, 31.

Duty of executor's attorney, 37.

Equitable claim on funds, 30.

Insolvent administrator, 15.

Judgment conclusive, 24, 31.

Jurisdiction of person, 23, 28.

Lien on estate funds, 29.

Personal to administrator, 14, 21.

Submission to court, 22, 27.

Sue administrator personally, 26.

Bank official, administrator, 13.

Before administration, 1.

Items proper, 2.

Monument expense, 4.

Voluntary payment, 3.

Costs and counsel fees, 7, 33.

Priority over debts, 5a, 34.

General guardian, 39.

Generally devised estate, 11.

Guardian ad litem, 38.

Homestead proceeds applied, 11, 12.

Implied contract for, 13.

Maladministration, 35.

Preference given them, 8.

Counsel fees, 5a.

Necessary incident, 9.

Sale of homestead, 10.

Revocation of administration, 15.

Stipulation for expenses, 40.

Widow's expenses, 6.

Will afterward found, 16.

Administration expenses, 18, 19.

Expenses not claim, 17.

1. "Only such necessary expenditures as from the nature of the circumstances cannot properly be postponed until an administrator shall be appointed", for "expenses incurred intermediate the death of an intestate and the granting of letters of administration are legally chargeable to the estate".

2. "This rule will, of course, entitle an heir, a legatee, widow or guardian, or even a stranger, who has paid reasonable burial expenses, necessarily incurred before administration could be granted, to be reimbursed from the estate. But, as we understand the law, the rule goes no further".

3. "Every expenditure which can decently and reasonably be postponed until an administrator is appointed, should be so postponed, and one who, before such appointment, voluntarily incurs an expense for

which there is no immediate necessity, does so in his own wrong, and cannot compel the administrator, when appointed, to reimburse him”.

4. Where a sister, one of three heirs, with the approval of one who had been the guardian of the deceased, expends \$500 for a monument and curbing, and \$14.75 for photographs for memorial cards, before the appointment of an administrator, though the same may be “appropriate to his estate and condition in life”, and “had the administrator made such expenditures, the court might, in its discretion, have allowed the amount thereof against the estate”,—it is held she cannot be reimbursed out of the estate. “The view we have taken of the law of this case is fully sustained in *Foley v. Bushway*, 71 Ill. 386”.

—*Samuel v. Est. of Thomas*, 51 W. 549, 552.

5. “Where the administrator has incurred a liability for services which have been performed for the benefit of the estate of the intestate, and the administrator is insolvent and unable to pay”, “the party performing such services”, can properly “present his case by petition to the county court”, and by order have “his claim allowed as a part of the expenses of the settlement of the estate”, but cannot have a setoff in an action by the administrator on an estate claim against such party. See ACTIONS BY EXECUTOR OR ADMINISTRATOR.

—*McLaughlin, Admr. v. Winner*, 63 W. 120, 131.

5a. “Counsel fees or other proper expenses of administration”, are allowed out of the assets, and given “priority over the general debts”. See LIABILITY.

—*Miller v. Tracy*, 86 W. 330, 333.

6. Expenses of the widow, in “litigation, much of which she herself commenced,” held “properly disallowed” as administration expenses.

—*Ford v. Ford*, 88 W., 122, 134.

7. Costs and counsel fees, authoritatively set forth. See COSTS AND FEES.

—*In re Donges's Est.*, 103 W. 497, 513.

8. “Expenses of administration constitute a charge of the highest character against the estate in which they are incurred. They take precedence of debts, even of such as grow out of the last sickness, unless otherwise provided by statute. *Woerner*, Admn. 356, 362.

9. Such expenses are a necessary incident to the carrying out of the purpose of the testator, without which such purpose would be quite likely to fail in whole or in part.”

10. “Where the will requires a sale of the homestead and a distribution of the proceeds in the payment of debts and legacies, thereby requiring a conversion of realty into personalty in the hands of the executor”, there attaches thereto “the payment of the expenses of administration, precedent to the rights of the beneficiaries of the fund”.

11. And it is held that the “expenses of administration”, first, though

not provided for in the will, and, second, "the payment of all his debts", so generally provided in the will, take precedence to legacies to be paid out of the remainder (one-half) of the homestead not specifically devised.

12. (There seems to have been no error assigned as to the payment of the debts, and in *Kuener v. Prohl*, 119 W. 487, 491, referring to the instant case, it is pointed out that the statute, sec. 3862, as to no general direction for the payment of debts out of the homestead being effective, "was not referred to in the opinion in" this case).

—*Will of Madden*, 104 W. 61, 65.

13. The facts that an administrator, being president of a bank, the principal creditor of the estate, and "could obtain his pay in the county court out of the estate",—"would not prevent the making of an express contract for payment, nor the implication of a contract in the absence of an express contract", by such bank creditor to pay the administrator for his services as such.

—*Lowe v. Ring*, 106 W. 647, 655.

14. A claim of an attorney for estate services is not one "as a creditor of the estate", but is one against the administrator personally. See ADMINISTRATOR DE BONIS NON.

15. But "exceptional circumstances, such as insolvency of the administrator," "have sometimes been held to justify a court in ordering payment out of the estate directly to the claimant."

—*Weismann v. Daniels*, 114 W., 240, 243.

16. Where, on appeal the allowance of a will and appointment of an administrator B., was revoked, and subsequently the will was admitted and another administrator appointed in another county court, where B. filed his claim for administration expenses incurred by him in good faith, it is held,—

17. That the claim was not properly a claim under sec. 3838, and as such was properly disallowed;

18. "Yet it does not follow that the plaintiff is not entitled to be reimbursed for the moneys he had in good faith expended and the services he had in good faith rendered, in pursuance of his appointment. (Citations)."

19. "If the plaintiff's claim, or any part of it, is to be allowed, it must be as a part of the expenses of administration", upon properly filing his account and on a hearing thereon upon notice. Secs. 3927, 3931. See also *Miller v. Tracey*, 86 W., supra.

—*Brown v. McGee's Est.*, 117 W., 389, 392.

20. In an action by an attorney against an administrator personally for services in the estate, the amount having been allowed in the final judgment in the estate, it is held, that, from the principle of *Weismann v. Daniels*, 114 W. supra,

21. The attorney could not "have gone into the county court, against objections by the defendant, and proven his claim against the estate or obtained an order for payment thereof. His claim was personal against her".

22. But "no reason is perceived why she might not herself in her final account present the question to the court as to how much she should pay to her attorney out of the residuum of the estate in her hands.

23. By doing so she waives any question of jurisdiction of her person, and the court, having full jurisdiction of the subject matter—i. e., the disposition of the funds in the hands of its officer—may doubtless render such a judgment as was rendered here.

24. When so rendered, such judgment must be considered as binding and conclusive upon the administratrix, upon whose request it was rendered,

25. Until set aside in a direct proceeding for fraud or some other reason recognized by the law. Another court cannot investigate it and set it aside in a collateral action, as was done here. (Cases)".

26. For the amount so allowed he may "sue her personally for the sum as for money had and received for his benefit" on "implied contract", and she may "counterclaim upon the promissory note" given by him. Judgment directed for the amount, less the sum due on the counterclaim.

—*Vaughn v. Walsh*, 122 W. 486, 489.

27. Where the administrator's account showed allowance for attorneys fees for M., but not for F., both having duly performed services for the administrator for the estate, neither having been paid,—on petition of such attorneys the order of the county court thereon made, is upheld, in a subsequent action on a bond, the administrator having defaulted.

28. The county court had "jurisdiction to determine the amount justly allowable to the attorneys of the administrator out of the estate on account of legal services performed by them,

29. To make the same a lien thereon and to order the lien to be extinguished by using funds for which the administrator was responsible".

30. The administrator holds the personalty of the estate "in trust and is accountable to the court appointing him after the manner of trustees generally", the court having "the amplest authority" "to recognize equitable claims upon the funds in his hands".

31. "His account was duly settled and the final order in respect thereto" "is conclusive in this action", whether or not "the county court committed judicial error in exercising its authority. Its decision cannot be disturbed by a collateral attack. (Cases)".

—*Carpenter, J., v. U. S. F. & Guaranty Co.*, 123 W. 209, 212.

33. Where an administrator, "authorized by the county court", brought an action to recover assets, in which judgment for costs was

entered against him as administrator, under sec. 2932, there being no bad faith, "it follows that the costs incurred in that action were 'necessary expenses of administration' within the meaning of" sec. 3852.

34. And as such, following *Miller v. Tracy*, 86 W. supra, 'will have priority over' debts. "Certainly, such costs were not a claim" "within the meaning of sec. 3838", —*Ferguson v. Woods*, 124 W. 544, 546.

35. As to almost total disallowance of administration expenses, for maladministration and bad faith. See ACCOUNTS OF EXTRS. & ADMRS. —*Mackin v. Hobbs*, 126 W. 216, 222.

36. "The beneficiaries, except as to the minors by their guardians ad litem, had no right to be represented by attorneys in the settlement of the estate at the expense thereof.

37. It was the duty of the attorneys for the executors to perform, in general, all legal services chargeable to the estate,

38. And that of the guardian ad litem to see that they did not do the work for them (beneficiaries?) and at the end combine to have several sets of attorneys' fees instead of one allowed".

39. As to other "attorneys for the general guardian and the adults, it was their duty to insist upon the attorneys for the executors and the guardians ad litem performing their duty. That was really their whole scope of legitimate employment".

40. The agreement between all the parties for their compensation is "held void on grounds of public policy and the compensation granted the attorneys for the executors held to cover all expenses of that nature chargeable to the estate". See also PROBATE OF WILLS.

—*Will of Rice*, 150 W. 401, 461-3.

ADMINISTRATOR.

See ADMINISTRATION. ADMINISTRATOR DE BONIS NON. ADMINISTRATOR WITH WILL ANNEXED. EXTRS. AND ADMRS. PUBLIC ADMR. SPECIAL ADMR.

ADMINISTRATOR DE BONIS NON.

Action for assets, 12.

Attorney's service claim, 18, 19.

Duty of court to appoint, 28.

Erroneous order, 22, 23.

Executor and trustee, 21, 22.

Final order: incomplete, 6.

Erroneously made, 21, 22.

Proof of payments, filed, 7.

Guardian ad litem, 14, 16.

Former guardian, 14.

Nunc pro tunc, 15.

Without guardian, 17, 26, 27.

Interest in estate, 18, 20.

Jurisdiction to make, 24.

Bondsmen liable, 25.

Nonresident administrator, 3.

Notice of appointment, 13, 16.

Without notice, 17, 26, 27.

Presumption of regularity, 8, 9.

Letters, *prima facie*, 10.

Reason for, not disclosed, 8.

Removal of executor, 1, 26, 27.

Resignation statutory, 2.

Sole residuary bond, 11.

Stranger cannot move, 18.

Suit on executor's bond, 4.

Void appointment, 1, 5, 10.

1. Administration de bonis non is held void where the executor is removed without notice. See REMOVAL.

—*Humes v. Cox*, 1 Pin. 551, 554.

2. "In the absence of a statute authorizing it, the probate courts have no power to appoint an administrator de bonis non on the resignation", and the failure of the original administrator to complete the administration, he being still in existence, and there being real estate unadministered and debts unpaid.—*Sitzman v. Pacquette*, 13 Wis. 291, 306, 311.

3. Where the original administrator is a non-resident, has failed to report for ten years, and the estate is left unsettled, the court may, for these reasons, appoint an administrator de bonis non, without formally removing the original administrator, the facts being valid reasons for formal removal.

—*Bailey v. Scott*, 13 W. 618, 621.

4. An administrator de bonis non can bring "a suit upon the bond, expressly authorized by statute (generally 'by any executor, administrator or guardian'), to compel the executors to pay over and account for the value of the property received by them", the executors being deceased, and the action being in the name of the county judge against their surety.

—*Golder v. Littlejohn*, 23 W. 251, 254.

5. Where the widow "gave bond and acted as executrix", but her authority "as executrix was extinguished by her subsequent marriage", and subsequently her husband was appointed administrator and gave bond as such, it is held, "that it does not appear, either presumptively or otherwise, that any will of B. was ever admitted to probate, and, consequently, that the county court had no power to appoint an administrator de bonis non with the will annexed".

—*Chase v. Ross*, 36 W. 267, 274.

6. An alleged final order which "only shows that the debts, funeral expenses and expenses of administration had been fully paid, and that there remained in the hands of the administratrix" a certain sum directed to "be paid to the heirs of said deceased, and that, upon making such payment, the administratrix be discharged from further trust in said matter", but which "order does not define who the heirs of the deceased are",—does not show that the estate has been fully settled;

7. The administratrix should have filed "some proof that she had paid the moneys in her hands to the proper person, in order to have

made a final distribution of the estate", and the fact that "she claims to be the sole heir at law", without any adjudication thereof, does not make such settlement as to prevent "the appointment of an administrator de bonis non" for further proceedings.

8. Where "the record does not disclose the reason for the appointment, it must be presumed that the appointment was for some good cause in the law", in the case of an administrator de bonis non, "the evidence showing that the former administratrix has remarried", that being then a good ground.

9. "The record also discloses that the appointment was made by the mutual consent of all parties interested", and the widow and administratrix "claims that she is the only party interested except the claimant; and it must be presumed, therefore, that she was present, consenting to such appointment.

10. But, in the absence of any evidence showing the appointment void, the order granting the letters, and the letters themselves are prima facie evidence of the authority to make the appointment. (Many cases)".

—*Oakes v. Est. of Buckley*, 49 W. 592, 598.

11. Where an executor, who gave a sole residuary legatee bond, dies before final judgment of distribution was entered, an administrator de bonis non is proper to be appointed on application of interested parties. See BOND FOR PAYMENT OF DEBTS, ETC.

—*Jones v. Roberts*, 84 W., 465, 472.

12. An administrator de bonis non may proceed in the circuit court for unadministered assets in the hands of third persons. See CONCURRENT JURISDICTION.

—*Meyer v. Garthwaite*, 92 W. 571, 576.

13. While an "application for the appointment of" an administrator de bonis non, subsequent to the final settlement of an estate, for the purpose of bringing an action to recover for the infant heirs damages for the death of the intestate under secs. 4255-6, "was made by their general guardian", yet, "he could not, as to such children or the defendant, waive the notice required by" sec. 3808; *O'Dell v. Rogers*, 44 W. 136 (See JURISDICTION);

14. "No guardian ad litem was appointed to represent such children in this action", and the "function as such guardian ad litem", of one previously appointed, "terminated with the final settlement of" the estate. Sec. 4052a; county court rule 3.

15. An order made many months afterward, allowing the previous guardian ad litem as such, being the same person who was present as general guardian, "to appear nunc pro tunc as of" the date "when plaintiff was so appointed administrator, is without significance. Certainly it did not cure the want of notice required by sec. 3808."

16. (In *Jenks v. Allen*, 151 W. post, it would appear that the instant decision, as to notice and guardian ad litem being necessary for the

appointment of an administrator de bonis non, is in effect though not in fact, overruled, it being queried whether it is distinguishable because "the first administrator had completed his administration, settled his accounts and been discharged", and "the court did not conceive that the appointment in that (this) case was made under sec. 3804, for that section is not mentioned",—being apparently overlooked;

17. And it is further held, that the appointment of an administrator de bonis non, upon the removal of an executor, under sec. 3804, "without notice and without the appointment of a guardian ad litem for the minors was valid"). See also ACTIONS BY EXTR. & ADMR.

—*Hubbard v. C. & N. W. R. Co.*, 104 W. 160, 165.

18. "A mere stranger," as an attorney for a previous administrator, B., whose "resignation was accepted", "cannot move the court for the appointment of an administrator" de bonis non, for the purpose of recovery "for services rendered to B. as administrator" "and to carry out the provisions of the will" of the deceased testator.

19. Such claim for services is not "as a creditor of the estate", but is "against B. personally, to be by him charged against the estate in his hands upon his accounting, if the outlay be proper and reasonable. (Cases).

20. One "in possession of a tract of land under some claim of right, which the petitioner claims should be sold by the proposed administrator as a part of" the estate, has such a "substantial and direct" interest, "as to entitle him to appear and oppose the application."

—*Weismann v. Daniels*, 114 W., 240, 243.

21. Where "the final order" in settlement discharged the executor and his bond liability, "upon his paying" trust funds as designated, but as to said funds "the said bond of said executor" to remain in full force, and such executor subsequently resigning, it is held,—

22. Whether the offices of executor and as trustee should have been separated by "the county court when there was no further use, necessarily, for an executor", nevertheless, "at most it was a mere error of judgment in the exercise of the undoubted jurisdiction of the court,—such an error, as has often been said, a court has jurisdiction, in other words 'authority of law' to make."

23. Right or wrong, the final conclusion declaring the law based on such an error, is the law in fact for the purpose of the proceeding".

24. And the appointment of an administrator de bonis non is upheld, because "the county judge had jurisdiction to decide that matter and did decide it, and (that) his decision is not open to collateral impeachment".

25. Such administrator subsequently dying insolvent, his estate and his bondsmen were held liable to a subsequently appointed trustee.

—*Barney, J. v. Babcock's Est.*, 115 W. 409, 414.

26. As to an administrator de bonis non upon the removal of an executor, "it must be held that such appointment, without notice and without the appointment of a guardian ad litem for the minors, was valid", pursuant to sec. 3804.

27. Secs. 3787 and 3808 "relate to the initial application" and "do not prescribe what must be done in case an executor or administrator is removed and a successor appointed in his place". See also *Hubbard v. C. & N. W. R. Co.*, 104 W. supra.

—*Jenks v. Allen*, 151 W. 625, 629.

28. "It was the duty of the county court to appoint an administrator de bonis non when, after the discharge of the executor and the closing of his administration, it appeared that there was estate which had not been administered upon. (Sec. 3804)". See also *APPEAL*.

—*Will of Durkee*, 164 W. 41, 43.

ADMINISTRATOR WITH WILL ANNEXED.

See also *EXECUTORS AND ADMINISTRATORS*.

Confidential powers, 1.
Not usually devolved, 2.

Intestate and testate estate, 4.
Will never allowed, 3.

1. Where a testator gives his estate to his son, 'J. B., sole executor of this my last will', with power to dispose of the same in such manner as to him shall seem meet, for the payment of my just debts and for the use and benefit of my only and afflicted daughter, G. B., so long as she shall remain insane', and such "executor and trustee" dies after paying the debts, the daughter "still living and insane" the "administrator with the will annexed" de bonis non "is not entitled to the possession of any part of the estate by virtue of his appointment", because of "the rule that powers and duties thus confidentially reposed, and not connected with the office of executor, do not pass to the administrator with the will annexed", notwithstanding the statute provides the latter "shall have the same authority to perform every act and discharge every trust, as the executor named in the will would have had".

2. "The duties thus specially imposed were of a delicate and responsible character, and quite distinct from those usually devolved on the office of executor" and "were in a great measure discretionary and personal".

—*Est. of Besley*, 18 W. 451, 454.

3. Where it does not appear that the will was ever proved and allowed, "the court had no power to appoint" an administrator with will annexed. See also *ADM. DE BONIS NON*.

—*Chase v. Ross*, 36 W. 267, 272.

4. Administrator with will annexed administers "all the personal estate of the testator, whether the same be disposed of by the will or not." See also ADMINISTRATION. —*Beem v. Kimberly*, 72 W. 343, 367.

ADMISSIONS.

See also PLEADINGS.

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|-----------------------------------|--|
| Agent of husband, 1. | Not conclusive, 35. |
| Authority of agent, 34. | Partner's admission, 31. |
| Part of res gestae, 4, 8, 16. | Pleading: conclusive, 3. |
| Scope of authority, 7, 9. | Admissible in evidence, 17. |
| Casual conversations, 36. | After amendment, 33. |
| Decedent: payment, 5. | Received with caution, 19. |
| Against mortgage title, 11, 22. | Self-serving declarations, 30, 38, 39. |
| Against realty title, 10, 12, 38. | Spendthrift received, 2. |
| Delivery of a gift, 24. | Strong evidence, 18, 37. |
| Husband to aid wife, 23. | Testator: latent ambiguity, 6. |
| Not part of res gestae, 15. | Against sole legatee, 29. |
| Deliberately made, 37. | Against testator's interest, 30. |
| Explanation allowed, 21. | Intention concerning, 32. |
| Gift: delivery of, 24. | Lost will contents, etc., 28. |
| In derogation of, 40. | Making of a will, 32. |
| Impeachment of, 26. | Weak testimony, 20, 36. |
| Incompetent, 25. | Widow, administratrix, 13, 15. |
| Lost will contents, etc., 28. | As party in interest, 14. |
| Memorandum as, 27. | Wife as agent, 1. |

1. Declarations and admissions of wife as agent of the husband, "in relation to matters done under her direction * may be given in evidence against him". See also HUSBAND AND WIFE.

—*Birdsall v. Dunn*, 16 W. 235.

2. Of spendthrift under guardianship may be received. See NECES-SARIES.

—*McNight v. Estate of McNight*, 20 W. 446, 448.

3. An admission in a pleading "is conclusive, and not open to contradiction or disproof by the party who made it".

—*Denton v. White*, 26 W. 679, 686.

4. The admission of an agent as part of the res gestae, against the principal, may be received. See RES GESTAE.

—*Hazleton v. Union Bank*, 32 W. 34, 48.

5. Declarations of the deceased in his lifetime "in relation to the payment of" a judgment against him, "were clearly inadmissible".

—*Jilsun, Admr. v. Stebbins*, 41 W. 235, 240.

6. Declarations of a testator are admissible to remove latent ambiguities in a will. See CONSTRUCTION OF WILLS.

—*Morgan v. Burrows*, 45 W. 211, 217.

7. "The admissions or representations of an agent while engaged in any particular transaction for his principal, made in regard to such transaction, may be received as evidence against the principal in a controversy concerning such transaction.

8. But, to be received, they must constitute a part of the *res gestae* in the course of the agent's employment about the matter in question.

9. They must accompany the transaction or the doing of the business, and must be within the scope of the delegated authority". *Hazleton v. Union Bank, supra.* —*Rounsavell v. Pease*, 45 W. 506, 510.

10. In ejectment, the plaintiff claiming title "as devisee of her late husband, S., deceased," who took title as son and heir of D. deceased, it is said: "D. and S. were privies in blood, and S. and the plaintiff privies in estate, in respect to the land in controversy.

11. Such being the relations between the plaintiff and those from whom, or through whom, she derives title, it is elementary that she is bound by their admissions affecting such title".

12. As the admission of D. and S. in like actions would be admissible against them, "the plaintiff being in privity directly with S., and derivatively with his mother, in respect to the title she claims, the admissions of both or either of them, derogatory to her title, may be proved against her. *Greenl. on Evidence*, 189".

—*Littlefield v. Littlefield*, 51 W. 23, 28.

13. In an action by the widow, as administratrix, for injuries causing the death of an intestate, "declarations of the plaintiff, made during the life of her husband, as to how the accident occurred", "were competent only for the purpose of contradicting the testimony given by the plaintiff on the trial, but were not admissible for the purpose of proving the fact of negligence on the part of the deceased".

14. Such declarations "as being made by a party in interest, within the meaning of the rule", "to be admissible, must be against the interest of the person making them at the time when they were made. 1 *Greenl. Ev.* 147".

15. Neither such declarations of the plaintiff, nor of the deceased, presumably made a day or two after the accident, were "admissible as a part of the *res gestae*". —*Fitzgerald v. Weston*, 52 W. 354, 357.

16. "Declarations of the plaintiff's agent as to a transaction with the defendant made, not at the time of the transaction, but at a time long subsequent", sought to be introduced by the defendant, are not admissible, not being part of the *res gestae*.

—*McIndoe v. Clarke*, 57 W. 165, 169.

17. Where the original verified pleading was allowed to be read to the jury, it is said: "There can be no doubt that the admission in the answer was competent evidence to go to the jury for what it was worth,

on the question as to what were the terms of the contract between the parties".

—*Norris v. Cargill*, 57 W. 251, 256.

18. "Admissions, as facts established by the testimony, are strong evidence against the party making them, and not weak;

19. But the testimony by which they are sought to be proved or established 'should be received with the greatest caution and scrutiny', as said by Chief Justice Dixon in *Benedict v. Horner*, 13 W. 256,

20. And 'is the weakest kind of testimony', as said by Mr. Justice Paine in *Dreher v. T. of Fitchburg*, 22 W. 675". *Orton*, J.

—*Nash v. Hoxie*, 59 W. 384, 388.

21. "A party may always deny, explain, or controvert his alleged admissions against his own interest, unless they create an estoppel."

—*Seefeld v. C. M. & St. P. Ry. Co.*, 67 W. 96, 98.

22. Following *Littlefield v. Littlefield*, 51 W., supra, it is held that statements of a deceased mortgagee made before his death as to ownership of a mortgage, "against his own interest at the time", are admissible in a foreclosure action.

23. But such statements of the husband for the benefit of the wife "to prove that she owned" the mortgage, were "clearly immaterial as well as incompetent".

—*Lehman v. Sherger*, 68 W. 145, 149.

24. "Statements of the deceased in his life-time to third persons are held competent to prove the delivery of a gift inter vivos".

—*Pritchard v. Pritchard*, 69 W. 373, 376.

25. The declarations of an incompetent at the time of the act complained of, ten months before, an inquisition de lunatico, were held competent. See TESTAMENTARY CAPACITY.

—*Giles v. Hodge*, 74 W., 360, 368.

26. No foundation need be laid as to evidence of admissions of a party to impeach his evidence. See IMPEACHMENT.

—*Hunter v. Gibbs*, 79 W., 70, 72.

27. A memorandum properly identified may be introduced as an admission. See WRITINGS.

—*Hazer v. Streich*, 92 W. 505, 509.

28. Declarations of the testator as to the existence and contents of a lost will, are admissible. See LOST WILL.

—*In re Valentine's Will*, 93 W. 45, 54.

29. In an action on a claim, against a sole residuary legatee, admissions or statements of the testator to such legatee in the latter's interest are held inadmissible, such declarations being "no more competent

as evidence for his estate after his death than for himself while living; and, if such statements were not made in the presence of the adverse party, they are inadmissible in a suit against the estate'. 1 Jones, Ev., 236".

30. "An exception to the rule stated is where the declarations made are against the interest of the party making them. (Citations). The giving of such declarations by the testator did not authorize the admission of such self-serving declarations", though the adverse party "himself opened the door". —*Pym v. Pym*, 118 W., 662, 670.

31. An admission by one defendant partner was held "competent, not only as against himself, but as against his co-partners". —*Muench v. Heinemann*, 119 W., 441, 445.

32. "Declarations by the testator concerning the making of a will, and as to intention concerning" provisions, are inadmissible in any case. See also AFTERBORN CHILD. —*Sandon v. Sandon*, 123 W. 603, 607.

33. As to admissibility of pleadings, after amended, and testimony of explanation. See PLEADINGS. —*Schultz v. Culbertson*, 125 W. 169, 171.

34. Admission of authority to act as agent "does not tend to prove the agency". See PRINCIPAL AND AGENT. —*McCune v. Badger*, 126 W. 186, 191.

35. "An unqualified admission of a party against his interest does not preclude sending the issue involved to the jury where there is credible evidence fairly conflicting therewith". —*Bruger v. Princeton & St. M. M. F. Ins. Co.*, 129 W. 281, 285.

36. "The rule, often asserted by this court, that 'evidence of casual statements or admissions by a party, made in casual conversations and to disinterested persons, is very weak testimony, because of the liability of the witness to misunderstand or forget what was really said or intended by the party'. Haven v. Markstrum, 67 W., 493.

37. The rule as to weakness of evidence of admissions so made is supplemented by Mr. Greenleaf with this statement: 'But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature'. 1 Greenlf. Ev. (15th ed.) 200. That statement was fully sanctioned by this court at an early day. (Cases)". —*Scheer v. Ulrich*, 133 W., 311, 317.

38. A declaration of a deceased grantor as to delivery of a "deed to J. for safe-keeping" merely, "was of a self-serving character and so was clearly not provable to defeat the deed which years before had passed into J's. possession". Welch v. Sugar Creek, 28 W. 618; Fay v. Rankin, 47 W. 400. —*Chase v. Woodruff*, 133 W. 555, 559.

39. "Self-service declarations; whether oral or written, not part of the *res gestae*, are incompetent",

40. And "declarations of a donor after a gift and in derogation of that gift are incompetent". See also *GIFT*.

—*Hilton v. Rahr*, 161 W. 619, 623.

ADOPTION.

Abandonment, 8.
 Judicially determined, 12.
 Jurisdiction obtained, 13, 14, 19.
 No evidence thereof, 11.
 Notice, effect of, 17, 21.
 After-born child, 25.
 Child: Rights as, 26.
 Effect of statute, 27.
 Favored, 16, 18.
 Intent of testator, 29.
 Issue of blood, 28, 31.
 No direct language, 30, 31.
 Consent not shown, 8, 11.
 Valid as to child, 10.
 Void as to parent, 9.
 Contract of adoption, 32.
 Conduct of parties, 36.
 Intended to adopt, 34.
 Lost writing, 33.
 Mother to contract, 35.
 Specific performance, 32.

Contract for inheritance rights, 38.
 Clearly shown; no fair doubt, 39.
 Estoppel, 18.
 Inheritance by blood, 2.
 Adopted parent, 3.
 Statutory change, 4, 5.
 Jurisdiction, 13, 19, 23.
 Abandonment, 14.
 Notice to parents, 11, 14.
 As to abandonment, 17, 21.
 Two constructions, 15.
 Order of adoption, 7, 20.
 Petition imperfect, 19.
 Presumption of record, 22.
 Revocation of will, 24.
 Services in family, 1.
 Statutory proceeding, 6.
 Civil law; not common, 37.

1. An infant adopted (unofficially) is governed by the same rule as to services in the family as a child by blood. See *SERVICES*.

—*Tyler v. Burrington*, 39 W. 376, 380.

2. "Both by the common law and by the statutes (sec. 2270) of this state inheritance is confined to the blood of the deceased, the only exception being made in favor of the wife of the deceased".

3. "We think it must be held, according to the rules of construction, that the general law of inheritance was not intended to be changed in favor of the adopted parent, and that the estate of the adopted child, upon his death without a will, must descend to his kindred of blood as prescribed by section" 2270. So held in this case, the property coming to the adopted child from his natural parents.

4. (The rule, so far as it affects estate of the adopted child which came to him from his adoptive parents, has been changed so that such estate goes "to the next of kin of such parents by adoption", by sec. 2272a).

5. In Massachusetts "the law upon the subject of adoption of children" is "almost in the same language as our statute." (And it seems

the foregoing amendment in effect also follows an amendment of that state).

—*Hole v. Robbins*, 53 W. 514, 517.

6. "The proceeding by adoption here in question is a mere statutory proceeding, not according to the course of the common law, and when legally conducted, has a much broader scope, and utterly terminates all relations between the minor and his legitimate parents".

7. Under the statute (sec. 4022), the adoption "order is required to recite the facts of the case, and to declare that from and after its date such child shall be deemed, to all intents and purposes, the child of the petitioners".

8. In an action by the father for damages for loss of services and affections of his minor child, against the adoptive parent, where the adoption proceedings "do not recite or show any consent" of the parents, next of kin, or guardian, but only of one appointed for that purpose, "but the proceedings recite that the plaintiff (father) had abandoned her, and that the mother was dead", (presumably without any other specific finding of abandonment), and "there is nothing whatever to show that any notice" was given to the father, or that he appeared, it is held,—

9. "That as to the father the order (of adoption) is a mere nullity and may be disregarded as such whenever and wherever it comes in question as against him or as affecting his rights.

10. But the order in question may well be held valid as against a minor child, as in the case of the commitment to the Industrial School of Milwaukee. *Milwaukee I. S. v. Milwaukee Co.*, 40 W. 328." (In affirming this paragraph, it is said, in *Parsons v. Parsons*, 101 W. post: "Obviously meaning because the court had jurisdiction that far, which of course included jurisdiction of the petitioner who commenced the proceedings"). See also PARENT AND CHILD.

—*Schlitz v. Roenitz*, 86 W. 31, 38.

11. A proceeding by an original petitioner, to set aside an order of adoption, about ten years later, there having been no consent of or notice to the living parent. The original "petition, in form, complies with the statute". There was no evidence as to abandonment found, "but the verified petition, and the allegation of abandonment was on information and belief".

12. "The fact of abandonment, judicially determined, was essential to the jurisdiction; not essential that it should be determined on proper evidence, necessarily, or in accordance with the truth, because mere error in that regard does not affect jurisdiction.

13. If jurisdiction be obtained to determine a fact, its determination wrong or on insufficient or improper evidence is immaterial on the question of the legal right to proceed judicially to the next step".

14. The court had "jurisdiction to act on the subject of the alleged abandonment, in the absence of notice, actual or constructive, to the parent".

15. Then "the statute did not require notice" thereof, "but if the statute would admit of two constructions, the result would be the same", under proper "rules of liberal construction".

16. "The adoption statute is a humane provision which looks to the interests of children primarily". "Therefore, every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object".

17. After quoting the amendment (Ch. 18, L. 1895) to sec. 4022, prescribing notice to a non-consenting living parent, it is said: "That notice to the parent is not requisite to a valid determination of the fact of abandonment as regards all other parties to the proceedings, has been held in numerous cases elsewhere". "Nugent v. Powell, 4 Wyo. 173; Van Fleet, Col. Attack § 408; Barnard v. Barnard, 119 Ill. 92".

18. The adoption order is sustained "on the merits of the case", but the proceedings being "clearly of an equitable nature, and after the lapse of many years", the petitioner is estopped from appealing "to the equity powers of the court to declare" void the adoption order "entered on her motion". —*Parsons v. Parsons*, 101 W. 76, 79.

19. Though, in adoption proceedings, "the petition is far from being a model" and "even fails to state the name or residence of" the child's father or mother, it is held sufficient to give "jurisdiction to hear proof in the matter of the adoption of the child. Sec. 4021.

20. But that did not authorize" the court to adjudge "adoption in violation of" sec. 4022, by failure to "find that the parents of the child, or either of them, had abandoned the child,—much less that they, or either of them, were dead", they being in fact living, and neither having had notice, and the order of adoption based upon abandonment "by the parents, was clearly a nullity as against them. *Schlitz v. Roenitz*, 86 W. *supra*.

21. Such want of notice to the parents, however, did not take away the jurisdiction of the county court to determine whether the parents had in fact abandoned the child. *Parsons v. Parsons*, 101 W. *supra*".

22. The rule "that in a certain class of cases, where the record is silent as to some fact, a presumption will be indulged in favor of the judgment (cases)", does not extend to "violation of an express statutory requirement, and in a proceeding which is purely statutory".

23. In a proceeding to determine the validity of an administration petition made by an adopted child, it is held, "that the county court, in granting such adoption, acted in excess of its jurisdiction. *State ex rel Atty. Gen. v. Circuit Court*, 97 W. 1".

—*In re Est. of McCormick*, 108 W. 234, 237.

24. The marriage and adoption of a child revokes a will previously made. See REVOCATION. —*Glascott v. Bragg*, 111 W., 605, 607.

25. A child adopted after the making of a will, has the same right to a share of the estate, as an after-born child. See AFTER-BORN CHILD.

—*Sandon v. Sandon*, 123 W. 603, 606.

26. A devise was made to E., a granddaughter, of a life estate, with "remainder over to her children and descendants of such", with power to convey "to such children", if any, and "with a further power in trust to dispose of the remainder by will," if "leaving no children or descendants". E., "without covenants of warranty, deeded her interest" to S., and he to L., plaintiff, and the latter, after her conveyance, legally adopted N., her "only child" at date of suit, and it is held:

27. "Sec. 4024, relating to the status of adopted children", is not "controlling", but "is, at best a mere aid in construing", and "does not cut any figure as to an adopted child taking under the will," "except as it may explain what the testator had in mind by the use of the term 'child' or 'children'", as the statute "deals with intestacy."

28. "The fact that E. was quite a young unmarried girl at the time the will was made, and at the time the testator died, rather repels the idea that her grandfather" "thought of great-grandchildren in any other sense than issue of her blood". So held, and that N. is not "a child of E., within the meaning of the will". See also CONSTRUCTION OF WILLS.

—*Lichter v. Thiers*, 139 W., 481, 485.

29. "The rule" that "the purpose of the testator is to be strictly carried out if it can be gathered from the" will and circumstances, "applies in determining whether the word 'child' of another in a will refers to a child of the blood of such other or an adopted child. *Lichter v. Thiers*, 139 W. *supra*".

30. Where a will indicated "an intention to have his property go to and be enjoyed by persons of his own blood", though there was no language directly so stating in a clause diverting property from a son if "he does not leave him surviving any child",—

31. The word 'child' is held not to include a child born after the will was made, "not of the blood" of the testator, "nor was his existence known" to him, who subsequent to the decease of the testator "became the adopted child of" such son, the latter dying without other children.

—*Will of Mitchell*, 157 W. 327, 330.

32. "It is fundamental to the specific performance of a contract of adoption, where the writing relied on as containing the contract is lost, that the evidence adduced to establish it must be clear, satisfactory, and convincing in its probative force."

33. In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory. *Wales v. Holden*, 209 Mo. 552".

34. "The contents of the letter" from the stepfather C., to "the

boarding-house keeper with whom the plaintiff was boarding", "stating that his mother would shortly call for him to bring him to M. and that said C. would adopt plaintiff as his own son",—"are in their most favorable aspects no more than a declaration by C., deceased, that he intended to adopt plaintiff",

35. "And fails to show that a contract of adoption had in fact been made with the plaintiff's mother, the only person who could contract for plaintiff (then a minor) in this matter".

36. And it is held that the facts do not show that C. "regarded the plaintiff as an adopted son", but "more in harmony with the treatment that a stepfather under like circumstances bestows on a stepson". Performance denied.

—*Heath v. Cuppel*, 163 W. 62, 67.

37. ("Adoption of children was a thing unknown to the common law, but was a familiar practice under the Roman or civil law; and our modern statutes of adoption are taken from the latter, and so far modify the rules of common law as to the succession of property.")

—*Butterfield v. Sawyer*, 52 L. R. A. 75, 77; 187 Ill. 598).

38. Where foster-parents agreed in writing with the father of an infant taken into their family,—to care for said child in a parental manner and to enjoy all of the privileges of a child as if born by said party of the second part and will do our utmost to care for her as if our own child,—it is held, "that the writing does not show with sufficient clearness that property advantages were promised" the child, "to justify specific performance" for inheritance rights.

39. "In a case of this kind, specific performance should not be decreed unless" it is clearly shown, "without room for fair doubt, that the parties to it intended the child to have the right of heirship the same as if born to those taking it into their family".

—*Winke v. Olson*, 164 W. 427, 431.

ADVANCEMENTS.

Acknowledgment in writing, 21.

Advances by administrator, 2.

Agreement as to, 3.

Heir deceased, 4.

Pleaded as payments, 6.

Promissory notes, 5.

Bequest to trustees, as, 25.

Computation, 27.

Not advancement, 26.

Bond and mortgage, 1.

Certificate of decedent, 30.

Character, at delivery, 20.

Charge; upon books, 18.

Contemporaneous, 31.

Computation for, 27, 28, 29.

Contemporaneous charge, 18, 31.

Declaration in writing, 21.

Evidence of, 9.

Conclusive, 13.

Final judgment as, 10.

Judgment conclusive, 12, 13.

Judgment creditor of heir, 7.

Special notice to, 8, 12.

Land conveyed, 17.

Oral evidence, 11.

Not to contradict, 24.

Not to prove, 14, 23.

Statute construed, 15, 16.

Promissory note, 22.

Statute mandatory, 19.

1. Held, "that a debt evidenced by bond and mortgage was" not "intended by language referring only to debts evidenced by 'notes of hand' or 'book accounts'," to be advancements under the will, in the absence of evidence showing the contrary.

—*Hopkins v. Holt*, 9 W. 228, 230.

2. Advances by the administrator to heirs, are personal matters between them. See ACCTS. OF EXTRS. & ADMRS.

—*In re Fitzgerald*, 57 W. 508, 514.

3. Where, pending administration, an administrator advanced to an heir, sums to be allowed him on her distributive share when assigned, and "it is a fact, decisively established by the proof that the parties intended and agreed that these advances should be so applied", it is held that he may so apply them, even,

4. Where such heir died before distribution, and her administrator made the demand for her full share; and,

5. Though part of such advances were evidenced by a promissory note from the heir;

6. And that it was not necessary for such administrator to present such advances as claims against the deceased heir, or be barred, as "these advances must be pleaded as payments, according to the intention and agreement of the parties".

—*Lyle, Admr. v. Williams*, 65 W. 231, 234.

7. A creditor of an heir obtained a judgment in 1878, and the heir received an advance of \$7,000 from his father in 1874, and a further advance of \$1,000 in 1883, at which time he gave an acknowledgment in writing to his father for "payment in full up to date for all services rendered, and all claims, now and in the future, against the said L. and his estate, living or dead, and that he has no further claim" "against his father or heirs;" the father died intestate in 1886, and final judgment in settlement of his estate was entered in 1887, finding such advances to be advancements, and that such son "was not entitled to any share in the estate," personal or real, there having been only a general notice of such settlement, by the statutory publication; held,—

8. That the judgment creditors of the son were not entitled to special notice of the final settlement, and that on the publication notice given, "it is quite clear that the county court had jurisdiction to make such order or judgment final to all the world;"

9. That the "use of the words 'claims' and 'claim' in the written instrument acknowledging the advancements", in connection with "the words 'estate' and 'heirs' used", is sufficient to establish the writing as evidence of the advancement;

10. That the final "judgment of the county court was competent evidence to prove the advancement and that it was acknowledged in writing"; and,

11. That such son "was properly asked whether it was in writing. The testimony of its contents was improper, but a witness may be asked whether a certain contract is in writing, in order to lay the foundation for proving it."

12. "From the nature and effect of such an order or judgment as to advancements made by the deceased to any heir, it is binding on everybody who is interested in that question. The statute (sec. 3961) confers on the county court the fullest jurisdiction to make it", without special notice.

13. It is "conclusive on all the world. To hold otherwise would work infinite mischief, and there would be no such thing as a final order of distribution or of settlement". —*Liginger v. Field*, 78 W., 367, 371.

14. Following Mass. and Mich., from which taken, it is held that under the statute, sec. 3959, "parol evidence is inadmissible to prove an advancement;

15. That, though the statute does not expressly declare that an advancement shall not be proved in any other manner than that indicated therein, such is undoubtedly its meaning;

16. That, by prescribing a particular manner for proving an advancement, by implication all other evidence is excluded".

17. So held, "in rejecting the offer of parol evidence to prove that land conveyed to plaintiff during the lifetime of the father was so conveyed by way of an advancement."

—*Pomeroy v. Pomeroy*, 93 W., 262, 266.

18. The testator furnished and charged to his children sums of money "upon his books in the form of loans", and stated in the will that "all sums advanced and charged by me to either of my children", "are to be deemed advancements to said child and to be taken into account in such distribution." Held, not advancements under sec. 3959, and that "the trial court rightly treated the accounts as assets of the estate to be treated the same as other property".

19. "The statute is mandatory and must be enforced as written. *Pomeroy v. Pomeroy*, 93 W. supra.

20. It clearly contemplates that a delivery of property by one to another, the latter having claims upon the former's bounty, is not to be deemed an advancement unless it is given that character at the time of such delivery,

21. Either by a declaration in the writing making the bestowal or by an acknowledgment in writing at that time by the recipient of the bounty, or by an expression of the donor in respect to the matter in charging the property to the person receiving the same". (Approvingly quoted and followed in *Arthur v. Arthur*, 143 W. post.)

—*Luddington v. Patton*, 121 W. 649, 662.

22. Where an ordinary promissory note was filed as a claim by the father against his deceased son's estate, it is held that "the admission

of parol evidence tending to show that the sum named in the note in question was an advancement from the father's estate was error, for two reasons:

23. First. Under our statute (sec. 3959) parol evidence is inadmissible to prove an advancement. *Pomeroy v. Pomeroy*, 93 W. supra.

24. Second. Irrespective of this question, it was inadmissible because it tended to contradict and set at nought the plain terms of an unambiguous written contract".

—*Schmidt v. Schmidt's Est.*, 123 W. 295, 297.

25. A will gives the residue to trustees, ultimately in equal shares to a son and daughter, the latter within one year to be paid 'one-fourth of her share or portion', and providing that advancements 'shall be added to and deemed a part of my estate' so 'devised in trust', 'and in the division' 'shall be deducted from the share of the child' to whom made. The only advancement is \$8000 to the daughter. Held:

26. "The bequest to the trustees was of money and property belonging to the deceased at his death. Any advancements were not such property. They did not belong to the testator" and "could not come to the trustees".

27. "We think the conception and intent plain merely to direct such method of computation as that the proportioning of the actual property held by the trustees between the children should give to the one receiving less advances a proportionate superiority over the other child".

28. "The one-half of the estate attributable to appellant (daughter) should be ascertained by dividing the estate plus the advancement by two, one-half for each child, and that the amount of advancement to her should be deducted from the same one-half share,

29. And the remainder pass to the trustees to be managed and divided by them in the proportions prescribed by the will",—the daughter's first one-fourth being one-fourth of her share so in the trustees' hands."

—*Rose v. Ruggles*, 137 W. 439, 443.

30. Where the intestate transferred and assigned property to several sons, \$5,000 to each, and four months thereafter and six weeks before his decease, executed a duly acknowledged certificate that by such transfers, 'I have made advancements' to such sons,—it was held, that such transfers were not "advancements", and that "the certificate was" not "competent" evidence.

31. Quoting and following *Pomeroy v. Pomeroy*, 93 W. and *Ludington v. Patton*, 121 W., supra, it is held that "the manifest purpose of the statute (sec. 3959) in making the charge in writing evidence of an advancement is that the charge must be made contemporaneously with the advancement" "in harmony with the rule respecting book accounts". (Cases). See also ACCOUNT BOOKS.

—*Arthur v. Arthur*, 143 W. 126, 133.

PROBATE AND GENERAL LAW, CODIFIED **ADVANCES BY EXECUTOR AND ADMINISTRATOR.**

See **ADVANCEMENTS.**

ADVERSE PARTY EXAMINATION.

See **DISCOVERY.**

AFFIDAVITS.

See **VERIFICATION.**

AFFIRMATIVE.

Chancery hearing, 5.

No presumed advantage, 6, 7.

Confession and avoidance, 8.

Counterclaim interposed, 2.

Denial on belief, 3.

Open and close, 1.

Pleadings furnish test, 4.

Rule of practice, merely, 9.

1. "The general practice" and "common law rule", "is for the party holding the affirmative of the issue to open and close the argument", but the matter is "under the control of the judge in his sound discretion", and will be interfered with only in case of abuse of such discretion.

—*Marshall v. American Ex. Co.*, 7 W. 1, 18.

2. Where "the answer does not controvert any of the material allegations of the complaint," and "the issue which was tried was made upon the counterclaim of the defendant," then the defendant "should have been allowed to open and close the argument", and "his right to do so is not affected by the fact that another issue was made by the reply".

—*Bonnell v. Jacobs*, 36 W., 59, 62.

3. A denial of "knowledge or information sufficient to form a belief," of the representative capacity put "the affirmative of that issue" upon the plaintiff.

—*Wittmann, Extrs., v. Watry*, 37 W., 238, 241.

4. On a suit on a guaranty of notes, it is held that "upon the pleadings, which, according to the authorities", "must furnish the test as to which party holds the affirmative, it clearly belonged to the respondent (defendant); for, in consequence of the denial in the answer, it was incumbent upon him to prove the original indebtedness by the notes. Second Wd. Bank v. Shakman, 30 W. 333."

—*Dahlman v. Hammel*, 45 W. 466, 467.

5. "The supposed advantage of having the opening and closing argument in a case at law, is not apparent upon the hearing of a cause in chancery;

6. And we cannot presume in this case that any substantial advantage has been gained or lost to either party, or that the judgment of the court was at all affected, by the order in which the argument of the learned counsel was allowed to be opened and closed;

7. And we do not think it manifest that any injustice was done by the ruling of the circuit court upon this question; and unless it is so manifest, it is no ground of error, even in actions at law".

—*Austin v. Austin*, 45 W. 523, 532.

8. Contrary to the former English rule, the court adopts the modern English rule, "that in actions to recover unliquidated damages, if the defendant" confesses and avoids, the plaintiff "still is entitled to open and close".

—*Cunningham v. Gallagher*, 61 W. 170, 173.

9. "This court has held that the question as to 'which party is entitled to open and close the argument is a mere rule of practice, and within the control of the courts'. *Cunningham v. Gallagher*, 61 W. *supra*".

—*Wausau Boom Co. v. Dunbar*, 75 W. 133, 138.

AFTER-BORN CHILD.

Adopted child, 15.

Born after decease, 2.

"Heir" construed, 3.

Contingent remainder, 4, 14.

Declaration of testator, 17.

Ellipsis or omission, 10, 13.

Extrinsic evidence, 7, 16.

If any be born, 8.

Intention of testator, 5.

Not expressed, 9.

Not outside of will, 1.

Provision made, 6.

No other intended, 12.

Remainder is, 4, 11.

1. "We are not permitted to look outside of the will to ascertain the purpose of the testator upon this point. For the statute positively declares, that unless it is apparent from the will itself, that it was the intention of the testator that no provision should be made for the after-born children, then they shall share in the estate as though no will had been made".

—*Bresee v. Stiles*, 22 W. 120, 124.

2. A testator in extremis, having no children, knowing his wife to be pregnant, bequeathed 'to my wife M. two thirds of my estate while she remains my widow (if not) one half to go to her heir, and the other third to my brother D.'; a son, W., was born after his decease, and the widow subsequently remarried; held,—

3. "The words 'her heir', in the will, referred to the unborn child"; the wife received "two thirds of his entire estate", while remaining his

widow, and on her remarriage "she was to retain but one of these thirds, and the other was to go to her unborn child. The remaining third" to D.;

4. "The remainder limited to the unborn child is a contingent remainder", and whether this is a 'provision', under section 2286, is not determined; "that it is not", see *Rhodes v. Weldy*, 46 Ohio St. 234; "That it is", see *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130.

5. If it is a 'provision', then "the will must prevail"; if it is not a 'provision', then "the will shows the intention of the testator not to make a 'provision' for the child, within the meaning of the statute, and the will must likewise prevail".

6. (In *re Donges's Est.*, 103 W. post, after referring to this, and reviewing the cases, generally, approval is given to the "rule that any provision, intended as such, however slight, will be respected and enforced as the complete will of the testator").

7. (And in *Sandon v. Sandon*, 123 W. post, citing *Bresee v. Stiles*, 22 W. supra, and this case, it is said, in effect, that while "extrinsic evidence" is not permissible to ascertain the intent of the testator, yet, it is proper to show "the circumstances surrounding the testator", to ascertain "the meaning and intention" of "ambiguous language" used in the will.)
—*Verrinder v. Winter*, 98 W. 287 290.

8. The testator gives to his wife "all the real estate", "to have and to hold the same until the youngest of my children, if any be born to me, shall attain the age of twenty-one years. In case there are no children living at the time of my decease, my said wife shall be the sole owner of my real estate". The wife was then pregnant and two children were born after the making of the will. There was no further disposition of the remainder in case there were such children.

9. After "an examination of the conclusions" of many similar cases, including *Baker v. McLeod's est.*, 79 W. 534, 543 (see VESTING OF ESTATES), it is said "that the testator had in mind the intention" to give such remainder to "his after-born children", "and that the failure to so declare was" "merely an omission to express an intention fully present in the mind of the testator".

10. "And it is our duty to declare and effectuate such intention in a case like this, and to supply the ellipsis or omission of the testator, so that there shall be added to the first paragraph of the will, 'and then to my said children', and to hold that by the will itself the realty is devised to respondents upon the majority of the youngest".

11. And after reviewing the cases, it is held "that the devise" of such "remainder in the real estate", to such children, "constitutes a 'provision' for them, within the terms of sec. 2286, and that the estate should be assigned and distributed according to the terms of the will, subject to" the modification of "the widow's election to take by law".

12. And, "independently of our view", as stated, following *Verrinder v. Winter*, 98 W. supra, "it appears from the will that such, and no

other, donation was intended, and, if that is not a provision, none was intended”.

13. (In *O’Hearn v. O’Hearn*, 114 W. 428, See CONSTRUCTION OF WILLS, it is said as to this case, that it was not intended to hold that the court “had power to amend the will by adding words to complete its meaning”, but that it “should be construed as if the added words had been used by the testator”, “and not to amend or change the will in any respect”.) See also CONSTRUCTION OF WILLS.

—*In re Donges’s Est.*, 103 W. 497, 501, 512.

14. Whether a “contingent remainder”, is a provision under sec. 2286, though the testator intended it as such, is not determined. See PRECATORY TRUSTS. —*Swarthout v. Swarthout*, 111 W., 102, 112.

15. Under sec. 2286 as to after-born child, and sec. 4024 as to effect of an adoption order,—where no provision or apparent intention not to provide, appears in a will, a child legally adopted nine days after the making of the will, is held entitled to the same intestate’s share of the estate as an after-born child.

16. Following cases supra, “extrinsic evidence” is admissible to show surrounding circumstances “if a will contain ambiguous language”,

17. But “declarations by the testator concerning the making of a will, and as to intention concerning the child’s relation to his estate” are inadmissible in any case. —*Sandon v. Sandon*, 123 W. 603, 606.

AGE.

See BIRTH.

AGENCY.

See PRINCIPAL AND AGENT.

AGGRIEVED PERSON.

See also APPEAL.

Administrator, 4, 5.
Affront or desire, 17.
Cited for examination, 24.
Executor in construction, 11.
Executor named, 21, 25.
Guardianship, 6.
Child of party, 13, 20.

Guardianship—continued
Nonresident sister, 18, 19.
Not under liability, 15.
Substantial interest, 14.
Legatee under other will, 8, 10.
Liberal interpretation, 9.
Lost will, 22, 23.

Not party to record, 1.

Not interested, 2.

Purchaser at sale, 12.

Rights adversely affected, 16.

Supreme test, 7.

Taxpayer, when, 3.

1. A person "directly interested" on account of his title to real estate, "though not a party to the record in the proceedings resulting in said order" of the county court, setting aside an administrator's sale, "was a person aggrieved by such order, within the meaning of the statute, and so was entitled to take and prosecute the appeal" to the circuit court.
—*Betts v. Schotton*, 27 W., 667, 670.

2. A party whom the testimony reveals has no interest in the controversy, and against whom no judgment is entered, is not a "party aggrieved", and cannot appeal, "however irregular may be the judgment". See APPEAL.
—*McGregor v. Pearson*, 51 W. 122, 123.

3. Where "members of the corporation as a whole are aggrieved," a taxpayer may appeal, where the city officers refuse to do so. See also APPEAL.
—*Mulberger v. Beurhaus*, 102 W., 1, 7.

4. An administrator, under the appeal statute, sec. 4031, and sec. 4035 as to "enlargement of the time" is an 'aggrieved person', and "any injury to" the interests of the heirs, "in legal effect, was a grievance to him within the meaning of the appeal statute."

5. "It is elementary that the legal representative of interests involved in litigation, prejudicially affected by the result, is a party aggrieved within the meaning of the appeal statutes. (Citations.)"

—*McKenney v. Minahan*, 119 W., 651, 654.

6. A guardian ad litem, and also a son under contractual relations, of an alleged incompetent, held aggrieved persons entitled to appeal from judgment of incompetency. See also INCOMPETENTS.

—*Ziegler v. Bark*, 121 W. 533, 542.

7. "The supreme test" is "substantial" interest, whether a party to the record or not. See APPEAL.

—*Hinn v. Gersten*, 122 W. 222, 225.

8. "A person named as legatee under another will, which might be valid if that under consideration were rejected", is held, "a party aggrieved", entitled to appeal from an uncontested probate in the county court, and from a contested affirmance in the circuit court, the earlier will having been "received in evidence" in the latter court which found that the testatrix signed the document "and that upon its face it purported to be her will".

9. The words 'person aggrieved' "must be interpreted liberally";

10. "Although, if the objection to the later will were first offered in the county court, we should highly favor the practice which prevails in New York of refusing to listen to such contestant until she had

presented to that court for probate the will under which she claimed, to the end that the court might effectually decide upon its validity and thus settle which document was to control the distribution of the estate before it." (Cases). —*In re Will of Hunt*, 122 W. 460, 463.

11. As to construction of will, the executrix "was an aggrieved party within the meaning of the statute (sec. 4031), and as such entitled to appeal". *McKenney v. Minahan*, 119 W. supra.

—*In re Paulson's Will*, 127 W. 612, 615.

12. A purchaser at an administrator's sale of realty "by order of the county court is aggrieved by an order of that court" confirming, as well as "vacating the proceedings and therefor may appeal therefrom. (Cases)". —*Greiling v. Watermolen*, 128 W. 440, 448.

13. The petitioner, an only child, appealing from the decision of the county court refusing to appoint a guardian of the father, "under sec. 1502, would be legally bound to relieve and support his father should he dissipate his property so as to be unable to maintain himself.

14. This liability" is held to give "him such a substantial interest" as to "be considered a 'person aggrieved'" under sec. 4031, "when his petition is denied.

15. When a mere friend or relative or other person not under such liability makes such a petition," under sec. 3978, "it seems extremely doubtful whether he can" so appeal. (In *Sanborn v. Carpenter*, 140 W., post, it is held that the "limitation of the term 'aggrieved'" should not extend "further than was declared" here).

—*Merrill v. Merrill*, 134 W., 395, 396.

16. "This phrase of the statute", sec. 4031, 'any person aggrieved', "has from the earliest days been construed to the effect that no one can be aggrieved, in the sense of the statute, unless the determination affects adversely his legal rights;

17. That mere affront to desire or sentimental interest is insufficient. (Cases supra).

18. Obviously no personal rights", or "legal interests", "are involved" as to "an adult non-resident sister";

19. And she is held "not aggrieved by the judgment" of refusal to appoint a guardian of her adult sister, though she was an original petitioner as "next of kin".

20. The son's "direct interest" satisfies the decision of *Merrill v. Merrill*, 134 W. supra, but "a mere next of kin or heir apparent" "has no present legal right whatsoever, but a mere conjectural expectancy", and cannot "be deemed aggrieved for the purposes of appeal in such proceedings". See also INCOMPETENTS.

—*Sanborn v. Carpenter*, 140 W. 572, 574.

21. It is not determined "whether or not one actually named as executor in a will that is refused probate is a person 'aggrieved' within the meaning of the statute and entitled to appeal."

22. In the case of a lost will refused probate, where "the appellant has failed to show that she was named as executrix", "the fact that she claims she was so named" is held not to give her the right to appeal.

23. "Nor does the fact that she could properly arouse the jurisdiction of the county court in the first instance entitle her to appeal". *Sanborn v. Carpenter*, 140 W. supra. Appeal dismissed.

—*Powers v. Powers*, 145 W. 671, 674.

24. One cited for examination on discovery citation, is held an aggrieved person, entitled to appeal. See DISCOVERY.

—*Mallory v. Wheeler*, 151 W., 136, 144.

25. "The proponent of a will, who is named as executor therein, is a 'person aggrieved' by a judgment" "refusing probate", and "may appeal" therefrom under sec. 4031. See also PROBATE OF WILLS.

—*Cowan v. Beans*, 155 W. 417, 418.

AGREEMENTS.

See also CONTRACTS.

Avoidance of agreement, 9.

Did not read it, 11.

Excusable mistake, 12.

Gross negligence, 13.

Inability to read, 10.

Fraudulent release, 14.

Happening after event, 15.

Misunderstanding nature, 16.

Mutual consent, 3.

Mutual relinquishment, 2.

Not to commence suit, 1.

Oral change in, when, 5.

Before breach in, 6.

Not contemporaneously, 7.

Same consideration, 8.

Presumption in signing, 11, 16.

Unilateral, 4.

1. "Agreement not to commence a suit on a demand for a given time will not defeat an action commenced before the expiration of the term fixed in the agreement." —*State Bank v. Corwith*, 6 W. 551, 578.

2. A mutual agreement to relinquish individual debts, acted upon by one debtor, binds the other. See DEBTS.

—*Davenport v. First Cong. Soc.*, 33 W. 387, 390.

3. Where the record discloses that an order "was made by the mutual consent of all parties interested," the presumption is that an interested party later objecting, "was present consenting". See ADMR. DE BONIS NON.

—*Oakes v. Est. of Buckley*, 49 W. 592, 599.

4. Acceptance of a land contract, by the party not signing, makes it his written agreement. See *LAND CONTRACT*.

—*Hubbard v. Marshall*, 50 W. 322, 327.

5. "We regard the rule as well established, that the terms and conditions of a written agreement, not required by the statute of frauds to be in writing, may subsequently be varied or qualified by the parties by a new agreement not reduced to writing.

6. The rule is thus stated by Lord Denman, in *Goss v. Lord Nugent*, 5 Barn. & Ad. 58: 'After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreements, or in any manner to add to or subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.' Page 65."

7. "Obviously the above rule is not in conflict with that other rule, asserted in numerous cases in this court, that proof of an antecedent or contemporaneous verbal agreement between the parties cannot be received to alter or control their written agreement. See *Hubbard v. Marshall*, 50 W. supra".

8. "On the subject of consideration, it is sufficient to say, in the language of Lord Denman in *Stead v. Dawber*, 10 Ad. & El., 57, that 'the same consideration which existed for the old agreement, is imported into the new agreement, which is substituted for it' Page 66."

—*Brown v. Everhard*, 52 W. 205, 207.

9. As to a release which is a bar to an action, on an instruction that plaintiff might avoid it "by merely showing that at the time he signed it he did not know its contents or effect", it is said: "Written instruments, regularly executed and delivered, cannot be thus dealt with and avoided, or their operation defeated".

10. There being no fraud or deception, "his inability to read English or understand the contents of the paper is no excuse. This was his own negligence. He could and should have sought the assistance of some one capable of properly informing him. *Fuller v. Madison M. I. Co.*, 36 W. 603; *Sanger v. Dun*, 47 W. 615.

11. It cannot be tolerated that a man shall execute a written instrument, and, when called upon to abide by its terms, say, merely, that he did not read it or know what it contained. *Upton v. Tribilcock*, 91 U. S. 50".

12. In *Sheanon v. Pacific M. L. Ins. Co.*, 83 W. 527, 528, is given "the true rule, in the absence of" deception, that "if the instrument was signed through the excusable mistake or negligence of the party, he is not bound by it, and that the burden of proof is on him to rebut the presumption of gross negligence.

13. If grossly negligent, manifestly he would be bound by it; but the presumption is not a conclusive one".

—*Albrecht v. Milwaukee & S. R. Co.*, 87 W. 105, 109.

14. The recording of a fraudulent release of a mortgage, is held not to protect innocent purchasers. See CLAIMS.

—*Franklin v. Killilea*, 126 W. 88, 98.

15. "An agreement to pay a sum of money ascertainable after the happening of an event which the contract contemplates will happen is" "enforceable after such happening".

—*Rust v. Fitzhugh*, 132 W., 549, 557.

16. As to statement of not understanding "the nature of the document which he signed", not overcoming the contrary presumption. See COMPROMISE.

—*Rayborn v. Galena I. W. Co.*, 159 W. 164, 169.

ALLOWANCE.

See WIDOW.

ALTERATION.

See also LANDLORD AND TENANT.

"After due" stricken out, 11.

Assent after alteration, 6.

Burden of explaining, 1; 27.

Consent of one party, 4.

Instrument not under seal, 5.

Different ink striking out, 11.

Foreclosure on note, 32.

Immaterial alteration, 17.

Adding name of witness, 22.

Changing figures held not, 18.

Legal effect not changed, 21.

Insurance beneficiary, 24.

Interlineation, 25.

Legal effect not changed, 21.

Made by party or privy, 19.

Must be material, 20.

Note. Without maker's consent, 1.

Original consideration, recovery, 3, 16.

Payable to order, to bearer, 12.

Presumption of time, 26.

Absence of indication, 27.

Innocence presumed, 28.

Question when raised, 14.

Signed in blank, 15.

Spoilation by stranger, 13.

True rule adopted, 7.

Burden on party offering, 8.

Explained in instrument, 9.

Suspicion on face, 10.

Void: extent of, 29.

Foreclosure on note, 32.

Holder in due course, 30.

Legal effect changed, 31.

Will after execution, 2.

Attempted erasure, 23.

Insurance beneficiary, 24.

Without fraud, 3, 16.

1. Of note without maker's consent vitiates it, and the burden of explaining is upon the holder. —*Law v. Merrill*, 1 Pin. 340.

2. Of a will after execution, without explanation, invalidates the will if alteration is material. See WILLS. —*In re Wilson*, 8 W. 171, 179.

3. An alteration of a note without fraud does not prevent recovery on the original consideration. See PROMISSORY NOTES.

—*Matteson v. Ellsworth*, 33 W. 488, 493.

4. "The alteration of a written instrument in a material point, with the knowledge or consent of the holder and party claiming under it, but without the consent of the party sought to be charged, extinguishes the liability of the latter. Such an alteration makes the contract void, and so long as it remains in that condition no recovery whatever can be had upon it". (But as to exception under Negotiable Ins. Act, L. 1899, see *Heck v. Shenners*, 126 W. post).

5 "The rule is well settled, that an alteration of an instrument not under seal, by one party, with the assent of the other, will not render void the instrument."

6. "If this be so, then his assent, given after the alteration was made and where knowledge of it was brought to him, ought to have the same effect and be in all respects equivalent to such assent previously given or to an original authority granted"; "and upon this question we find no disagreement among the authorities".

—*Kilkelly v. Martin*, 34 W. 525, 530.

7. The court saying that they were "at liberty to adopt that rule which appears to us most in accordance with sound principle"; they "therefore adopt substantially the following remarks of Prof. Greenleaf as laying down the true rule;

8. 'If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance.'

9. 'If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for and the instrument is relieved from that suspicion.'

10. 'But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact, to be ultimately found by the jury upon proofs to be adduced by the party offering the instrument in evidence'. 1 Greenl. Ev. Sec. 564".

11. In this case the words 'after due' being stricken out, "with a different ink," it was held the "plaintiffs were bound to account for the change in the note, and should have given some evidence from which the jury might have found that the words 'after due' were stricken out prior to or contemporaneously with the execution of the note."

—*Page v. Danaher*, 43 W. 221, 225.

12. "A note payable to bearer is essentially a different contract from a note payable to order"; and an alteration changing it from payable 'to order', to payable 'to bearer', is material.

13. Where the alteration is made by a trespasser "it remained as written, as much as if it had been merely obscured by an accidental blot of ink. It was spoliation by a stranger, not alteration to charge the holder".
—*Union Nat. Bank v. Roberts*, 45 W. 373, 377.

14. The question of alteration of a note must be raised, and the alteration explained when the note "is offered and before it is received in evidence." See PROMISSORY NOTE.

—*Austin v. Austin*, 45 W. 523, 530.

15. The holder of a note signed in blank, may fill and alter the same before negotiation, "without vitiating the note". See OMISSIONS.

—*Snyder v. Van Doren*, 46 W. 602, 607.

16. An alteration of a note by the holder, without fraudulent intent, as decided in *Matteson v. Ellsworth*, 33 W. supra, does "not prevent a recovery on the original consideration", the alleged alteration here being the addition of the words 'payable annually' and the subsequent erasure thereof.

—*Gorden v. Robertson*, 48 W. 493, 495.

17. "We must hold that, assuming the words 'This note to be extended if desired by makers' were written upon the back of the note at the time of its execution and a part of it, yet they are too indefinite to constitute any material qualification of the agreement contained in the body of the note, and hence the subsequent addition of the words, 'on payment of the interest as expressed until January 1, 1879,' was not a material alteration of the note".

—*Krouskop v. Shontz*, 51 W. 204, 207.

18. Changing \$45 on the margin of a note in blank to \$450, is held not an alteration to vitiate the note. See OMISSIONS.

—*Johnston H. Co. v. McLean*, 57 W. 258, 263.

19. "The reasonable rule has now become firmly established that an alteration of a contract which will render it void must be made by a party thereto or with his knowledge or consent;

20. And, further the alteration must be material; that is, the alteration must in some way change the legal effect thereof as between the parties thereto.

21. The insertion or addition of words in or to a contract, or the erasing of words therefrom, which do not change the legal effect thereof in any respect, does not render the contract void, and is an immaterial alteration. (Many cases).

22. The affixing of the name of F. as an attesting witness to the note in question does not change the liability of the maker thereof", and is an immaterial alteration.

—*Fuller, Extr. v. Green*, 64 W. 159, 165.

23. "Attempt to alter certain portions of the will by erasure, without obliteration." See REVOCATION. —*Will of Ladd*, 60 W., 187, 200.

24. Change attempted in beneficiary of a policy, as designated in a will, and no will made. See INSURANCE.

—*Grace v. N. W. Mut. Relief Assn.*, 87 W., 562, 564.

25. Where "the words 'or order' were interlined," it is said: "The mere interlineation in the note raises no presumption of a fraudulent alteration. The note itself furnishes no evidence casting suspicion upon it. It appears to have been all written by the same hand, with the same ink, at the same time."

26. "The mere fact that a note has a material interlineation raises no presumption that it was changed after delivery". Page v. Danaher, 43 W., supra, distinguished as altered with a different ink, raising a suspicion, to be removed.

27. "In the absence of any indication that the paper has been altered since its completion, execution, and delivery, it is free from suspicion notwithstanding there may be an interlineation in it."

28. "'In such a case it is clear that the usual presumption in favor of innocence and against wrong doing will obtain and the burden will rest upon the person asserting that a wrongful alteration has been made to establish it'. Jones Ev. 578". —*Maldaner v. Smith*, 102 W., 30, 35.

29. "If the note has been altered in a material respect since its delivery, it is receivable in evidence for no purpose except to prove such alteration, and is wholly void either in the hands of the original payee or any subsequent holder thereof, however innocent. (Citations).

30. The exception to this elementary rule of law in favor of a holder in due course, not connected with the alteration, established by the Negotiable Instrument Act (ch. 356, L. 1899, secs. 1675 to 1684-7), is inapplicable, for the rights of the parties became fixed" here, before its enactment.

31. Although the alteration "did not affect the negotiability of the note", "any alteration which changes the legal effect of the instrument upon the rights of the parties is a material alteration, whether such change be prejudicial or favorable to the maker. (Citations)."

32. On a note held void for material alterations, foreclosure judgment on the mortgage was sustained, but "personal judgment for the original consideration", "cannot be sustained, for the reason that there was no original actual consideration; the papers having been executed by" defendant "merely as accommodation".

—*Hecht v. Shenners*, 126 W. 27, 30.

AMBIGUITY.

See also CONSTRUCTION OF CONTRACTS. CONSTRUCTION OF DEEDS.
CONSTRUCTION OF WILLS. PAROL.

- | | |
|--------------------------------|------------------------------------|
| Expression; of meaning, 7. | Meaning: by conduct, 19. |
| Extraneous evidence, 2. | Either of two ways, 20, 22, 23. |
| Intention of parties, 6. | Patent: void devise, 5. |
| Limited to circumstances, 10. | Subject matter thereof, 17. |
| Not to conversations, 11. | Surrounding circumstances, 10, 18. |
| Sense of parties, 9. | Unambiguous, 1, 8, 21. |
| When in will, 3, 12, 13, 14. | Clause in two ways, 22. |
| Identify legacy or devise, 12. | Meaning is clear, 23. |
| Names, cemeteries, 3. | Will: Person or object, 3, 13. |
| Latent: two lines, 2. | Sec. 21 as sec. 22, 16. |
| Extrinsic evidence, names, 3. | Misdescription, 14. |
| Individual indebtedness, 4. | Without adding, 15. |

1. "Where there is no ambiguity, no exposition shall be made contrary to the express words of the instrument."

—*Hopkins Admr. v. Holt*, 9 W. 228, 230.

2. "Two lines corresponding with the description in the will", is held to be a "latent ambiguity", explainable by extraneous facts. See CONSTRUCTION OF WILLS.

—*Morgan v. Burrows*, 45 W. 211, 217.

3. "Extrinsic evidence was admissible to show which of the two cemetery associations was intended," to remove "the latent ambiguity which otherwise would have existed," in the will. See also CHARITABLE TRUSTS.

—*Webster v. Morris*, 66 W. 366, 379.

4. Parol evidence is held properly admissible to show what was intended by the words "individual indebtedness" in a will, as a latent ambiguity. See CONSTRUCTION OF WILLS.

—*Scott v. Neeves*, 77 W., 305, 310.

5. A patent ambiguity, causing a void devise, and intestacy as to such portion of the will. See CONSTRUCTION OF WILLS.

—*Willey v. Clark*, 105 W., 22.

6. Parol evidence is admissible "to enable the court to say what the parties to a contract intended to express by the language adopted in making it," and "to show the real nature of the agreement," where there is an ambiguity or its language is obscure. (Cases).

—*Boden v. Maher*, 105 W., 539, 543.

7. "Ambiguity of expression is one thing and ambiguity of meaning is another." "Obscurity, which often springs from the consequences of a literal application of the plain, ordinary meaning of words in a con-

tract to the subject matter of it, calls for the light which the settled rules of law shed upon the uncertainty of intention of the contracting parties, the same as when obscurity exists in the language of the contract itself. *State ex rel Heiden v. Ryan*, 99 W., 123."

—*Vilas v. Bundy*, 106 W., 168, 177.

8. "Where there is no ambiguity in the contract, either in its literal sense or when it is applied to the subject thereof, it must speak for itself entirely unaided by extrinsic matters.

9. Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court in the light thereof to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law. (Many cases)".

10. "The rule of construction", "is limited to proof of the situation of the parties and the circumstances characterizing the making of the contract.

11. It does not extend to mere conversations between them leading up to the completion of the agreement. That is elementary." *Steele v. Schricker*, 55 W., 134. —*Johnson v. Pugh*, 110 W., 167, 170.

12. "The admissibility of parol evidence to identify the subject-matter of a legacy or devise' is undoubted. 2 Underhill, Wills, § 911. Thus,

13. It has been held in the supreme court of the United States: 'A latent ambiguity in a will which may be removed by extrinsic evidence may arise (1) either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description;

14. Or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, the person is not the one intended, or the thing does not belong to the testator;

15. When a careful study of the testator's language, applied to the circumstances by which he was surrounded, discloses an inadvertency or mistake in a description of persons or things in a will, which can be corrected without adding to the testator's language, and thus make a different will from that left by him, the correction should be made'. *Patch v. White*, 117 U. S. 210". —*Flood v. Kerwin*, 113 W., 673, 680.

16. Extrinsic evidence to construe sec. 21 (as sec. 22,) in a will, following *Scott v. Neeves*, 77 W., supra. See MISTAKE.

—*Hanley v. Kraftczyk*, 119 W., 352, 358.

17. "Ambiguity requiring judicial construction may as well arise from applying the contract to the subject-matter thereof as from the literal sense of the word. (Cases).

18. In either case, in aid of determining the intention of the parties,

which of course must govern if within the reasonable scope of their words, the agreement may be considered from the precise standpoint, as regards surrounding circumstances, of the parties at the time of entering into the same. (*Johnson v. Pugh*, 110 W., supra),

19. And the meaning which they subsequently, by their conduct, ascribed thereto."

20. "Where the words of a contract may be reasonably taken in either of two ways, one that will render it void and one that will not, the latter is to be preferred. *Hunt v. Stinson*, 101 W., 556". See also SERVICES. —*Loper v. Est. of Sheldon*, 120 W., 26, 30.

21. "In case of a contract being unambiguous no attempt should be made to determine its meaning by rules of construction".

22. "A contract is not, necessarily, obscure because some particular word or clause, by itself, is susceptible of being read in two or more ways.

23. Notwithstanding that, if looking at the writing in all its parts, the meaning is clear, there is no case for a choice between conflicting reasonable meanings". See also MARRIAGE CONTRACTS.

—*Oesau v. Est. of Oesau*, 157 W. 255, 262.

AMENDMENT.

See also MISTAKE. PLEADINGS.

After verdict, 18.

Appeal: Of account, 1.

Agreement added, 8.

Claim, complaint, 5.

Claim for services, 4.

Failure to state facts, 6.

Indefiniteness, 7.

Jurisdiction not involved, 3.

New items, wrong, 15.

Petition to vacate will, 2.

Within court's discretion, 9.

Contract, to money had, 20.

Contract, to quantum meruit, 21.

Commenced at filing, 23.

Barring of action, 24.

Separate cause of action, 22.

Discretion, broad, 10.

Accrue pending suit, 13.

Furtherance of justice, 14.

Nor contract to tort, 12.

Not equity to law, 11.

Increasing the amount, 17.

Not presented below, 16.

Quantum meruit, to contract, 19.

1. On an appeal on an administrator's account, amendment as to detail and "particulars of the service etc", is held within the circuit court's discretion, but not "to allow an entirely new claim to be" there first presented. See ACCOUNTS OF EXTRS. AND ADMRS.

—*Sloan v. Duffy*, 117 W., 480, 483.

2. Amendment, on appeal in circuit court, of petition to vacate probate of will order, for constructive fraud, allowing also to be "set up the claim of petitioner as being an afterborn child, and asking that the (final) order assigning the real estate" also "be vacated and set

aside", there being no appeal from such last order,—was held properly allowed.

3. "The original petition gave the county court jurisdiction of these matters; hence it was proper to allow the amendment, or the court could have granted the relief without the amendment. *Brook v. Chapell*, 34 W. 405 (See JURISDICTION)." See also FRAUDULENT ORDERS.

—*Parsons v. Balson*, 129 W. 311, 319.

4. Where a claim for services "did not contain any statement of the agreement out of which it originated, yet" "indicated" "that it was based on an agreement of some sort", and "was not barred by the statute",

5. "In view of this and the liberal rule in respect to such matters in county courts and the treatment of the claim filed as a complaint on appeal to the circuit court,

6. We are constrained to hold that the failure to state therein facts showing expressly a cause of action which accrued within six years prior to the death of M.,

7. Was a matter of indefiniteness rather than a fatal defect in the cause of action;" and

8. Amendment "by adding to the writing a statement that the work was done under an agreement that it should be paid for upon the death of M.", was held properly allowed.

9. It being "within the court's discretion to allow the amendment, and, it having been allowed, the fact that it was not formally reduced to writing and filed, inasmuch as the cause proceeded to the end on the theory that it had been made, is immaterial.

10. Trial courts have a very broad discretion in such matters", with "the limits, generally speaking",—

11. "That the form of the action must not be changed from one in equity to one at law,

12. Nor from one on contract to one sounding in tort,

13. Nor contain an independent cause of action accruing pending the suit,

14. And the amendment must be in furtherance of justice and allowed in such manner as not, in a legal sense, to prejudice the rights of the adverse party. *Gates v. Hall*, 117 W. 170".

—*Longwell v. Mierow*, 130 W. 208, 210.

15. "The circuit court allowed an amendment to the original claim (for board and lodging) as filed in the county court which added two entirely new items", being for "washing, mending, and cleaning, etc.". "This was clearly erroneous".

16. "Matters not presented in the county court cannot be brought into the controversy upon appeal, because the theory of the statute is that only claims which have been passed upon by the probate court are to be considered upon the appeal. *Sloan v. Duffy*, 117 W. supra."

17. "Where the original claim is for the value of definite property or services, an amendment increasing the amount of such value is permissible, because" not considered "a new or independent claim, but as merely making change in the scope of the claim upon which the county court passed. *Dayton v. Est. of Dakin*, 103 Mich. 65. See also *Longwell v. Mierow*, 130 W. supra".

18. Amendment after verdict, allowed "to conform with the verdict and evidence" increasing board and lodging "to \$7 per week instead of \$4".
—*Taylor v. Thieman*, 132 W. 38, 41.

19. "It has been held that a complaint for services on quantum meruit could be changed by amendment on the trial to a cause of action on express contract. *Pellage v. Pellage*, 32 W., 136.

20. So it has been held that an action on express contract could be changed by amendment to an action for money had and received. *N. W. U. P. Co. v. Shaw*, 37 W., 655; (other cases)".

21. Where on the trial, "by leave of the court", an amended complaint was filed changing the action from one "upon express contract to one on quantum meruit, and annexed a written agreement thereto as a part thereof" without claiming performance of such agreement, it is held:

22. "That the cause of action on quantum meruit was separate and independent from the cause of action on express contract,

23. And that no action was commenced on quantum meruit until the filing of the amended complaint, at which time that cause of action was barred by the statute of limitation.

24. It follows" "that the complaint was improperly amended," though "the amendment in question would undoubtedly have been permissible had it been made before the statutes of limitation had run upon the new cause of action." See also LIMITATION OF ACTIONS.

—*Meinshausen v. A. Gettelman B. Co.*, 133 W., 95, 100.

ANCILLARY PROCEEDINGS.

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Creditor barred, 10.

Primary administration, 4.

Probate elsewhere, 1, 2.

Real estate, *lex loci*, 7.

Subordinate to principal, 5.

Surplus to ancillary, 3.

Sent to principal, 6.

1. "The proper jurisdiction for the probate of" the will of a testatrix, "in chief, was that of her domicil at death. Probate of her will elsewhere would be ancillary". —*Smith v. Peckham*, 39 W. 414, 419.

2. "The principal administration of the estate of an intestate is at the place of his domicil at death. Administration in another jurisdiction is ancillary.

3. And where there is a surplus for distribution in an ancillary administration, the cases seem all to agree that, though the distribution must follow the *lex domicilii*, yet it is discretionary with the court granting the ancillary letters to transmit the surplus to the principal administrator, or to distribute it for itself". See FOREIGN JUDGMENTS.

—*Price v. Mace, Admr.*, 47 W. 23, 27.

4. "The administration in the state of the domicile is deemed the principal or primary administration,—the one which can make the final decree for the settlement and distribution of the estate.

5. If administration is granted in another state, it is treated as in its nature ancillary merely, and is generally held subordinate to the principal administration. See *Story's Confl. Laws*, Sec. 518; *Price v. Mace*, 47 W. supra; *Parsons v. Lyman*, 20 N. Y. 103.

6. So, where assets remain in the hands of the ancillary administrator after the satisfaction of all debts in his jurisdiction, they are usually ordered to be sent to the principal administrator for distribution.

7. But real estate is governed by the *lex loci*, and questions in respect to it properly belong to the jurisdiction where it is situated".

—*Van Steenuryck, Extr., v. Washburn*, 59 W. 483, 510-11.

8. The non-claim statute, sec. 3844, applies to ancillary administration here as to claimants. See CLAIMS.

9. "The ancillary administration is an entirely independent administration. *Price v. Mace*, 47 W., supra. "When letters have been issued, the course of administration is the same" in the case of non-resident decedents as residents. —*Winter v. Winter*, 101 W., 494, 498.

10. "A creditor who fails to present his claim in an ancillary administration in this state within the time limited cannot maintain an action here against an heir of the decedent after the time for presenting claims has expired. (*Cases*)".

11. As to conclusiveness of ancillary proceedings as to claims. See CLAIMS.

—*Davis v. Davis*, 137 W. 640, 647.

ANTE-NUPTIAL CONTRACT.

See MARRIAGE CONTRACTS.

APPEAL.

See also AGGRIEVED PERSONS. BONDS. STAY OF PROCEEDINGS.

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1. Appellant must "show or offer to show that he had an interest in the estate, the subject of controversy, or that any wrong had been done, for which he could claim redress in a court of justice."

—*Strong v. Winslow*, 3 Pin. 27, 29.

2. A "writ of error will lie to reverse" a void judgment.

—*Abrams v. Jones*, 4 W. 806, 808.

3. Appeal to circuit court has "the effect to suspend the order" of the county court, "until the determination of the appeal."

—*Gaston v. Babcock*, 6 W. 503, 508.

4. Circuit court should affirm, reverse, or modify on appeal from county court, and not dismiss where the appeal is perfected.

—*In re Newland*, 12 W. 490.

5. The purchaser of real estate from an heir before final settlement, has not such an interest in the settlement as entitled him to appeal therefrom.

6. The court "cannot look beyond the orders of the probate court appealed from, and examine into" the regularity of the appointment of the administrator, etc.

—*Gunn v. Green*, 14 W. 316, 318.

7. Suspends all proceedings until "cause remitted to the county court," and administration with will annexed could not be granted, pending appeal.

—*In re Fisher*, 15 W. 511, 521.

8. After guardian's qualification and appointment, he is the adverse party and the bond "should have been executed to the guardian" and not to the petitioner. See BONDS.

—*State ex rel. Tallmadge v. Flint*, 19 W. 621, 623.

9. Bond received and properly filed need not necessarily have "approval thereon endorsed in writing." See BONDS.

—*Bowles v. Page*, 20 W. 309.

10. In appeal on claim, the cause may be properly entitled by the name of the claimant as plaintiff and "The Estate of M. deceased," defendant, though "generally it would be more regular to name the executor or administrator as defendant or plaintiff in such cases."

—*McNight v. Estate of McNight*, 20 W. 446, 447.

11. Upon an application to the circuit court to allow an appeal from an order of the county judge, after the time for appealing has expired, the circuit court properly declined to receive counter affidavits "in regard to the merits of the claim", and it was held doubtful whether the opposite party "had any right to notice of the application, and whether it was not designed to be entirely *ex parte*".

12. It is not necessary for the claim to be "objected to" in the county court, to allow an appeal.

13. "A neglect to appeal until the right was barred, would be declining in the most effectual manner".

—*Groner v. Hield*, 22 W. 200, 202.

14. In "bringing two appeals for the same purpose, * the practice has been adopted, to dismiss one of the appeals".

15. "It is doubtful whether this order (of the circuit court), allowing an appeal to be taken from a decision of a county judge, was appealable at all".

—*Young v. Groner*, 22 W. 205, 206.

16. "It is the more regular practice, where the appellant fails to prosecute the appeal with reasonable diligence, for the circuit court", on motion "to affirm the judgment or order appealed from".

17. While it was held irregular to dismiss the appeal, the dismissal was sustained because "the irregularity can work her (appellant) no prejudice".

—*Betts v. Sholton*, 24 W. 306, 308.

18. The objection "that the appellant had no interest in the subject-matter of the appeal" may properly be taken by motion in the circuit court supported by "affidavits, papers and documents". "In such case, if any serious or doubtful question of fact arises, an issue may be made up and the verdict of a jury taken".

—*Amory v. Amory*, 26 W. 152, 158.

19. Where the power to appoint commissioners for condemnation purposes, is given by statute, disconnected from the regular county court proceedings, "and is not conferred upon the county judge as a part of his ordinary judicial functions", the general county court appeal statute does not apply, and there is no appeal in such proceedings in the absence of special authority in connection therewith.

20. "An appeal is purely a statutory right, and unless given by the statute, the right does not exist."

—*Western U. Ry. Co. v. Dickson*, 30 W. 389, 391.

21. The county court having entered judgment against several heirs claiming an undivided fund, and only one appealing therefrom, the judgment must stand as to the remainder where reversed as to the one on appeal.

—*Tryon v. Farnsworth*, 30 W. 577, 582.

22. An appeal by the general guardian instead of guardian ad litem, was held proper. See INFANTS.

—*Foster v. Hammond*, 37 W. 185, 187.

23. "Probably, in any case, the special administrator should be considered as the adverse party, to whom, in circumstances like these, the appeal bond should run", he being appointed before the probate of a will. "He is, for the time being, the only representative of the estate".

24. "Here, however, the special administrator is also the proponent of the will and the executor named in it. There appears no room for doubt that he is the adverse party to whom the appeal bond should run".

—*Appeal of John Mullins*, 40 W. 154, 155.

25. Co-defendants in a construction suit are not "adverse parties", necessarily entitled to notice of appeal from other defendants. See INTERPLEADER.

—*Wheeler v. Hartshorn*, 40 W. 83, 97.

26. On an appeal by one defendant, co-defendants are "entitled, upon proper application here (in the appellate court), to all the rights of practice of respondents", being, though not parties, "privies to the appeal, because parties to the record below", the plaintiff below being prima facie at least, "the adverse party of the statute".

—*Hunter v. Bosworth*, 43 W. 583, 590.

27. Where the circuit court construed a will, certain parties appealed and obtained a different construction as to them by the supreme court; while other parties accepted their shares under the circuit court construction without appealing, until after the reversal by the supreme court as to the first appellants, when they also appealed;

28. A motion to dismiss this appeal on the ground of settlement made, etc., was denied, not on the merits and without prejudice to the right to further litigate said matter, and the court says: "We reverse the judgment of the circuit court as to these appellants on the same grounds that we reversed it as to the former appellants on their appeal. (40 W. 83, supra)".

—*Wheeler v. Catlin*, 44 W. 464, 466.

29. "The penalty of the (appeal) bond was not fixed, nor was the bond formally approved by the county judge, until after the expiration of the sixty days of the statute; but we are of the opinion that those circumstances do not invalidate the appeal".

30. When the creditors "are adverse parties to the appeal", and the order "required personal service of the notice of appeal on the adverse parties" (sec. 4033), and none were so served, it is held that "service

on their attorney alone is not a compliance with that order, and would not give the court jurisdiction of them", i. e. of the person, though "the appeal was perfected so as to give the circuit court jurisdiction of the subject matter—that is, of the order appealed from".

31. But the adverse parties having "appeared generally in the circuit court, and submitted a motion that the order of the county court", be affirmed, "that was an appearance which operated as a waiver of defects in the service of the notice of appeal."

—*Perkins v. Shadbolt*, 44 W. 574, 578.

32. "The appeal should not have been dismissed" for defects of service, "for the reason that the adverse parties appeared generally in the circuit court by their attorneys, by obtaining and arguing the motion to show cause why the appeal should not be dismissed, and thereby waived all irregularities in the service of the notice of appeal", the motion to dismiss not being confined to this point. See also APPEARANCE.

33. That an order directing "the notice to be served upon the adverse party, without naming the party", "would be good when the proof shows that it was in fact served upon the adverse party, was decided in *Nelson v. Clongland*, 15 W. 392;

34. And we have no doubt but an order directing it to be served upon the person or persons who are in fact the adverse parties, would be equally good, provided it was properly served upon such persons so named in the order".

35. "A motion to dismiss the appeal on the ground that there was no evidence filed in the circuit court of the service of the notice of the appeal, by implication admits that there was a service in fact, and therefore admits the jurisdiction of the court over the person of appellant".

—*Kasson v. Est. of Brocker*, 47 W. 79, 83.

36. In a case "of bad faith and laches", the circuit court's order allowing an appeal after sixty days, was reversed. See CIRCUIT COURT.

—*Downer, Adm. v. Howard*, 47 W. 476, 478.

37. Where on a claim for money loaned and for services preformed, the money claim was allowed and the service claim disallowed in county court, and there was an appeal only by the administrator from the money allowance, but no appeal by the claimant from the service disallowance, held, that the only question which the circuit court could adjudicate was the amount due claimant as for money loaned.

—*Moerchen v. Stoll*, 48 W. 307.

38. Upon appeal from the verdict of a jury in equity, the judgment will not be reversed, "unless it appeared that such finding was clearly against the preponderance of the evidence". See JURY.

—*Stanley v. Risse, Exrx.* 49 W. 219, 220.

39. "We * hold that an appeal will not lie in favor of one who had no interest in the controversy (revealed by the testimony, though a party), and against whom no judgment has been entered, however irregular may be the judgment. Appeals are to be taken by a 'party aggrieved.' (Many cases inc. *Idley v. Bowen*, 11 Wend. 227; *Mills v. Hoag*, 7 Paige, 18)". —*McGregor v. Pearson*, 51 W. 122, 123.

40. "Upon an appeal from a judgment, this court may review any intermediate order or determination of the court below appearing upon the record, which involves the merits and necessarily affects the judgment (Sec. 3070);

41. But on an appeal from an order, no authority is conferred to review a prior order in the cause. *Flanagan v. Railway Co.*, 45 W. 98, and cases cited". —*Breed v. Ketchum*, 51 W. 164, 166.

42. Where plaintiff obtained judgment in the circuit court, and died without an administrator having been appointed within the two years limited for appeal, it is held that neither under the statute (secs. 3039 and 4234), or otherwise, can the judgment defendants appeal after such two years, an administrator having thereafter been appointed.

43. "It would seem that under section 3086, an administrator might have been appointed on the application of the defendants, and then, upon their application, the administrator might have been compelled to revive the judgment under sec. 2811." See also LIMITATION OF ACTIONS. —*Sambs, Admx. v. Stein*, 53 W. 569, 574.

44. Though the matter is tried de novo in the circuit court on appeal, if "the county court failed to obtain jurisdiction of the subject matter of the proceedings, then the circuit court could not obtain jurisdiction of them by the appeal", and could only dismiss the proceedings. (Cases). —*Appeal of Royston*, 53 W. 612, 617.

45. The rule of law is "the payment of a judgment is no waiver of the right to appeal therefrom, or to bring a writ of error to review it".

46. The reason given "for this rule is doubtless the true one, namely, that because payment of the judgment may be enforced by execution, a party is not deemed to waive his right to an appeal or writ of error by paying it".

47. A mutual agreement "to settle all litigation in the matter and waive all right of appeal", "if fairly made, would probably be enforced. See *Dyett v. Pendleton*, 8 Cow. 325", and other cases.

48. "But such an agreement ought to be clearly established, and not made out by way of inference". —*Sloane v. Anderson*, 57 W. 123, 127.

49. "This court clearly recognizes the right of all persons against whom the judgment is entered to join in an appeal to this court, even though their interests may be different and the judgment rendered may affect them differently". —*Kachler v. Halpin*, 59 W. 40, 43.

50. A guardian ad litem should be appointed to appeal, when the general guardian is adversely interested. See GUARDIAN AND WARD.

—*Marx v. Rowlands*, 59 W. 110, 114.

51. An appeal by either party to the circuit from the award on the claim, "necessitated a trial de novo in the circuit court of the whole controversy", and the party not appealing is not limited to "recover in the circuit court any greater sum," than awarded to him in the county court.

—*Yorke v. Orton, Admr.* 65 W. 6, 8.

52. Payment of a judgment is no waiver of the right to appeal, and the money may be recovered on reversal. See PAYMENTS.

—*Chapman v. Sutton*, 68 W. 657-661.

53. Though his ward has arrived at age, and the amount due from the guardian exceeded his bond, yet the statute, section 4032, "in express words relieved the guardian from giving an undertaking in the circuit court on appeal."

—*Stinson v. Leary*, 69 W. 269, 270.

54. Following *Stinson v. Leary*, 69 W. supra, there was the same holding, that section 4032 "is general, and embraces all appeals taken by a guardian".

—*Tompkins v. Page*, 70 W. 249, 251.

55. As to appeal being dismissed when the part of the judgment favorable was accepted and receipted for. See PAYMENTS.

—*Webster-Glover L. & M. Co. v. St. Croix Co.*, 71 W. 317, 319.

56. "The notice of appeal is that the defendants will appeal from the judgment, etc. It is very doubtful whether this is an effectual notice of appeal," but the point not being made, the question is not determined.

—*Hinton v. Coleman*, 76 W., 221, 229.

57. Refusal to reverse a default judgment after a general appearance for appeal purposes. (Afterward overruled). See APPEARANCE.

—*Dikeman v. Struck*, 76 W., 332, 335.

58. "Upon the affirmance or reversal of a judgment by this court upon an appeal in an equity case, the circuit court, upon a remittitur from this court, must enter judgment according to the opinion of this court as to the rights of the respective parties as found by this court, unless this court in its remittitur directs or leaves it to the discretion of the circuit court to grant a new trial as to some or all of the issues in the case."

59. "On such appeal, this court not only corrects any errors which may have been committed by the trial court, but it retries the case upon the merits, and so indicates in its decision the judgment which should

be entered therein by the court below", or gives necessary directions for further proceedings, if any, by the court below.

—*Whitney v. Traynor*, 76 W., 628, 630.

60. "Sec. 4035, gives the circuit court ample power to allow an appeal" from the county court's decision, within a year, where it appears justice requires; and, here the circuit court's refusal was set aside, it appearing that the petitioner lived at a great distance, could not readily obtain legal advice, "was ignorant of her rights, and of what was being done in the settlement of her father's estate, until the sixty days for taking an appeal had expired."

61. "The matter stated in the petition presents a case for allowing an appeal from the order of the county court admitting the copy of the will to probate, and there are strong grounds for believing that justice will be promoted by the revision of that order." "It was an abuse of discretion" not to allow such appeal.

62. (In *Deering Har. Co. v. Johnson*, 108 W., post, it is indicated and approved, that the record of documents and affidavits presented in the present case showed the information justifying appeal, and it is said that this is "the only case in which this court has reversed the decision of a circuit court denying appeal").

—*Jamison v. Snyder*, 79 W. 286, 288.

63. "No rule of practice is more firmly established in this court than the rule that, on an appeal from a judgment, orders made in the cause after judgment cannot be reviewed. *Leary v. Leary*, 68 W. 662."

—*Second Nat. Bank v. Larson*, 80 W. 469, 474.

64. Where a minor ward F. and guardian, "were both ignorant of the entry of" an order of assignment, awarding curtesy against the infant's interests, there being doubt, "and failed to take an appeal" during the statutory limit, it is held that on petition the circuit court properly allowed such appeal. "The bare intimation of these (doubtful) questions, and the infancy of the petitioner, are sufficient grounds for such leave." (See also under LEGITIMACY, *Shuman*, by Gdn. v. *Shuman*, 83 W., 250).

—*Shuman v. Hurd*, 79 W., 654, 656.

65. Where "the 'order for judgment' contains all the effective words of a judgment", an appeal therefrom refusing probate of a will, was considered and not dismissed on motion, the court saying, "we should treat it as an effective judgment itself if it stood alone."

—*Spehn v. Heubschen*, 83 W., 313, 315.

66. It is held "that by accepting the money on the portion of the judgment in his favor the plaintiff thereby waived his right to appeal from the whole judgment", and "especially should such rule prevail where, as here, the moneys so applied are exempt from execution, and

the principal defendant has waived such exemption in order to prevent further litigation, and such waiver has been incorporated into the judgment appeal from". (See *Fiedler v. Howard*, 99 W., 388, 396, post, where the cases are reviewed, and the distinction as to a "condition" in a judgment emphasized). —*Laird v. Giffin*, 84 W., 286, 288.

67. As to an order of the circuit court allowing an appeal from the county court, it is said that it "must have found the necessary facts,—that such omission was not her fault, and that justice required a revision of her case", the record not showing the ground.

—*Marsh v. Briesen, Admr.*, 84 W., 618, 619.

68. "A mere appeal does not affect the judgment as a bar to another action". See RES ADJUDICATA. —*Smith v. Schreiner*, 86 W. 19, 24.

69. An appeal by an administratrix of the estate of M., from a judgment of the county court in the estate of S., dismissing her claim as such administratrix, was dismissed because of lack of jurisdiction, for failure to give an undertaking.

70. "The statute (sec. 4032) was not intended to, and does not, confer on an administrator a general right to appeal without giving the security prescribed by it, but merely to so appeal from an order, judgment, or determination made in the matter of the estate in which he has been appointed such administrator".

—*In re Steiner's Estate*, 91 W. 399, 406.

71. A guardian ad litem was allowed to have his appeal perfected by filing an undertaking in the lower court, and certified up. See GUARDIAN AD LITEM.

—*Tyson v. Tyson*, 94 W., 225, 233.

72. "A substantial compliance", in an undertaking on appeal, is sufficient. See BONDS.

—*C. & J. Michel B. Co. v. Est. of Wightman*, 97 W. 657, 660.

73. Prior decisions are reviewed, and the distinction is emphasized, "that, where a party is entitled to a certain sum of money absolutely under a judgment, he is not, by accepting that money, precluded from prosecuting an appeal which does not involve a reversal of that part of the judgment or decree under which he takes the money".

74. "If the benefit received is dependent upon, or was granted as a condition of, the order or judgment attacked, clearly the party ought not to be permitted to carry on his warfare."

75. "In *Cogswell v. Colley*, 22 W. 399, Mr. Justice Paine rightfully holds that, where a new trial has been granted on condition that defendant shall pay the costs of the former trial, plaintiff cannot accept the costs and then maintain an appeal from the order".

—*Fiedler v. Howard*, 99 W. 388, 396.

76. An uncle of minors, setting forth misconduct by the guardian, their mother, "is not a party in interest and cannot appeal." Appeals of minors can only be taken as provided by statute sec. 4031, by the general guardian "or by a guardian ad litem appointed for that purpose."
—*In re Gdnsp. of McLaughlin*, 101 W. 672, 673.

77. Where the city officers refused to appeal from an adverse judgment of the county court as to the application of funds from principal or income of a trust estate, in which the city was the remainderman,—it is held that a taxpayer for himself and others may so appeal, and "enforce the cause of action of a public corporation of which he is a member when its officers neglect or refuse to perform their duty. (Cases)".
—*Mulberger v. Beurhaus*, 102 W. 1, 7.

78. Where attorneys fail to properly perfect an appeal from an order disallowing a will, within sixty days, and the proponents through other attorneys, and with an affidavit of merits, apply to the circuit court under sec. 4035, it is said that "the failure to take the appeal within the time prescribed by statute was sufficiently excused", (cases), and,

79. That "it sufficiently appeared from the showing made that justice required a revision of the case";

80. That following *Groner v. Hield*, 22 W. supra, on "a prima facie case, the court should grant it without considering counter affidavits as to the justice of the claim", but that, "of course, the applicant must not be guilty of laches. *Chase v. Bates*, 81 Me. 182".

—*Oakley v. Davidson*, 103 W. 98, 101.

81. "A notice of appeal duly directed to the clerk of the trial court was delivered to him for the purpose of complying with the appeal statute (sec. 3049), and was filed and returned by him to this court as a part of the record", "shows prima facie the jurisdictional requisite as to such service", "and the clerk's filing thereon sufficiently proves the service".
—*Will of Madden*, 104 W. 61, 63.

82. An appeal by an executor named, before appointment, without filing an undertaking, is ineffective. See *EXTRS. & ADMRS.*

—*Will of Somervail*, 104 W. 72, 75.

83. Where the respondent by voluntary act relinquished his right under the judgment, before the appeal was perfected, the appeal will be dismissed. See also *JUDICIAL DECISIONS*.

—*Hogan v. C. of La Crosse*, 104 W. 106, 108.

84. "Upon appeal from a judgment, intermediate orders involving the merits and necessarily affecting the judgment may be reviewed. Sec. 3070.

85. But we know of no provision which authorizes a review of one order upon an appeal from another. *Breed v. Ketchum*, 51 W. *supra*''.

—*Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 W., 493, 502.

86. There being a defective notice of appeal, on subsequent application to the circuit court under sec. 4035, on the affidavit of the attorney of claimant, on information and belief, met by counter-affidavits and a deposition on the merits, supplementing the evidence in the county court,—appeal was refused, and such order sustained, as not an abuse of "discretion in holding" that appellant had not satisfactorily shown that justice required a revision of the case." *Oakley v. Davidson*, 103 W., *supra*.

87. "Full justice may be done by a decision notwithstanding the commission of specific errors," by the county court allowing the claim, it appearing that such error in the record "does not necessarily establish that justice requires revision."

88. "The burden is upon the applicant to satisfy the court that, in view of all the known facts, there is at least reasonable probability that upon further hearing a result more favorable to him will be reached.

89. The court should be given opportunity to judge from the facts themselves, rather than from the applicant's conclusions or generalizations, and it is the latter's duty—since he is a supplicant for favor—to lay before the court, as fully and frankly as in his power, all the facts which he believes to justify him in making the application. (Many cases)".

90. As to the applicant's information: "If derived from documents, they could and should have been laid before the court; if from statements of other persons, affidavits from such others of the truth of their statements should have been presented, or applicant's inability to obtain them should have been explained." *Jamison v. Snyder*, 79 W., *supra*.

—*Deering H. Co. v. Johnson*, 108 W., 275, 278-81.

91. On an appeal by an alleged incompetent, from an order of the county court appointing a guardian, who "had not qualified" as to giving bond,—it is held that "service of notice of appeal was sufficient", where served upon the attorney for the petitioners as adverse parties, pursuant to the order of the court, under sec. 4033. See also INCOMPETENTS.

—*In re Gdnsp. of Welch*, 108 W., 387, 391.

92. "One of the two co-executors or co-trustees can appeal without the other", it is held, in effect, only when necessary for protective reasons, the co-executor and interested parties being satisfied with the judgment. See also TRUSTEES.

—*In re Luscombe's Will*, 109 W., 186, 195.

93. Where the executor "qualified" as such, and the will was afterward set aside in circuit court, he is "aggrieved" and can appeal, it being his duty "to protect and enforce his trust and to take all" neces-

sary steps to that end. In re Luscombe's Will, 109 W., supra; Hesterberg v. Clark, 166, Ill. 241. —*In re Butler's Will*, 110 W., 70, 75.

94. An order of the circuit court, reversing the county court, and establishing the widow's right to the estate "as sole beneficiary", under sec. 3795, "was to all intents and purposes a final judgment and appealable as such, though it was, in form, an order." Sec. 4037.

95. "Whether the determination of a court is an order or a judgment within the meaning of the appeal statute, cannot always be solved by mere form".

96. "A proceeding upon appeal, as regards the appellate court, is an action, or a proceeding in the nature of an action, and the decision is a final determination of the rights of the parties thereto. Sec. 2282". Sec. 2595. —*Swarthout v. Swarthout*, 111 W., 102, 106.

97. On appeal from the county court, amendment "to allow an entirely new claim" in an administrator's account, "would be an abuse of discretion." See ACCOUNTS OF EXTRS. AND ADMRS.

—*Sloan v. Duffy*, 117 W., 480, 483.

98. Where the notice, undertaking, and order allowing appeal, were duly "made within the time prescribed," and "the only objection is that the appeal papers and record were not filed in the circuit court until" several months after the twenty days required by sec. 4033, it is held,

99. That the circuit "court certainly had jurisdiction of the case by virtue of the appeal taken" (*Congregation v. Hellstern*, 105 W., 632), and as under sec. 2831, the court had discretion to allow such records "to be so transmitted to the circuit court 'after the time limited,'" a motion to dismiss because "the appeal 'was not taken in due time or according to the provisions of the statutes,'" was properly refused.

—*Hanley v. Kraftczyk*, 119 W., 352, 357.

100. In an action of replevin, the administrator only being a party, distributees are held "parties aggrieved by the (adverse) decision though they are not parties to the record, and as such are entitled to appeal.

101. The supreme test of whether a person has a right to appeal to this court is whether he has a substantial adverse interest to the adjudication sought to have reviewed, not whether he was a party as appears by the record of the trial. (Cases)".

—*Hinn v. Gersten*, 122 W., 222, 225.

102. "The dismissal of an appeal removes the case from the appellate court and places the parties in the same condition as they were before the appeal was taken. (Citations): Sec. 4037", as to appeals from county courts, "does not affect the question".

103. An order of the circuit court which "dismissed the appeal and

remanded the cause 'for further proceedings in accordance with the findings' " is reversed as to the latter direction.

—*Silverman v. Fidelity & C. Co.*, 124 W. 459, 461.

104. Citing *Kasson v. Est. of Brocker*, 47 W., and *Perkins v. Shadbolt*, 44 W. *supra*, it is held that filing an undertaking "three days after the notice of appeal was filed", does not invalidate the appeal.

105. "A literal compliance with the words of the statute (Sec. 4032) is not necessary. Substantial compliance is sufficient. (Case, *supra*).

106. The prime essential in taking an appeal is the filing of the notice of appeal within the time limited therefor. That being done, the filing of the bond afterwards will operate to perfect the appeal".

—*Charmley v. Charmley*, 125 W. 297, 301.

107. As to permitting appeal after time expired, under sec. 4035, "the liberal rules for reading out of pleadings facts essential to support them should be broadly applied" to the petition, and the phrase 'near relatives and heirs at law' 'entitled to a distributive share,' is held to import interest and aggrieved persons.

108. The court, also, may, on application, require "a more definite statement of material matters", as in pleadings.

109. "The court can determine the right of the matter upon affidavits, or upon the petition alone, or upon evidence in support of and against the petition, taken in open court, or otherwise by its direction." See also *KIN*.

—*Perry v. Scaife*, 126 W. 405, 410.

110. Though "the form of the notice of appeal is that the authorized representative of the parties in interest 'being aggrieved * hereby appeals'," "it is perfectly apparent that the principals—the ones represented by the person (consul with power of attorney) signing the notice—were in fact aggrieved, and that the notice was by their authority filed in their behalf".

111. Such notice is held sufficient. "No form for such notice is prescribed by statute".

—*Est. of Sander*, 126 W. 660, 664.

112. Where the applicant, for leave to appeal from a construction of a will as to the administrator's right to sell realty, under sec. 4035, "did not move until nearly a year after she received notice that the sale would be made, and more than three months after notice that the order was made, during which time the purchaser was in possession, making valuable improvements and changing his position on the faith of his purchase",—denial, on the ground of laches, was affirmed.

113. Such application "is addressed to the sound discretion of the court, and the determination will not be disturbed unless it clearly appears that such discretion has been abused. (Cases)".

—*In re O'Hara's Will*, 127 W. 258, 262.

114. Where the notice of appeal was filed within sixty days, an undertaking filed "a few days after the expiration of the sixty days", "should have been accepted and approved by the county court". *Charmley v. Charmley*, 125 W., supra.

115. "Failing to do so, the circuit court should", on the application made shortly thereafter, under sec. 4035, have "allowed such appeal" upon reasonable terms, and "the order of the circuit court denying such application twenty-one months after it was made was an abuse of discretion".
—*In re Box's Will*, 127 W. 264, 270.

116. On return of appeal papers "to render judgment" "in accordance with the opinion", the trial court "has no authority to reframe the pleadings as to any issue and retry them", and "the only course open to it is to render judgment in accordance with the opinion of this court".
—*Halsey v. Waukesha S. S.*, 128 W. 438, 440.

117. Motion to dismiss appeal from county court "pending for about five years", it appearing "that substantial grounds existed for the delay" in hearing, there being other litigation in progress depending thereon and also protracted settlement negotiations,—was held properly denied under sec. 4038. (Cases).

As to order on appeal setting aside probate, carrying with it also the setting aside of the order assigning the estate. See JURISDICTION.

118. As to amendment of petition after appeal to circuit court. See AMENDMENT.
—*Parsons v. Balson*, 129 W. 311, 315.

119. As to decision of county judge as magistrate not being subject to appeal, but subject only to review as to jurisdiction,—unless specifically otherwise provided. See COUNTY JUDGE.

—*State ex rel. Velie, v. Morgan*, 130 W. 293, 295.

120. Where it "appeared by the records of the county court, at the time of" appeal, that the appellant "was interested in the estate", no interest appearing in the appeal papers, or,

121. Where the notice "was not signed by" him, but "it purports to be given by him and is signed 'B., Attorneys for Appellant'", and "he gave and signed the undertaking on such appeal as principal, and the same was approved by the county court", "the circuit court had jurisdiction".

122. The fact that an heir appeared and assented to the judgment of probate in county court, does not prevent his appealing. See also TRIAL.

—*Bovee v. Johnson*, 130 W. 447, 453.

123. Following cases, supra, the order of the circuit court, refusing to allow appeal on final judgment, after time for appeal had expired, was sustained, it appearing that while the attorney of the appellant made various inquiries and was several times at the county seat within the

sixty-day limit (he being from another county), yet he failed to examine the records as to the entry of such judgment.

—*Maxey v. Ellison*, 132 W. 389, 391.

124. Where the petition to the circuit court to allow an appeal under sec. 4035, after time expired, "is in the most general terms and quite barren of any facts tending to show that justice requires a revision of the case", with "no affidavit of merits", "an order refusing appeal, is sustained, as not being "an abuse of discretion". (Cases, supra).

125. "The doctrine that where the petition makes a prima facie case the court should grant it without considering counter affidavits", "does not go to the extent of permitting" an appeal on such "prima facie case without stating the facts from which the court can see and judge whether or not justice requires a revision of the case".

—*Roemer v. Schmidt*, 134 W. 1, 5.

126. Pending a contest for probate of a will, an order of the circuit court requiring the payment out of the estate, to the guardian ad litem of minors, of funds to procure attendance of witnesses in the contest, it is held, "did not necessarily relate to the determination of the contest of the probate", and therefore, under subd. 2, sec. 3069, is "a final order entered in a special proceeding within the rule of *Kingston v. Kingston*, 124 W. 263," and is appealable.

127. Where one F. was proponent, executor, and special administrator, and the preliminary "order to show cause is directed to the proponent and respondents", and "requires them to show cause why F., special administrator" "and the proponent" "should not be ordered to pay, etc.", and the final order requires such special administrator and proponent to pay, etc.,—it is held,

128. That neither the executor nor special administrator, were parties to the proceeding, that the executor was "not a party aggrieved", but that "as the proponent was required to make payment of the money, he was certainly the party aggrieved by the order".

—*Frame v. Plumb*, 135 W. 24, 28.

129. A guardian ad litem is not "entitled to recognition as such in appeal proceedings" in a contested claim therein. See also PARTIES.

—*Est. of Koch*, 148 W. 548, 571.

130. Where an appeal by certain parties after the sixty-day period and within one year, was allowed at the trial in circuit court on another appeal on construction, all parties being present and all consenting but one,—it was held that under the circumstances "the notice was reasonable," there being "no special circumstances" indicating the contrary.

131. And where a guardian ad litem has appealed, under the impression that no bond was necessary, and he files such bond during the trial in circuit court, it being certified from the county court, and on the

proceeding of the trial and determining the issues raised thereby, it was held "that the court impliedly" "approved the procedure followed", and that "the default in the timely filing of the bond" may be so waived. *Charmley v. Charmley*, 125 W. supra.

—*Will of Stark*, 149 W. 631, 644.

132. When an executor "presents a matter to the supervising court for an advisory order, or presents a matter for adjudication proper to be so presented, and parties have due notice and opportunity to be heard,

133. Time for appealing commences to run from the time the result is announced, whether embodied in a final order or merely minuted on the court record;

134. And, unless challenged seasonably for correction in the same court or on appeal, it is conclusive. Such is the doctrine of *Schinz v. Schinz*, 90 W. 236 (See *ACCOUNTS OF EXTRS. & ADMRS.*), and we affirm it".

—*Will of Rice*, 150 W. 401, 458.

135. "The right of appeal is purely statutory, and unless given it is withheld. *Puffer v. Welch*, 141 W. 304".

—*Clancy v. Fire & P. Com.*, 150 W. 630, 633.

136. As to permission to appeal after time expired, sec. 4035 "confers a discretionary power upon the circuit court,

137. And in order to reverse its decision it must appear that the circuit court abused that discretion. (Cases)".

138. Where a compromise of a claim for damage for injury was, with the county court's approval, made by the guardian of the ward about of age, and the injury thereafter appeared more serious, application by the ward and his mother (former guardian) several months after settlement and after the ward became of age, for leave to appeal from such order of approval, was refused, and a contrary order also "would undoubtedly be affirmed".

—*Gustafson v. Whitney Bros. Co.*, 154 W. 8, 11.

139. It is not decided "whether an executor who presents and has allowed his final account can appeal from the order or judgment allowing the same entered at his request".

140. Where one only of two executors prepares, signs, and files a final account, and the other H., as residuary legatee, files formal objections thereto and contests its allowance, there being "no question about the intention", it is held that he was entitled to appeal from the allowance, as executor.

141. "If it were necessary for him to file formal objections to the account as executor, the objections filed might well be treated as having been made in such capacity as well as that of residuary legatee".

142. "Neither is there any doubt about the right of an executor to appeal from an order or judgment of the county court which in his judgment does injustice to a residuary legatee. (Cases).

143. Nor is there any doubt about the right of H. to appeal as executor without the consent or participation of his co-executor. *Luscombe's Will*, 109 W. *supra*".
—*Will of Hyde*, 157 W. 462, 464.

144. "We do not" "decide whether the word 'administrator' in sec. 4031 includes an administrator appointed under the laws of another state. This may admit of doubt."

145. A dismissal of an appeal of such foreign administrator from an order appointing H. administrator *de bonis non* "after the discharge of the executor", there being unadministered "choses in action",—is held not "prejudicial error", "even if erroneous", there being no objection "made to the fitness of H", and the court having "simply performed its duty".
—*Will of Durkee*, 164 W. 41, 43.

146. (As to forms in appeal proceedings, and practice in execution of undertaking,—see Zimmerman's Probate Practice, p. 492.)

APPEAL BOND.

See BONDS.

APPEARANCE.

After an execution sale, 10.
Amend return motion, 27.
Asking such relief, 28.
Appeal: saving objection for, 30.
Trial on merits, 29.
Attorneys: authority presumed, 3.
Prima facie evidence, 8.
Contesting on the merits, 14.
Equivalent to an answer, 15.
County court practice, 32.
Dismiss the appeal, 18.
Equivalent to proof of service, 13.
General, on process defect, 1.
Infant, after at age, 17.
Jurisdiction of person, 23.
Inconsistent step, 24, 26.
Specifically to object, 25.

Party without state, 5.
Purpose incompatible with defect, 12.
Set aside judgment, 9, 11.
For said motion only, 16.
Jurisdiction; irregularity, 20.
Minor after at age, 17.
True rule laid down, 19.
Sole purpose of appeal, 21.
Merits may be considered, 22.
Special: on process defect, 2.
Stay and open default, 7.
Vacate and dismiss with costs, 31.
Waiver of defects and process, 6.
Without process issued, 4.

1. "It is a familiar rule, that a general appearance waives any defect in process".

2. "To avoid the effect of this rule, it is the common practice, when it is desired to take advantage of such defects, to appear specially for that purpose only."
—*Lowe v. Stringham*, 14 W. 222, 224.

3. "The authority of an attorney at law who appears in a court of justice in behalf of a party to an action, is to be presumed. He is an officer of court; and if his authority is denied, the burden of showing,
—*Thomas v. Steele*, 22 W. 207, 209.

4. "An appearance may be made without the issuing or service of any process whatsoever, whether by publication or otherwise."

5. "It may be made as well by a party residing without the state as one within it".

6. "An appearance is a waiver of all previous defects in the service of process, and of the process itself, if none has been issued".

—*Keeler v. Keeler*, 24 W. 522, 526.

7. Making a motion in open court to stay proceedings and open a default to enable answering, which stay was granted, "was an appearance in the action, and a waiver on the part of the defendants of all previous defects in the service of process".

—*Ins. Co. v. Swineford*, 28 W. 257, 264.

8. An attorney's "appearance is prima facie evidence of his authority and retainer until some contrary proof is made". He has "a perfect right to decline", "to answer a question put to him on argument", as to his retainer, as the burden of proof is on the other party.

—*Andrews v. Thayer*, 30 W. 228, 233.

9. In *Grantier v. Rosecrance*, 27 W. 488, "it was held that a motion to set aside a judgment on the ground that the complaint did not state a cause of action, was a general appearance, and waived any defect in the service of summons, although the notice of motion stated that the defendant appeared 'specially' for the purpose of setting aside the judgment, and although such defective service was also assigned as a ground for the motion".

10. In *Anderson v. Coburn*, 27 W. 588, "it was decided that where a defendant, not duly served with process of summons, appeared after an execution sale under a judgment in the cause, and moved to set aside the judgment and execution, not only because of the defective service, but for lack of proof of certain facts essential to his liability, and for excess of damages, this was a general appearance, and cured the defect of jurisdiction".

11. "Moving to set aside the judgment", because "there was no proof that a notice of the pendency of the action was filed", is inconsistent with the grounds "specifying defects in the service of the summons and want of jurisdiction", and made the appearance general.

12. "If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make the objection.

13. It is a general appearance on his part, equivalent in its effect to proof of due personal service of process".

—*Alderson v. White*, 32 W. 308, 311.

14. Appearing and contesting on the merits "was a waiver of any defect" and "was an appearance in the action". See JURISDICTION.

—*Atkins v. Fraker*, 32 W. 510, 517.

15. "The respondent appeared before the probate court and contested the application. His appearance and opposition was equivalent to an answer in the case".

—*Brook v. Chappell*, 34 W. 405, 419.

16. An "appearance by stating that it was 'for the purposes of said motion only'," to make a motion 'to set aside the findings of fact, conclusions of law, and the judgment rendered', on the record, "was a general appearance in the cause, and waived all defects in the service of process."

—*Coad v. Coad*, 41 W. 23, 26.

17. Where the petitioner, as a minor, was not represented by guardian ad litem at the probate of the will, and after becoming of full age petitioned the court to set aside the probate proceedings on the grounds of fraud, defective publication, want of notice, etc., but did not set out her infancy and failure of the appointment of a guardian ad litem, or appear to set aside the proceedings for that reason, (which would have been a valid reason), it was held that the petitioner's attitude was "equivalent to an appearance to the proceeding sought to be declared void for want of notice; and operate as an assent and submission to the proceedings of the court in the probate of the will and the appointment of executors," and "for the purposes of this case, therefore, we must hold said proceedings valid as to all the parties". See JURISDICTION; NOTICE.

—*O'Dell v. Rogers*, 44 W. 136, 176.

18. "That the appearance of the defendants, and their making the motion to dismiss the appeal for the causes set forth in the motion (additional to defects of service), was a general appearance in the case, and a waiver of any defects in the service of the notice of appeal, is fully sustained by the following decisions: *Grantier v. Rosecrance*, 27 W. 488; 27 W. 558; 32 W. 308; 37 W. 344." See APPEAL.

—*Kasson v. Est. of Brocker*, 47 W. 79, 85.

19. "The rule laid down by this court in the case of *Blackburn v. Sweet*, 38 W. 578, is the true rule which must govern cases of this kind," as follows:

20. "'When a motion to set aside the judgment is founded partly on the failure of the court to obtain jurisdiction of the moving defendant, and partly on the ground of mere irregularities consistent with the fact of jurisdiction and which imply its existence, this constitutes a general appearance and a waiver of any defect of process'".

—*Sanderson v. O. C. Ry. & Coal Co.*, 61 W. 609, 612.

21. In notice of retainer after judgment, for one of several defendants sought to be served by publication, to "appear specially for him, for

the express and sole purpose of taking an appeal from the judgment", and a notice of appeal the same day "from each and every part of the judgment, and the whole thereof," is held to be "a full appearance in the action, and is a waiver of service. *Alderson v. White*, 32 W., supra, (and other cases.)

22. Under this notice and appeal the merits of the action may be considered by this court. *Anderson v. Coburn*, 27 W. 558." "The want of service upon S. (such defendant), if any, is cured," and the judgment was affirmed. (This case is overruled in *Zimmernan v. Gerdes*, 106 W. 608, so far as it holds that a default judgment will not "be reversed on appeal by a defendant as to whom the record fails to present proof of service", but otherwise is cited and followed in *Corbett v. Physicians' Casualty Assn.*, 135 W. post).

—*Dikeman v. Struck*, 76 W. 332, 334.

23. "It is well settled in this court that if a litigant desires to avail himself of want of jurisdiction of his person he must keep out of court for all purposes except that of objecting to jurisdiction, or, what is the same thing, moving to dismiss on that ground.

24. If he takes any step consistent with the idea that the court has jurisdiction of his person, such appearance amounts to a general appearance and gives the court jurisdiction for all purposes. (Cases).

25. The mere fact that the defendant stated that he appeared specially to object to the jurisdiction of the court will not protect him from the consequences of a general appearance,

26. If the proceedings taken by him show that he appeared for any purpose consistent with jurisdiction".

27. Where "the defendant moved the court to amend the return of the officer to the summons to conform to the facts", this "was inconsistent with want of jurisdiction of the court over the person of the defendant".

28. "The asking of the relief prayed for in the motion, whether granted or not, was a submission by defendant to the jurisdiction of the court and a waiver of all jurisdictional defects", and "amounted to a general appearance in the action".

—*Bestor v. Inter-County Fair*, 135 W. 339, 341.

29. "It is firmly settled" "by numerous decisions of this court", that on objection on jurisdictional grounds to defective service, and then proceeding "to a trial upon the merits" after such objection is overruled,

30. The party cannot "on appeal, have the benefit of the objection made at the start", though "saving an objection to the ruling." (Many cases). Contra: *Harkness v. Hyde*, 98 U. S., 476.

—*Corbett v. Physicians' C. Asso.*, 135 W. 505, 511.

31. An appearance "specially", to move "merely to vacate the service" and "to dismiss the action with costs", is held not "a general appearance". —*Milwaukee E. Co. v. Feuchtwanger*, 141 W. 266, 267.

32. (As to detailed discussion of points of practice as to appearance in county court proceedings,—see Zimmerman's Probate Practice, §§ 427, et al.; and especially as to attorneys, §§ 475, et al.)

APPRAISAL.

See INVENTORY AND APPRAISAL.

ARBITRATION.

Court may suggest, not impose, 3.
 Errors of judgment, 5.
 Impeachment for fraud, 6.
 Clear mistake, 6.
 Failure to apprehend fact, 7.

Parol submission, 1.
 Publication of award, 4.
 Submission to judge, 2.

1. Notwithstanding the statute, a parol submission and award is binding on the parties to it, as at common law.

—*Winne v. Elderkin*, 2 Pin. 248.

2. A submission of a dispute to a judge for his decision is binding upon the parties and no appeal lies, the same as with any other private arbitrator.

—*Linsing's Appeal*, 10 W. 120.

3. "Undoubtedly a circuit court may well suggest arbitration to parties litigant before it; but it cannot impose it as a condition of justice".

—*Sobey v. Thomas*, 37 W. 568, 573.

4. "The publication of the award' contemplated by the statute (sec. 3554) is the filing of the submission and award in the clerk's office of the court designated in the submission, for the action of the court thereon".

—*Russell v. Clark*, 60 W. 284, 285.

5. "A common-law award of arbitrators is not to be set aside for mere errors of judgment upon questions of fact or law submitted,

6. But it is subject to impeachment for fraud", "or upon clear evidence of mistake when such mistake is not simply a wrong conclusion upon the facts or law submitted,

7. But an unconscious failure to know or apprehend some material fact or right in the light of which their judgment should be exercised.

Consolidated W. P. Co. v. Nash, 109 W. 490.
 —*Donaldson v. Buhlman*, 134 W. 117, 119.

ARGUMENT.

See **AFFIRMATIVE.**

ASSESSMENT.

See **CONDEMNATION. TAXATION OF ESTATES.**

ASSIGNMENT.

- | | |
|-----------------------------------|---------------------------------|
| Actual delivery, 9. | Judgment: assignee's title, 18. |
| To third person, 9. | At common law, 19. |
| After acquired property, 15. | Statute not conclusive, 21. |
| Certificates of stock, etc., 10. | Statutory provision, 20. |
| Order, writing or act, 11. | Possibility or expectancy, 13. |
| Check, funds pro tanto, 6. | Potential interest, 14. |
| Choses in action, 12. | Rent, no formality, 2. |
| Confidence personal contract, 16. | By tenant in common, 4. |
| Consideration unnecessary, 8. | Crediting on books, 3. |
| Deposit books, funds, 16a. | Salary to become due, 1. |
| Notice to bank, 17. | Trust personalty income, 5. |
| Future earnings, 1, 22, 23. | Wages, non-existing employ, 22. |
| Irrevocable transfer, 7. | Must be a contract, 23. |

1. The salary of a public officer to become due is "a possibility coupled with an interest, and as such capable of being assigned."

—*State Bank v. Hastings*, 15 W. 75, 77.

2. "We are not aware that any particular formality is necessary to effect the transfer of such a claim", which being "for rent, was a mere matter of account, or a chose in action".

3. The transfer was held valid, being made "by crediting F. and J. with the amount on the books of the defendants at the time the assignment was made, and charging the plaintiffs with the same".

4. A transfer by one tenant in common, subsequently ratified or assented to by the other, makes a valid assignment.

—*Chapman v. Plummer*, 36 W. 262, 265.

5. A trust income from personalty is held assignable. See **TRUST VARIATION.**

—*Lamberton v. Pereles*, 87 W. 449, 459.

6. As to the effect of check as an assignment of funds pro tanto. See **CHECK.**

—*Raesser v. Nat. Exch. Bank*, 112 W., 591, 593.

7. In an assignment "there is an actual irrevocable transfer of the property".

8. "No consideration is necessary to support an assignment. And

transfer of property, whether by gift or otherwise, is in a general sense an assignment. 1 Bouv. Law Dict. 155.

9. True, there must be an actual delivery of the thing assigned, or its equivalent', which may be "made to a third person with intent on the part of the assignor to surrender dominion over the thing assigned," and if "the assignee assents to the transaction, that is sufficient". (Cases).

—*Stoll v. Mutual B. L. I. Co.*, 115 W. 558, 562.

10. As to certificates of stock, insurance, etc., "no particular form or words or written instrument is required by the law to constitute an assignment of this class of property.

11. 'Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument.*

12. The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place'. *Crook v. First Nat. Bank*, 83 W., 31 (see GIFT; other cases)". See also INSURANCE.

—*Opitz v. Karel*, 118 W., 527, 531.

13. "A mere possibility or expectancy of acquiring property, 'not coupled with an interest, is insufficient'," to enable assignment thereof to be valid,

14. But "it is well settled that a potential interest in property is sufficient to support such a transfer".

15. And "an attempted transfer of after acquired property is not effectual to create a lien in equity. (Cases)".

—*O'Neil v. Kerr Co.*, 124 W. 234, 237.

16. A contract with individual inexperienced subscribers for the erection of a plant by a skilled concern, "involved a relation of personal confidence which the subscribers must have intended would be exercised by the party in whom they confided", and is non-assignable by the latter "without the consent of the other party thereto. (Cases)".

—*Johnson v. Vickers*, 139 W., 145, 148.

16a. Where Ed. B. "rendered services" and "advanced money to secure necessities for" decedent, and "attended to her affairs", and her bank "deposit book, with the slip attached, having thereon the words, 'Ed., this is for you. Lida' (decedent), was in his possession (before her death), as were also withdrawal receipts signed by her",—held, "that it is an assignment to him of decedent's claim against the bank".

17. Sec. 2319c, merely "was designed to protect banks as to payments made on such accounts before they have had notice of an assignment", and the assignment is held "to become operative on the bank" after notice by delivery to the bank "after the death of Lida, the owner".

—*Stacks v. Buten*, 141 W., 235, 237.

18. "The assignee of a judgment takes subject to the equities between the parties. (Cases).

19. At common law a judgment was not assignable so as to vest the legal title in the assignee, but such an assignment, will operate to vest an equitable interest which the law will protect. 23 Cyc. 1413."

20. A statutory provision must be followed "to secure to the assignee any rights which depend solely on the statute;

21. But such statute is not regarded as exclusive and does not prevent" "an assignment, good at least between the parties thereto, in any other lawful way". —*Cowie v. Nat. Exch. Bank*, 147 W. 124, 128.

22. "Wages to be earned under an employment not in existence are not assignable.

23. The law recognizes no assignment of future earnings unless such earnings are based on an existing contract of employment".

—*Porte v. C. & N. W. R. Co.*, 162 W. 446, 449.

ASSIGNMENT OF ESTATES.

See DESCENT AND DISTRIBUTION. JUDGMENTS.

ATTESTATION.

See EXECUTION OF WILLS.

ATTORNEY AND CLIENT.

See also ADMINISTRATION EXPENSES. CHAMPERTY AND MAINTENANCE. LIEN. PRIVILEGED COMMUNICATIONS.

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- Words spoken in proceedings, 3.

1. "An attorney cannot be compelled to disclose, at the instance of a third person, any matter which came to his knowledge, in consequence of his employment, even though such business had no reference to legal proceedings begun, or apprehended."

—*Dudley v. Beck*, 3 W. 274, 284.

2. "Negligence of solicitor is good ground on which to base an application to set aside a default". But "if the party has been guilty of negligence or laches himself, the negligence of his solicitor will not avail."

—*Babcock v. Perry*, 4 W. 31, 40.

3. Attorney cannot be held liable for "words spoken in the course of judicial proceedings, though they impute crime to another, and therefore, if spoken elsewhere would import malice and be actionable in themselves,* if they are applicable and pertinent to the subject of inquiry." For "accusation of perjury against the witness", the attorney is not liable.

—*Jennings v. Paine*, 4 W. 358, 361.

4. Attorneys for non-resident clients, or at a distance, employed to collect debts, are authorized to employ all the necessary and usual means, including the giving of personal bonds of indemnity to officers, and their acts are binding on the clients, and they can recover for losses so sustained in good faith. —*Clark v. Randall*, 9 W. 135.

5. Attorney of record is "not bound to recognize" other attorneys "as having anything to do with the case," until "regularly substituted." —*Waterhouse v. Freeman*, 13 W. 339, 340.

6. Attorney as to collections "is an agent—nothing more. The title to property which he collects for his principal, is in the principal and not in him," and he is liable for conversion as any other agent. —*Cotton v. Sharpstein*, 14 W. 226, 230.

7. Authority of attorney to appear is presumed. "He is an officer of court". See APPEARANCE. —*Thomas v. Steele*, 22 W. 207, 209.

8. "Where a settlement is privately effected between the parties, with the design of preventing the attorney from obtaining his compensation, as this was, it should be set aside".

9. An attorney "was to be paid for his services in collecting the money on the (town) order, out of the avails of the judgment", his client having no other means of payment, and having "advanced money and rendered services", held "that he has a lien for compensation upon the order by well established principles".

—*Howard v. Osceola*, 22 W. 453, 458.

10. An attorney has no "lien upon the cause of action," before judgment on "a claim for unliquidated damages", in the absence of an agreement and of notice to the other party.

—*Courtney v. McGavock*, 23 W. 619, 622

11. A percentage agreement for services between attorney and client on the amount recovered, is held valid and proper, there being no agreement by the attorney "to pay the expenses of the action". See CHAMPERTY.

—*Allard v. Lamirande*, 29 W. 502, 509.

12. Attorneys may not become sureties, whether interested in the action or proceeding or not. See BONDS.

—*Gilbank v. Stephenson*, 30 W. 155, 156.

13. An "attorney has a lien upon the judgment" for services. See LIEN.

—*Rice v. Garnhart*, 35 W. 282, 283.

14. Non-resident attorneys may appear in causes here. "No license to practice here is necessary or proper for that purpose; the usual and proper practice being to grant leave ex gratia, for the occasion".

15. "The bar is no unimportant part of the court; and its members are officers of the court (cases). And if officers of the court, certainly, in some sense, officers of the state for which the court acts".

16. "Attorneys and counsellors of a court, though not properly public officers, are quasi officers of the state whose justice is administered by the court".

17. Non-resident attorneys cannot be admitted to the bar here. "Our courts cannot have a non-resident bar".

—*In re Ole Mosness, Esq.*, 39 W. 509, 510.

18. Attorneys have "the undoubted right to retain out of the collection" of client's funds "reasonable charges for their services";

19. But it is not competent "to exact a receipt in full as a condition precedent to paying over the sum admitted to belong to the" client, on a disagreement as to the attorneys' charges, "and in such a case it is the duty of the attorney to pay to his client the sum which he admits his client is entitled to receive, and the latter can only be required to receipt therefor on account". —*Charboneau v. Orton*, 43 W. 96, 102.

20. Where an attorney drew the will, suggested the executors, became their "legal adviser, as well as the attorney and legal adviser of the heirs, and, down to the day of final settlement of the estate, had virtually the control of all the proceedings", and with his law partner had become a purchaser of a large part of the estate, it is held that he holds such property as trustee at the option of the parties interested. p. 178. See also JURISDICTION; NOTICE.

21. And it is held that the attorney's law partner and a third person who became purchasers with the attorney and had full knowledge of the attorney's relation to the estate, "stand affected with whatever disability the purchase attached to R. (the attorney), and that they are equally chargeable with the trust. *Hoffman S. C. Co. v. Cumberland C. & I. Co.*, 16 Md. 456". p. 180.

22. Where heirs "not personally present at the probate", "appeared there by their attorney R., and they also subsequently consented to the proceedings by receiving their shares of the proceeds of the sales, and executing receipts and deeds of confirmation", though the regular notice was defective, they are concluded by the proceedings. See also TRUSTEES.

—*O'Dell v. Rogers*, 44 W. 136, 173.

23. Where an attorney for the grantee sister, drew the papers and aided in the negotiations for a transfer without valuable consideration, of parental estate, from a weaker sister, without the knowledge of the latter's husband, and without the knowledge of her attorney in a prior proceeding relating thereto in court, the court per Ryan, C. J., says:

24. "It was against all professional ethics, against all propriety, to suffer that woman, without professional advice of her rights, without advising her of them himself, in the absence of the counsel who had

maintained them, without the knowledge of her husband, without the counsel or sanction of any friend, alone, and in an apparent condition of weak health, to avoid the effect of the judgment of the county court”.

25. “It was the plain professional duty of the gentleman who was the elder sister’s attorney here, to have told these women, in these circumstances, that he would take no part in consummating the agreement between them, until the younger sister had taken proper professional advice, or had at least consulted her husband. No such transaction should ever be consummated as it were ex parte in a lawyer’s office”.

26. “This gentleman presumably acted without conscious bad faith. But the effect was the same. And this court holds what took place in his office to be equivalent to undue influence—adequate grounds for avoiding a conveyance so executed”.

—*Watkins v. Brant*, 46 W. 419, 428.

27. “The learning and ability of the counsel, the means of the client, the magnitude of the interests involved, the hazards of the litigation, and the final result whether successful or otherwise, as well as the actual time and labor expended for the client, all are or may be elements to be considered in determining what is reasonable compensation in a given case.

28. More or less prominence may be given to these and other elements entering into the question of value, by different witnesses.

29. Hence it is that witnesses equally honest and equally competent to testify as experts in that behalf, differ so widely from each other in their estimates”.

30. The fact that the case was tried before him, “does not make the judge a witness in the cause, but it peculiarly qualified him to pass upon the weight of the conflicting testimony in respect to the value of the defendants’ services,” in an action therefor. See *Wis. Cen. Ry. Co. v. Cornell Uni.*, 49 W. 162. —*Halaska v. Cotzhausen*, 52 W. 624, 626.

31. “As a general rule, no doubt, attorneys should not be witnesses for their clients. The sentiment of the profession is opposed to it, and for very satisfactory reasons;

32. Yet cases may arise, and in practice often do arise, in which there would be a failure of justice should the attorney withhold his testimony. In such a case it would be a vicious professional sentiment which would deprive the client of the benefit of his attorney’s testimony.

33. The attorney must decide for himself whether he ought to become a witness. If he resolves the question in the affirmative, a nice sense of professional propriety will no doubt prompt him to do as W. did in the present case; that is, surrender the management of the case to others.

34. Of course, an attorney should not accept a retainer if he knows in advance that he will be a material witness for the party seeking to employ him. But a breach of professional ethics in this respect does not necessarily involve moral turpitude or affect the credibility of the

attorney who has thus become a witness for his client". See also WITNESSES.
—*Connolly, jr. v. Straw*, 53 W. 645, 649.

35. "In *Am. Ins. Co. v. Oakley*, 9 Paige, 498", "Chancellor Walworth states the rule thus: 'As a general rule, when a suit is commenced or defended, or any other proceeding is had therein, by one of the regular licensed solicitors, it is not the practice of the court to inquire into his authority to appear for his supposed client.

36. But if the party for whom such solicitor appears or assumes to act, denies his authority and applies to the court for the relief before the adverse party has acquired any rights or suffered and prejudice in consequence of the acts of the solicitors, the court may correct the proceeding, and may compel the solicitor who has assumed to act without authority to pay the costs to which the parties have been subjected in consequence of his improper interferences. (Cases).

37. In cases, however, where the adverse party has acquired rights, or been subjected to costs by proceedings in the name of a party who afterward denies the authority of the attorney or solicitor who has thus proceeded, the courts are in the habit of permitting the proceedings to stand where the solicitor or attorney is a responsible man, and leaving the party injured by such unauthorized proceedings in his name to seek his redress against such solicitor or attorney by a summary application to the court or otherwise. (Cases)."

38. "In this state, however, the question has been somewhat simplified by the statute (sec. 2832), which provides," for relief from a judgment, order or proceeding, "through mistake, inadvertence, surprise, or excusable neglect", where application is made within a year.

—*Cleveland v. Hopkins*, 55 W. 387, 389-90.

39. Counsel cannot "prevent the discontinuance" of an action, "merely because in their judgment such discontinuance would be detrimental to the rights of such client. It is the action of the party, not of the counsel.

40. The party is the principal and counsel are not to dictate but simply to aid in settling and discontinuing actions". See MARRIED WOMAN.
—*Dolloff v. Curran*, 59 W. 332, 335.

41. "The authority of an attorney at law who appears in a court of justice on behalf of a party to an action, is to be presumed.

42. He is an officer of the court, and if his authority is denied, the burden of showing that he is unauthorized rests upon the party making the denial'. *Thomas v. Steele*, 22 W. supra".

—*Schlitz v. Meyer*, 61 W. 418, 421."

43. "Settlements effected by an attorney on the one side with the opposing party on the other should be closely scrutinized, and should never be sanctioned where there is any appearance that undue influence was used in effecting them".

44. In this case, the other attorney was easily available, and such settlement was set aside, and it is said: "In the language of the chief justice in *Watkins v. Brant*, 46 W. supra, no such transaction should ever be consummated as it were ex parte in a lawyer's office".

—*Voell v. Kelly*, 64 W. 504, 506.

45. "Certainly, in the absence of any intervening rights, or of any fraud, duress, circumvention, or undue influence, a man of legal age, possessed of his mental faculties, may, especially when acting by the advice of friends and counsel, and for a valuable consideration paid to him at the time, settle and authorize the discontinuance of a suit against him, wherein he claims to have a good defense upon the merits, and whereby he may have lost valuable rights,

46. Without the presence of his attorney of record, and even against the wish and protest of such attorney. *Dolloff v. Curran*, 59 W. supra,

47. In such case, the party to the action is supposed to be the principal, and his attorney his agency in securing his lawful purposes. *Ibid*".

—*Sullivan v. Bruhling*, 70 W. 388, 391.

48. Authority to file election by widow. See WIDOW.

—*Beem v. Kimberly*, 72 W. 343, 363.

49. "This court has held, in effect, that where the charges of professional misconduct upon which the accused (attorney) is disbarred are such as would, if true, subject him to criminal prosecution, the same should be established by clear and satisfactory evidence, and cannot rest in doubtful and uncertain inferences." In re. *Orton*, 54 W. 386.

50. But even where such charges are not of a criminal nature, yet we apprehend that, in order to justify disbarment, they should be established by a preponderance of satisfactory evidence."

51. "To entitle a person to practice law in Wisconsin, he must, in addition to the other requisites, be 'of good moral character'. Sec. 2586. As a good moral character is a condition precedent to admission to the bar, so it is a requisite condition for the rightful continuance in the practice of the profession. (Many cases).

52. The words 'good moral character', are general in their application, but of course they include all the elements essential to make up such a character. Among these are common honesty and veracity, especially in all professional intercourse".

53. "The better rule seems to be, that the misconduct requisite for such suspension (of attorneys) is not limited to acts committed strictly in a professional character, but extends to all such misconduct as would have prevented an admission to the bar".

54. "It may be said that an attorney is not obliged to continue in the service of his client without pay. However this may be, he certainly is not at liberty to desert this client and to take up against him in the

same cause or a similar cause based upon substantially the same facts, for the purposes of getting better pay or even any pay”.

—*In re O*——, 73 W. 602, 617.

55. “We think, upon authority and principle, an employment to defend an action pending in a trial does not, under ordinary circumstances, authorize such attorney to take an appeal to a higher court from the judgment rendered against his client.

56. Public policy and the rights of litigants require that their attorneys in such case, especially where they have easy access to their clients, should first consult their wishes upon the question of taking an appeal from the judgment rendered against them in the trial court, before incurring further expenses in such litigation. (Cases)”. Disallowance of claim for such services was upheld.

—*Hooker v. V. of Brandon*, 75 W. 8, 17.

57. In an action for services as attorney, a judgment against the attorney on the ground of negligence, “first, in not having a stipulation of settlement in writing; and, second, in not noticing the case for trial,” is upheld as a matter of law.

—*Armin v. Loomis*, 82 W., 86, 89.

58. Recovery of fees for services to an administrator when not employed by him. See LIABILITY. —*Miller v. Tracy*, 86 W., 330, 336.

59. “The whole doctrine of imputed notice to the client or principal rests upon the ground that the attorney or agent has knowledge of something, material to the particular transaction, which it is his duty to communicate to his principal. (Citation.)

60. And notice of it will not be imputed to the client where it would be a breach of professional confidence to make the communication;

61. And where the interest in, or the relation of the attorney to, the previous transaction is such as would be sufficient to induce him to withhold the information, the presumption of its communication is rebutted.

62. The client will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal. *Kettlewell v. Watson*, 21 Ch. Div. 707”. See also SALE OF REALTY.

—*Melms v. Pabst Brewing Co.*, 93 W., 153, 169.

63. An engagement as attorney does “not carry by implication authority to employ other attorneys at the expense of” such attorney’s employer.

64. But “an attorney may, at his own expense and risk, employ an assistant to aid him in his professional employment (*Weeks Attys.* 246)”, and may include such services as part of his own.

65. An employemnt as attorney, “included power to do those things reasonably necessary, or reasonably supposed by him to be necessary

from a professional standpoint, to carry out the object of such employment.

66. That an attorney may, as incident to professional employment by a client, incur reasonable expenses in conducting the matter under his charge, cannot be doubted."

67. "An attorney is never bound to acquaint his client in advance with the necessity of making each specific disbursement, and to obtain his sanction of it, in order to" charge therefor or retain it out of proceeds "as an expense incident to such attorney's professional employment." He "merely takes the chances" as to reasonableness.

—*Vilas v. Bundy*, 106 W., 168, 182.

68. The statute of limitations "does not commence to run upon an attorney's claim for services and disbursements until the termination of the proceedings in which they were rendered, where his employment was to conduct such proceeding to its termination, or until the employment is otherwise terminated. (Cases)". So held, though the case lay dormant at one time for more than six years without action thereon.

69. "Where services are rendered to a corporation by one of its officers, which are clearly outside of his official duties, a recovery may be had therefor under implied contract, if the circumstances be such as to fairly imply that it was expected that the services were to be paid for. (Cases)". Compensation allowed in case of attorney's services by a bank president.

—*Lowe v. Ring*, 106 W. 647, 653.

70. "Attorneys are officers of the court and charged as such with duties in the administration of justice entirely inconsistent with liberty to traffic in the subjects of the litigation of which they have the management. The law which condemns such transactions necessarily renders them absolutely void". See also *CHAMPERTY, ETC.*

—*Miles v. Mutual M. R. F. L. Assn.*, 108 W., 421, 423.

71. Following *In re O*——, 73 W., supra, an attorney is disbarred for an "attempt to deceive the court" "in making and presenting to the court false affidavits as to the pretended service" and filing of a notice of appeal.

—*Flanders v. Keefe*, 108 W., 441, 446.

72. "The attorney for an assignee, administrator, or other person similarly situated is his private employee.

73. At law the attorney must look to such person for his pay, and the latter must rely for reimbursement for his outlay in that regard upon the allowance of his account by the court."

74. "The attorney does not" "stand for the beneficiaries of the trust. He stands for the trustee. He is the latter's personal representative. The trust estate is not directly chargeable with the attorney's claim for compensation." See also *PRIVILEGED COMMUNICATIONS.*

—*Herman v. Schlesinger*, 114 W., 382, 388.

75. "The idea that an attorney can acquire a lien of either a legal or an equitable character upon the mere right of his client to defend against the claim or cause of action of the plaintiff, precluding the parties from settling the litigation independently of him, regardless of their motives therefor, is without support in principle or authority, so far as we are aware".

76. Where the defendant's attorneys' fees in the main, by contract with the client, were to be taxable costs to be recovered,

77. A settlement between the defendant in the absence of his attorney, and the plaintiff's attorney, dismissing the action without costs, was upheld, there being no fraud, though plaintiff's attorney had knowledge of the fee contract of defendant's attorney.

—*Garvin v. Crowley*, 116 W. 496, 503.

78. The circuit court rule 5, sec. 2 "is made in pursuance of the statute", sec. 2585, as to any "civil action or proceeding", "and contemplates consent in writing, signed by the party and his or her attorney of record, before any substitution is permissible", and refusal to recognize an attorney on substitution signed by the attorneys only is approved.

—*McMahon v. Snyder*, 117 W., 463, 466.

79. "If an attorney purchases his client's property, concerning which his advice is sought, the transaction is always viewed with suspicion,

80. And the attorney assumes the heavy burden of proving not only that there was no overreaching of the client, but that the client acted upon the fullest information and advice as to his rights.

81. In other words, the attorney must prove uberrima fides, or the transaction will be set aside by a court of equity." Deed set aside.

—*Young v. Murphy*, 120 W., 49, 51.

82. An attorney "under his retainer" can "bind his client in an" "accord and satisfaction" but "can exercise such power only upon an express authority. (Cases). —*Fosha v. O'Donnell*, 120 W. 336, 342.

83. As to authority of attorney terminating on dismissal of action by order without costs. See DISCONTINUANCE.

—*Wawrzyniakowski v. Hoffman & B. Mfg. Co.*, 137 W. 629, 632.

84. "The powers of attorneys at law in charge of litigation are very broad, and while it may be that the general retainer is not sufficient to authorize an absolute surrender of substantial property rights which the attorney is employed to establish and enforce (*Fosha v. O'Donnell*, 120 W. 336, See STIPULATION),

85. Still it is and must be sufficient to enable the attorney in his honest judgment to control all matters of procedure in the action brought for such enforcement. (Citations)".

86. A stipulation "merely to waive such procedure", not by "the

attorney who signed the summons and for whom no substitution had been made",

87. But by attorneys who had his consent, and "full authority from the plaintiff as its attorneys to conduct the litigation, and" "defendants's attorneys knew it",—held binding,

88. It not being "improvident and induced by fraud, misunderstanding, or mistake, or rendered inequitable by the development of a new situation, as in *Brown v. Cohn*, 88 W. 627". See also *STIPULATION*.
—*Illinois S. Co. v. Warras*, 141 W. 119, 122.

89. As to running of the statute on collection made for a client, without demand. See *LIMITATIONS OF ACTIONS*.

—*Ott v. Hood*, 152 W. 97, 99.

90. "An attorney is an officer of the court and, in a sense, of the state."

91. Admission of an attorney to practice, he not having qualified "as our statute requires", is held "jurisdictional error".

92. "The court can act upon its own motion as to whether the name of a member of its bar should be stricken from the roll or on application of any member of such bar, or even of a private person", or of a bar association.
—*Vernon Co. Bar Asso. v. McKibbin*, 153 W. 350, 352.

93. An attorney cannot stipulate "to dismiss an action upon the merits" without "special authority so to do". See also *DISCONTINUANCE*.
—*Seymour S. Bank v. Rettler*, 164 W. 619.

94. (As to practice concerning appearance and substitution in county court proceedings,—see *Zimmerman's Probate Practice*, §§ 475, et seq.)

AUCTION SALES.

See also *SALE OF PERSONALTY*. *SALE OF REALTY*.

Auctioneer may sue, 7.

Auctioneer's memorandum, 3.

Agent for both parties, 4.

Contemporaneous with sale, 5.

Bidding for another, 2.

Bidding jointly, 8.

Purchaser, a quasi party, 1.

Vendor's agent memoranda, 6.

1. "The authorities establish that a purchaser, by bidding at such sales, becomes a quasi party to the proceeding, and subjects himself to the jurisdiction of the court. And it would be strange if it were not so—if a man might bid, and then abandon it at pleasure, and thus baffle wantonly the execution of judgments".

2. "The fact that" a bidder "was bidding for the benefit of" another,

"cannot be set up by him to affect the rights of other parties. That is a matter that he must arrange with" his principal.

—*Atkinson v. Richardson*, 14 W. 157, 161.

3. "Where a memorandum containing all the essentials of the contract for the sale of land is made and signed at the time of the sale, by the auctioneer, who sold it for the owner, it is well settled in law that this is sufficient to take the case out of the statute.

4. The auctioneer is deemed to be the agent for both parties at a public sale for the purpose of signing the contract. *Benj. on Sales*, 268; *Tallman v. Franklin*, 14 N. Y. 584.

5. But 'it has been decided that the memorandum of the auctioneer, to bind the purchaser, must be contemporaneous with the sale. It cannot be made afterwards'. *Story, J. in Smith v. Arnold*, 5 Mason, 414-9. See also *Gill v. Bickwell*, 2 Cush. 355; *Horton v. McCarty*, 53 Me. 394".

6. The agent of the vendor cannot make and sign such a memorandum for his principal, and bind the vendee who has not accepted or assented to it.

—*Bamber v. Savage*, 52 W. 110, 113.

7. When the auctioneer has paid his principal before receiving payment, he may sue the purchaser in his own name. See FACTOR.

—*Progress B. R. F. v. Chicago H. S. Co.*, 153 W. 249, 251.

8. "Agreements to bid jointly at a public sale", in good faith, "are valid." See also SALE OF PERSONALTY.

—*Stack v. Roth Bros. Co.*, 162 W. 281, 288.

AUTHENTICATION.

Authentication, what is, 2, 10.

Certificate to show, 11.

Certified copies admissible, 1.

Federal or state statute, 3.

Originals in court, 1.

Compared with original, 7, 8.

Certificate as to, 11.

Exemplified copy, 10.

Foreign judgment proof, 12.

Judge ex officio clerk, 9.

Numerous documents, 5.

Court records, 6.

Seal with clerk's certificate, 4.

1. Certified copies are properly admissible as evidence, though the opposite party have the originals in court. —*Fouke v. Ray*, 1 W. 104.

2. "The authentication of any document is that which is certified concerning it by the proper certifying officer or officers."

3. According to either federal or state statute, if relevant, certified copies are admitted as evidence the same as originals.

—*Ordway v. Conroe*, 4 W. 45, 50.

4. Certificate of clerk and not that of the judge must have the seal of the court attached, to entitle a record to admission.

—*Kirschner v. State*, 9 W. 140, 145.

5. Certified copies of ten deeds attached with one certificate of the register, were held not “so authenticated as to entitle them to be read in evidence” under the statute (sec. 4149). “The method of authentication contemplated by this statute would seem to be for the officer to certify to each document or record which is offered in evidence”. (Court record distinguished in 51 W. post). —*Newell v. Smith*, 38 W., 39, 40.

6. The case of *Newell v. Smith*, *supra*, “is very wide of the point here raised as to court records, which should be, and must be, attached in some way, and the whole followed as a single record by the proper certificate. The deeds in the case referred to could not be attached in any manner so as to be properly authenticated by one certificate”.

—*Sherburne, Admr. v. Róðman*, 51 W. 474, 478.

7. “The copy of the bill of sale was properly rejected, because the certificate of the town clerk was insufficient, in that it did not state that the copy ‘had been compared by him, (the clerk), with the original’, as required by sec. 4149.

8. See also, *Stevens v. Clark Co.*, 43 W., 36”. (There “the certificate of the secretary of state offered in evidence does not state that he has compared the copy with the original; but only that it has been compared”, and such certificate was held insufficient, and the case determined differently solely for that reason).

—*Doran v. Ryan*, 81 W. 63, 65.

9. When the foreign judge is also *ex officio* clerk, under sec. 905 R. S. of U. S., “no doubt he must certify in each capacity,” but “it is a matter of form, rather than of substance, whether the certification shall be by two separate certificates, or comprised in one.” One such certificate is here approved.

—*Keith Bros. Co. v. Stiles*, 92 W., 15, 17.

10. As to what constitutes an ‘exemplified copy’ of records as to a foreign will, and,

11. As to necessity of certificate to show that copies by the clerk “had ‘been by him compared with the original’”, to valid authentication under state and also federal statute. See FOREIGN WILLS.

—*In re Box's Will*, 127 W. 264, 270.

12. As to proof of the foreign judgment of an inferior court, “authenticated under title 13, ch. 17, sec. 905, R. S. of U. S. (U. S. Comp. Stats. 1901, p. 677)”. See FOREIGN JUDGMENTS.

—*Christiansen v. Kriesel*, 133 W. 508, 510.

BAILMENT.

Bailment is special deposit, 1.

General deposit liability, 2.

1. Where money given by A. to B. for safekeeping, and "the parties did not contemplate or understand that the same identical money" was to be kept and returned, "the transaction is not, therefore, a bailment or special deposit, but rather what, in commercial language, is termed a general deposit, which is not a bailment, but in the nature of a loan. Story on Bailments, 41".

2. "The liability of the defendant (B) in this case is precisely the same as the liability of a bank for a general deposit made with it". "His liability is absolute, and it is immaterial that the money was lost without his fault", in this case having been stolen.

—*Shoemaker v. Hinze*, 53 W. 116, 117.

BILL OF PARTICULARS.

See also PLEADINGS.

Amended like pleadings, 4.

Confined to items in bill, 3.

Object is to inform, 2.

Variance immaterial, 1.

1. Where judgment for \$575 is demanded, and "an exhibit in the nature of a bill of particulars is made a part of the complaint" in which but \$435 is demanded, an application to make more definite and certain is denied, the variance being held immaterial, "as the plaintiff will be confined in his proof to the bill, unless he should obtain leave of the court to amend it".

2. "The object of a bill of particulars is to inform the opposite party what will be attempted to be proved against him on the trial, so that he may prepare his evidence accordingly. *Brewster v. Sackett*, 1 Cow., 571, (and other cases)".

3. "The rule is that a party is confined in his proofs to the items contained in his bill, and is not entitled to recover for items not included in it. *Hurst v. Watkis*, 1 Camp. 68; *Holland v. Hopkins*, 2 Bos. & P. 243.

4. Such a bill may be amended like other pleadings, upon terms, where it will promote substantial justice. *Melvin v. Wood*, 3 Keyes, 533, 4 Abb.Pr. (N. S.) 438".

—*Cudworth v. Gaynor*, 76 W., 296.

BILLS AND NOTES.

See PROMISSORY NOTES, ETC.

BIRTH, AGE, DEATH, AND PROOF OF HEIRSHIP.

See also **HEIRS.**

Baptismal certificate, 5, 6, 9, 25.
 Church registry entry, 1, 2, 11.
 Copies stipulated, 12.
 Family record, 23, 24.
 Father may prove, 3, 21.
 Memorandum by him, 21.
 With family record, 23, 24.
 Identity of the persons, 16.
 Antiquity of documents, 18.
 Independent proof of, 17.
 Law when offered, 13.

Material fact in certificate, 14.
 Marital status of mother, 15.
 Minority; burden of proof, 26.
 Minor may testify, 4.
 Mother may testify, 5.
 Party himself may testify, 4, 10.
 As to own age, 18.
 Knowledge from parents, 20.
 Personal presence proof, 8.
 Register of deeds certificate, 6, 7.

1. "The entry in the church register, although it may be competent evidence to prove the date of his baptism, is not evidence of the date of plaintiff's birth. So far as the latter date is concerned, it is only hearsay", to prove infancy. (But, see sec. 4160, as amended in 1898; also *Sandberg v. State*, 113 W. post).

2. "Prof. Greenleaf says: 'Neither is the mention of the child's age in the register of christenings, proof of the day of his birth, to support a plea of infancy.'"

3. Knowing him for years the defendant "had only to call the father as a witness to prove the age of the plaintiff".

—*Herman v. Mason*, 37 W. 273, 274.

4. It seems that a minor is competent to testify in his own behalf as to his age. "It was a matter of repute in the family when the defendant was born, and though he could not have any personal knowledge of his birth, yet he might testify to his age as he had learned it from his parents and relatives".

—*Hart v. Stickney*, 41 W. 630, 638.

5. As to her daughter's age, the mother testified "that she had or kept a baptismal certificate. It was contended that such family record was the best evidence of her age. We have no statute that makes such record evidence, and Sec. 4160 makes the registration of births in the register's office only presumptive evidence thereof.

6. In both cases, the evidence would be merely hearsay or secondary, at best.

7. It certainly could not supersede the testimony of the mother of the exact age of her child. No evidence could possibly be better or more reliable." (But, see sec. 4160, as subsequently amended in 1898; also *Sandberg v. State*, 113 W. post).

8. "The personal appearance of this young girl (sixteen) on view in presence of the jury", was held to be "very satisfactory evidence that the defendant knew that she was under the age of twenty-one years".

—*Hermann v. State*, 73 W. 248, 249.

9. A foreign certificate of baptism "incidentally mentions or recites the age of the infant baptised. But that was no proof of the birth of such infant. *Herman v. Mason*, 37 W., *supra*. But it is plain that the certificate was not admissible under the statute (sec. 4172), because it did not purport to be a certificate of the birth of any one; therefore was no evidence bearing on the question of the age of the insured". (But, see *Sandberg v. State*, 113 W. post).

—*Lavin v. Mutual Aid Soc.*, 74 W., 349, 351.

10. "It was intimated, but not decided, in *Hart v. Stickney*, 41 W., *supra*, that a witness might testify as to his own age. The intimation was certainly in accord with the great weight of authority, and we now hold affirmatively that such testimony is competent. *Commonw. v. Stevenson*, 142, Mass., 466; 2 *Jones*, Ev. 303". So held, in case of a minor under fourteen years of age, the fact being vital, "and there was no other direct evidence as to her age".

—*Dodge v. State*, 100 W., 294, 295.

11. Under sec. 4160, as amended by the revision of 1898, it is held that, "copies of parish registers of births and deaths, kept in the Kingdom of Sweden, in accordance with its laws, and offered in evidence upon the trial,

12. Under a stipulation that they should have the same effect as if the originals had been produced by the proper custodian, and duly sworn to by him", were held properly admissible on the question of heirship.

13. The admissibility "is controlled by the law in existence at the time when the evidence is offered", though the decedent died before the law's enactment. (U. S. cases).

14. The statute "provides that the record shall be *prima facie* evidence of any material fact stated therein, in this respect extending the efficacy of such records beyond that accorded them at common law".

15. And it is held that "the marital status of the mother (a deceased sister of decedent) is a material fact in a birth record", and the *prima facie* illegitimacy of a child of such deceased sister, who otherwise would be an heir of decedent, is held so established "within the phrase of the statute, 'other material facts'" and "the record is sufficient to overcome a mere *prima facie* presumption" of legitimacy.

16. While the rule, that "the records themselves" "establish *prima facie* the identity of the persons named therein", without "some independent proof of identity", rather than the contrary rule, "seems more nearly so (universal) according to the weight of authority", "in the present case it is not necessary to decide between them", there being "some fact or circumstance in addition to the mere name,

17. Although that alone in several instances, we are persuaded ought to suffice, because of the duplication of rather unusual Christian names, constituting combinations extremely unlikely to occur in different individuals".

18. Where "the evidence with reference to the death of the six maternal uncles and aunts" was "wholly documentary", it was held, "in view of the antiquity of these events", "these three elements of identification—name, date of birth, and place of birth—would seem entirely sufficient".
—*Sandberg v. State*, 113 W. 578, 584.

19. "Any one, after arriving at the age of discretion so as to be competent to testify as a witness at all, may give evidence as to his own age. (Citation.)

20. And that applies though the witness has no other knowledge in respect to the subject except that which was told him by his parents. *Hart v. Stickney*, 41 W., supra".

21. The father's testimony, as to his child's age where "he relied in part" "upon a memorandum made by him at the time of the child's birth, which memorandum was not produced in court", was held proper,

22. The witness testifying "that he was present at such birth, that he made the memorandum, and knew at the time thereof that he made it correctly."

23. Such memorandum "which appears to have been an ordinary family record", was not "the best evidence", being "a mere private memorandum" properly used only "to refresh the memory of the witness who made it or who at some time knew it was correct,

24. Or as evidence in connection with the verbal testimony and as a part of the witness' evidence". See also WRITINGS.

—*Loose v. State*, 120 W., 115, 122.

25. That "a baptismal certificate" "was not admissible in evidence to prove the date of birth of respondent, is ruled by *Lavin v. Mutual Aid Soc.*, 74 W. supra." (But see *Sandberg v. State*, 113 W., supra).

26. "The burden was upon" plaintiff "to establish his claim, by evidence, to the satisfaction of the jury",—that he was "a minor", when he made the contract he now desires to rescind.

—*Lambrecht v. Holsaple*, 164 W. 465, 467.

BLANKS.

See OMISSIONS.

BOARD CLAIMS.

See SERVICES.

BOND FOR MAINTENANCE.

See also RESCISSION OF CONTRACT.

- Absence of agreement, 41.
- Action by administrator, 73.
- Administration not settle, 32.
- Assignment of covenants, 17, 54.
 - Contract not delegable, 57.
- Breach wholly by grantee, 48, 71.
- Claim filed for support, 31.
- Cloud on title removed, 60, 81, 82.
- Contracts out of ordinary, 5.
- Compliance made impossible, 65.
 - Could not demand rescission, 66.
- Conditional sale of property, 33.
- Condition subsequent, 4, 53, 59, 82a.
 - Conveyance so rescinded, 21.
 - Liberally so construed, 25.
 - Unless contrary intent, 20.
 - Voluntary conveyance rule, 24.
- Conduct afterward condoned, 1.
- Damages for support, 48.
 - Breach wholly by grantee, 48.
 - For partial breach, 49.
- Decease of grantee, unexpectedly, 63.
 - Not ground for rescission, 63.
- Dissatisfaction only, 28.
- Election, two obligated, 44.
- Election to rescind, 64.
- Entire nonperformance, 8.
 - Settled law of state, 16.
 - Sufficient to rescind, 15.
- Equity grant proper relief, 7, 48, 83.
 - Quiet title, 60.
 - Rescission, cancellation, 9, 55, 83.
 - Wife alone may act, 84, 85.
- Estoppel by administration, 31.
- Executory performance, 53.
- Failure: to demand support, 42.
 - Substantial failure, 83.
 - Without justification, 62.
- Foreclosure: complaint, 11, 14.
 - Judgment for breach, 49.
 - Prayer for sale disregarded, 13.
 - Strict foreclosure nature, 12.
- Forfeiture not relief, 14, 56, 82b.
- Grantee complies with, 22.
- Grantors first breached, 65.
 - Could not demand rescission, 66.
- Full money equivalent, 67.
- Grantee's compliance, 65.
- New contract, full payment, 68, 69.
- Husband's duty to support, 44.
- Joint tort feasons, 75.
 - Decease of one, 76.
 - Separate findings, 77.
- Lease given with notice, 30.
- Mutual rescinding, 87.
 - Rights of third parties, 88, 89, 90.
- Over-payment relief, 18.
- Parol: addition to contract, 19.
 - Parol contract performed, 27.
- Penalty: sum named, 10.
 - Not for payment of farm, 50.
- Permanent improvements, 26, 47.
 - Consent of both parties, 72.
- Personal, by grantee, 91, 92.
 - Assignment, a breach, 92.
 - Condition supplied, 93.
 - Grantee; not others, 94.
- Personal care required, 51, 82a.
- Property: to remain intact, 45.
 - Not expended for support, 46.
 - Not to pay condition, 94.
 - By new mortgage, 94.
- Security for breach, 45.
- Provision elsewhere, 3.
- Quiet title, 60, 81.
- Rescission, cancellation, 9, 48, 52, 55, 60, 61, 70, 71.
- Remedy to remove cloud, 81.
 - By special administration, 82.
 - No administration, 78.
 - Rights of heirs settled, 79, 80.
- Rescind on future failure, 23.
- Self interest, absent, 6.
- Separate instruments as one, 34.
- Survival of action, 75.
- Testimony of grantor, 61.
- Third person's benefit, 95.
 - Contingent, condition precedent, 96.
 - Lien on the land, 95.
- Third persons: parties, 86.
 - Contract mutually rescinded, 87.
 - Estoppel as to payment claim, 90.
 - Vested rights of, 88.
- Trust for support, etc., 35.
 - Deficiency of assets suit, 40.
 - In trust for own use, 38.
 - Not expressed in form, 36.
 - Sums to other children, 37.
 - Void as to creditors, 38, 39.
- Uncomfortable in family, 2.
- Undue influence contract, 74.
- Voluntary conveyance rule, 24.
- Waiver: of strict performance, 29.
 - Competent to waive, 43.
 - Waiver for time only, 44.
- Wife alone may bring action, 84.
 - Especially if homesteaded, 85.

1. An inconsequential breach, or a failure for a short time to extend the "usual and customary domestic courtesies" required, which conduct ceased and was afterward condoned, or a failure to continue the obligee in the family on removal to another county, she refusing to go with the obligors, and they making other satisfactory provision in lieu thereof, held insufficient to justify the interference of the court to invalidate a bond for maintenance.

2. While being made uncomfortable as a member of defendant's family, plaintiff "would doubtless have been justified in leaving their house for that reason, and could then have successfully claimed that the condition of the bond had been broken".

3. "This controversy should be speedily and amicably arranged, either by a return of the plaintiff to the family of the defendants, or by adequate provision for her support elsewhere."

—*Smith v. Smith*, 34 W. 320, 325.

4. In the case of a conveyance by the father to a son, in consideration of an agreement executed at the same time for the maintenance of the father, and the performance of certain other conditions at his decease, it is indicated in effect that the "maintenance" was not "a condition subsequent, the failure to perform which works a forfeiture of the lands conveyed", and that on that theory relief could not be granted by a court of equity, on failure to fulfill the agreement. (Overruled on this point in *Glocke v. Glocke*, 113 W. post).

5. "Conveyances of property by aged and infirm people to their children, in consideration of promised support and maintenance, are somewhat peculiar in their character and incidents, and must sometimes be dealt with by the courts on principles not applicable to ordinary conveyances".

6. "We seldom find in such transactions evidences of that deliberation and careful regard to self interest on the part of the father, which usually characterize ordinary business transactions of the same magnitude."

7. "Because of these and other considerations peculiar to a case like this, it is the duty of the son, and he should regard it as his highest privilege, fully to perform his agreement. This is not only a moral and religious duty, but it is a duty of which a court of equity will take cognizance, and grant proper relief for its non-performance".

8. In the case of an entire non-performance, it is held that a prior demand was not necessary.

9. "The rescission, cancellation, or delivery of agreements, securities or deeds, is said to be one of the heads of equity jurisdiction indispensable to reciprocal justice. It is the converse of a specific performance. The ground for the equitable relief, in either case is the same". *Reid v. Burns*, 13 O. St. 49.

—*Bogie v. Bogie*, 41 W. 209, 217.

10. In a bond for maintenance of parents, secured by mortgage on the premises deeded to the son, the sum of \$2200.00 being named in the

bond, it is held: "Under well settled rules, the sum so named must be regarded as a penalty. (Cases)".

11. And, on a complaint for foreclosure, not asking for rescission as to the realty, but only as to the personalty, it is said:

12. "Had the action been for a rescission of such conveyance, that relief should have been granted. We perceive no difficulty, however, in the way of granting equivalent relief under the complaint in its present form. Instead of rescinding the conveyance, we think the court may give judgment in the nature of a strict foreclosure, to the effect that, by reason of the breaches of the condition of the bond for the maintenance of the plaintiffs, the defendants have lost their equity of redemption in the mortgaged premises, and that the whole title thereto has thereby become vested absolutely in the plaintiffs".

13. "Although the instrument sought to be foreclosed is in the form of a mortgage, and in its inception was a mortgage, by default of the mortgagors it has become, in fact, an absolute conveyance to the plaintiffs". "The prayer for a sale of the mortgaged premises may be disregarded".
—*Bresnahan v. Bresnahan*, 46 W. 385, 388.

14. In case of a breach of a bond for maintenance of parent by child, secured by mortgage, it is held, that foreclosure and sale "is the proper remedy, and not rescission of the contract as in *Bogie v. Bogie*, 41 W. supra, and *Bresnahan v. Bresnahan*, 46 W., supra." (In *Glocke v. Glocke*, 113 W. post, this case is overruled, the court saying that its doctrine, as well as that of *Bogie v. Bogie*, "so far as it is to the effect that relief in such a case cannot go upon the ground of forfeiture for non-performance of a condition subsequent, is not the law".)

—*Peterson v. Oleson*, 47 W. 122, 130.

15. "In *Bogie v. Bogie*, 41 W. supra, it was held, on principle and authority, that an entire failure to perform covenants for support and maintenance, which constituted the consideration for a conveyance, was sufficient to authorize a court of equity rescind the conveyance".

16. "The rule of *Bogie v. Bogie* was reasserted in *Bresnahan v. Bresnahan*, 46 W. supra, and must be regarded as the settled law of this state".

17. "The covenants of Mrs. C. to support and maintain the plaintiffs were not assignable, and died with her. Her death, a few months after the conveyance, put an end to the obligation to maintain the plaintiffs." "The consideration for the conveyance has failed, and, under the circumstances peculiar to cases of this class, the conveyance ought to fail with it".

18. And it is said that if the deceased "expended more for the support" for the short time "than she received", that probably her estate might receive such excess "to be paid as a condition of relief" by rescission.
—*Bishop v. Aldrich*, 48 W. 619, 622.

19. In case of a deed, containing an agreement, with a bond for support secured by mortgage, parol evidence, to include personal chattels, was held inadmissible to vary the written agreement. See *PAROL*.

—*Het, Admr. v. Heller*, 53 W. 415, 418.

20. "Notwithstanding the strict rule which prevails in construing conditions subsequent, it is not difficult to hold that a condition, the breach of which is good ground in equity for cancelling the conveyance of which it is a part, is a condition subsequent, unless there is something in the instrument to show that such a condition was not intended", especially where such condition is for the support of the parents by a son.

21. And it is here held that a covenant for support is construed as a condition subsequent, and for a breach thereof, the conveyance was rescinded, the son having left the premises and the parent having assumed control.

—*Blake v. Blake*, 56 W. 392, 397.

22. Where a mother makes a conveyance to her daughter in consideration of the support of the grantor and a weakminded son, the grantee and her assignee will not be disturbed as long as "he has done and is ready to do all that equity requires of him".

23. "In case of such failure hereafter, the court on proper proceedings will cancel the conveyance to J. (the grantee), and from her to him, (her assignee), without hesitation. (Cases, supra)".

—*Dailey v. Kastell*, 56 W. 444, 453.

24. Stipulations and covenants in conveyance by parents to a son and wife, for support of the grantors, are held to be conditions subsequent, under, "the rule of construction which prevails in the case of a voluntary conveyance. *Horner v. C. M. & St. P. Ry. Co.*, 28 W. 165;" and the cases of *Bogie v. Bogie*, 41 W. and *Bresnahan v. Bresnahan*, 46 W., supra, are followed.

25 "In *Blake v. Blake*, 56 W. supra, it was said in substance, that in such a case stipulations in the conveyance might be held conditions subsequent, which in other and different cases would be held covenants merely".

26. On condition broken, and re-entry, and the conveyance containing an agreement to that effect, the value of the grantee's permanent improvements are allowed in this action of ejectment, but against such value, "the plaintiff must be allowed all unpaid sums", stipulated to be paid up "to the commencement of this action".

—*Delong v. Delong*, 56 W. 514, 518.

27. An agreement, by a son with his mother to "return home and take care of his parents while they lived, stay on and work the farm, he should have it and all that was on it", executed "faithfully for twelve years or more", making improvements etc., with such agreement evi-

denced by oral testimony of the contents of a lost letter of the mother, the son being in possession at the parents' decease, is upheld and enforced.

28. Evidence "that the defendant failed to supply his parents with proper clothing, etc", is held to be "confined to showing that Mrs. T. was dissatisfied and repudiated the contract;—

29. That if she did not choose to repudiate it, it was immaterial whether the defendant fully performed". "No doubt Mrs. T. could waive a strict performance on the part of the defendant".

30. A fifteen year lease given by the mother to her husband, shortly before she died, "doubtless voluntary", was held to be taken "chargeable with notice of defendant's rights".

31. A petition for administration filed by the son and his claim "that the estate was indebted to him for improvements", services and support of parents, with no action thereon but issuance of letters, which proceedings he was induced to begin by advice of counsel that "he could not hold the farm under his contract", was held not to be an estoppel.

32. Granting the letters did not "adjudicate upon or settle any question of title to real estate". —*Thrall v. Thrall*, 60 W. 503, 506.

33. As to a conveyance of realty to an adopted son, with conditions therein for a portion of the proceeds and buildings to the grantors during their lifetime, and certain payments to other heirs at the decease, and also a bill of sale of personalty at the same time, it is held:

34. "The conveyance of the real estate and the bill of sale of the personal property, although separate instruments, are founded upon a single agreement", and will "be construed together as evidences of one agreement", with the same effect as if the whole agreement had "been embodied in a single instrument".

35. "Disregarding mere form, and looking only to the substance", the conveyance "created a trust in the property conveyed for the support and maintenance of the intestate and his wife during their lives, etc."

36. "True, the condition expressed in the conveyance is not, in form, for such maintenance, but that is its plain and obvious import," and on a failure to so fulfil, "a court of equity would promptly have rescinded the conveyance and restored the property to the intestate. (Cases, supra)".

37. "The condition for the payment of the specified sums to all the other children is an express trust created by the intestate in their favor", in principle the same as "a similar provision in a will".

38. It "was a conveyance or transfer of his property by the intestate in trust for his own use, and hence", "under sec. 2306, the same is void as against his creditors, existing or subsequent".

39. "The fact that the defendant had previously made advances of considerable sums of money to the intestate does not change the character of the conveyance, or strengthen his title to the property as against such creditors."

40. As to increase of cows so purchased, "as to creditors such increase belonged to the estate". The suit was brought under sec. 3832, where there was a "deficiency of assets", to recover property conveyed by "the intestate during his lifetime". —*Severin v. Rueckerick*, 62 W. 1, 5.

41. "Considering the relationship between the plaintiff and defendant, as mother-in-law and son-in-law, during the whole time she was an inmate in his family he was not entitled to any compensation or remuneration for her board, support, and maintenance therein, unless it was agreed between them that he should be paid by her".

—*Austin v. Moe*, 68 W. 458, 461.

42. Under a conditional devise for maintenance, it is held that "failure of A. to demand her support did not release S. from his liability to furnish it.

43. But it was competent for A. to waive her right to it, as was held in *Jenkins v. Stetson*, 9 All. 128.

44. While her husband lived, it was his duty under the law, to maintain her. At the same time it was the duty of S. to do so under his father's will. She could elect upon which of them she would cast the burden. She received her maintenance from her husband, and thus elected to look to him for it, instead of S. This was a waiver by her of the obligation of S. until the death of her husband, which revived the obligation". See also CONSTRUCTION OF WILLS.

—*Dickson v. Field*, 77 W. 439, 447.

45. Where a widow deeded her land to a nephew with an agreement back for her support during life, and after a few years the nephew died and his representatives went into possession,—on suit brought by the widow to set aside the conveyance, it was "found that there had been a breach of such conditions", and the decision of the circuit court awarding the defendants damages for part support of the widow as a condition of setting aside the conveyance, was disapproved, it being held that the principles in such a case "go upon the theory that property thus conveyed shall remain intact for the security of the conditions thus annexed to the grant."

46. The trial court's decision seems to have been erroneously "based upon the theory that the property thus conveyed should be held" to "be expended for the support" etc., "of the grantor, with the right to permanently retain all not so expended", with the further right of the grantee at his option to discontinue the arrangement, "and reclaim all he had expended, less rents and profits actually received," which would be unjust and "contrary to the rule (thus) established by this court".

47. "We are inclined to think, however, that it is no violation of that rule to allow the defendants for the \$150 expended in making permanent improvements on the land, less the \$50 damage to the premises by reason

of timber cut and removed therefrom. *Blake v. Blake*, 56 W., supra; *Delong v. Delong*, 56 W., supra.”

48. “This court has by a long line of adjudications settled the rule that for such breach of conditions a court of equity will, upon proper pleadings, set aside such conveyance and agreement, and do equity between the parties, especially in favor of an aged woman in the condition of the plaintiff at the time of the execution of the papers in question. *Bogie v. Bogie*, 41 W. supra; *Bresnahan v. Bresnahan*, 46 W. supra; *Blake v. Blake*, 56 W. supra; *Delong v. Delong*, 56 W. supra; *Divan v. Loomis*, 68 W. 150; *Stoel v. Flanders*, 68 W. 256; *Hartstein v. Hartstein*, 74 W. 1; *Dickson v. Field*, 77 W. supra. See also *Martin v. Martin*, 44 Kan. 295”. (This case is distinguished in *Lowrey v. Finkleston*, 149 W. 222, 223, the court indicating that the decision went on the ground that here “the breach was wholly by the grantee”, as the reason for disallowance of damages for support).

—*Morgan v. Loomis*, 78 W. 594, 600-1.

49. On a deed by parents to son, and maintenance bond in the sum of \$2,000 to them, secured by mortgage on the premises, the conditions being fulfilled except as to the payment of \$337.50,—it is held, on foreclosure, that under section 2890, “the proper practice now is to render judgment for the amount which is due for the breach of the condition of the bond”.

50. “The penalty of the bond is of no significance as indicating an intention that the obligor should pay for the farm”. It “is a mere nominal sum” to cover all possible damages for a breach.

—*Heidtke v. Krause*, 97 W. 118, 120.

51. On a conveyance by parents to a son of their farm and personal property, and an agreement for their support and ‘to care for them in all things’ during their lives, with a mortgage back to secure the same, the agreement requiring personal care by the son, and he getting married and removing several miles away, and their being substantial breaches, it is held,—

52. That judgment be rendered “rescinding and setting aside the said agreement, and the deed of conveyance and bill of sale”, and granting “restitution of said premises”.

53. “The performance of the condition upon which the conveyance and transfer were made was executory, and when taken and construed together, they appear to have been taken and held by the defendant under a condition subsequent for the support and care of his aged parents. (Cases supra)”

—*Knutson v. Bostrak*, 99 W. 469, 483.

54. Referring to *Bogie v. Bogie*, 41 W. supra, and *Frederick v. Douglas Co.*, 96 W. 415, where parents conveyed their homestead to a daughter for support during their lives, and, she failing, assigned her interest to a son-in-law with the consent of the beneficiaries, and he carried out the

agreement until the decease of the surviving parent,—on application of the heirs, the court declined to rescind the agreement, on the ground of laches on the part of the heirs who, for several years neglected to proceed.

—*Cross v. Bowker*, 102 W. 497, 500.

55. Where a father deeded his farm to his son, with a separate written agreement for support and maintenance, secured by a mortgage on the premises, and there was a failure to carry out the agreement, and the son removed from the premises,—in an action in equity to enforce rescission for non-performance, it is held:

56. "That the doctrine of *Peterson v. Olson*, 47 W., supra," and "of *Bogie v. Bogie*, 41 W., supra, so far as it is to the effect that relief in such a case cannot go upon the ground of forfeiture for non-performance of a condition subsequent, is not the law;

57. And that by repeated decisions of this and other courts the law has been firmly established that where a son obtains title and possession of his father's property, giving as a consideration therefor his promise to support the grantor for life, such promise, whether the manner in which it is to be kept be definitely specified in the writings or not, is not delegable;

58. That the property conveyed is held upon condition subsequent;

59. That for a breach thereof the title thereto will, at the election of the grantor, no sufficient equitable consideration to the contrary standing in the way, revert without judicial aid, the same as in any other case of breach of condition subsequent;

60. And that the grantor may have the aid of a court of equity for such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto, removing any adverse claim or outstanding paper in regard thereto that may exist, which might be used presently or in the future, prejudicially to him";

—*Glocke v. Glocke*, 113 W., 303, 321.

61. As to a deed from father to son, and a bond for support by the latter, secured by mortgage, the rule of *Glocke v. Glocke*, 113 W., supra, is stated and followed, and exclusion of "the testimony of the father tending to show that the defendant's breach of his contract was wilful and without excuse," is held error.

62. If the "failure to furnish board was without justification," the plaintiff "was entitled to have the conveyance cancelled upon surrender by him of the \$1000 cash or notes which he received as the first payment".

—*Wanner v. Wanner*, 115 W., 196, 199.

63. Plaintiff made a will and a conveyance giving her property to a grand-daughter, the latter giving back a bond and mortgage for life support of the grantor, and while executing the agreement died "unexpectedly". "Then the plaintiff manifestly discovered that she had not fixed her property as she would have done had she anticipated such a

contingency". Held, in the absence of fraud, that "that is no ground for setting aside the transaction".

—*Haynes v. Harriman*, 117 W. 132, 141.

64. Conveyance of land in consideration of support, between parent and child, created an estate upon condition subsequent. Election to rescind, conditions of title, and as to notice thereof, considered and determined, on the facts, cases, *supra* followed.

—*Gall v. Gall* 126 W. 390.

65. In case of conveyance from parents to son and bond for support in return (See same case, 115 W. *supra*), where the plaintiffs (parents) "first breached the contract", and "made it practically impossible for the defendants to carry out their agreement to furnish board, fuel, and personal services," it is held:

66. "Plainly they could not demand rescission", and perhaps had "forfeited their right to enforce the conditions of the bond as to board and personal service.

67. Certainly they have no ground for complaint", that they are to receive "all the money payments agreed on, besides a full money equivalent for the board, fuel, and personal services provided for in the bond".

68. The fact "that the court has made a new contract for the parties", "might indeed be a serious objection were the defendant's here appealing from the judgment, but they are not.

69. The question is, upon the plaintiff's appeal, whether the judgment does not give them as much as or more than they are entitled to".

—*Wanner v. Wanner*, 134 W. 71, 73.

70. In a contract for conveyance of lands to a daughter and her husband for support, etc., "the majority of the court", on the facts, find "a breach of a condition subsequent which entitled the defendants (parents) to rescind and re-enter for condition broken and thereby become repossessed of their former estate, under the rule of *Glocke v. Glocke*, 113 W. *supra*; (other cases)".

71. "The plaintiffs having breached the agreement before the commencement of the action, the defendants' right to rescission was complete, and the defendants were entitled to enforce it under their counterclaim. (Cases, *supra*)".

72. Permanent "improvements having been made by consent of both parties to the contract", "the ordinary rule does not apply, but the reasonable value of the improvements, not exceeding the actual cost, should be ascertained and allowed".

—*Mootz v. Petraschefski*, 137 W. 315, 322.

73. In a suit by the administrator of W., deceased, for rescission of a contract for maintenance of W. and her husband, by defendant F. and his wife A., the latter having "died pending the litigation, and" is represented by her executors,

74. It being shown that F. and A. "by means of undue influence" "induced the making of the contract and the transfer of the property from W.",—it is held:

75. "In such case, where two persons jointly commit a tort, fraud, or wrong, and the right of action therefor survives (see same case, 132 W. 593, ACTIONS BY EXTR., ETC.),

76. And afterwards one of these wrongdoers dies and his executor or administrator is substituted as defendant, the judgment at law cannot ordinarily be a joint one".

77. "In a suit in equity for rescission like this the court should find" separately, and enter judgment against the executor only for what was "wrongfully taken" by the deceased, to "be collected only out of the estate represented. (Cases)".

—*Borchert v. Borchert*, 141 W. 142, 144.

78. Where a mother J., conveyed her realty to plaintiff, a son, "in consideration of a bond for her support" and "took a mortgage from the plaintiff to secure" such bond, and "died intestate, without property", leaving a husband and children, and there having been "no administration" of her estate,—in "an action to quiet title", it is held:

79. "It is obvious that the plaintiff was entitled to have the alleged rights of J.'s heirs under the mortgage ascertained and determined. This could not be accomplished" under an "ex parte application" by "order of discharge entered by a (circuit) court under" sec. 2252, which "would not bind the heirs who could not be made parties thereto.

80. To obtain such relief necessitated the institution of an action whereby plaintiff could compel the defendants to assert such rights as they might claim to have under the mortgage".

81. "An action for the removal of the cloud created by this mortgage on plaintiff's title to these premises is the appropriate remedy for relief".

82. (While apparently overlooked in this case, it would seem that the appointment of a special administrator, with or without notice as the county "court shall determine", for the specific purpose of satisfying such mortgage, under sec. 3813a, would be a simple and appropriate remedy,—and also conclusive on the heirs if the notice provided be given).

—*Rosenthal v. Rosenthal*, 146 W. 41, 45.

82a. Where "a substantial part of the consideration was the agreement" "to render personal services," "the agreement will be treated in equity as a condition subsequent, and, if substantially broken through failure of the grantee to perform, the conveyance will be set aside. (Cases, supra).

82b. As said by this court in *Glocke v. Glocke*, 113 W. supra, courts of equity take jurisdiction in such cases not to forfeit a title, but to quiet a title already forfeited for nonperformance of a condition subsequent."

—*Lowrey v. Finkleston*, 149 W. 222, 230.

83. "Conveyances like the present, made by aged people in consideration of support and care, are deemed to be conveyances made upon conditions subsequent, and will be set aside by a court of equity upon proof of substantial failure to perform. *Bogie v. Bogie*, 41 W. supra; *Lowrey v. Finkleston*, 149 W. 222."

84. Though the title "was in the husband, the wife" "is entitled to bring an equitable action alone (the husband refusing) for reconveyance of the land and rescission", "joining her husband as a party defendant.

85. Especially is this true when a part of the premises conveyed consists, as here, of the homestead".

86. "Where the agreement" "also provides for" payments to third persons charged upon the realty, they "are not only proper but necessary parties" to such action. *Mootz v. Petraschefski*, 137 W. supra".

—*Young v. Young*, 157 W. 424, 426.

87. Where parents conveyed their farm to a son F., in consideration of an agreement and mortgage back for their support, and to pay W. \$600 and G. \$100, at certain ages, and after several years the arrangement between the parents and F. is mutually rescinded, with the knowledge and acquiescence of W., but not of G., it is held:

88. That such contract "established the relation of debtor and creditor between F. and each of the beneficiaries, which relation could not be changed merely by agreement of the parents and F. without the consent of the beneficiaries. *Tweeddale v. Tweeddale*, 116 W. 517;"

89. That W. was "estopped from asserting any claim", and also "is barred by the twenty-year statute", subd. 2, sec. 4220, running subsequent to the time of payment;

90. That "G. not being estopped or barred by the statute of limitations, is entitled to foreclose the mortgage for the amount due her under the agreement with interest". *Timlin, Siebecker, and Kerwin, J.J.*, dissent.

—*Wetutzke v. Wetutzke*, 158 W. 305, 308.

91. In a conveyance to a son-in-law, in consideration of payment of debts of the grantor, and other sums, besides support and maintenance of the grantor, where the grantee subsequently conveyed to others, it is held:

92. There being "nothing in the deed indicating that the grantee was to be permitted to pass his obligations on to his vendee", they "were expressly made personal on his part," and "any shifting of the responsibility was a breach of the condition of the conveyance.

93. Had there been no express condition, one, if necessary, would have been read out of the instrument by the rule of construction peculiarly applicable to such situations and enforced by forfeiture or otherwise, as needed for the protection of the grantors as to the dominant purpose of the grant and all which were inseparably connected therewith. (Cases)".

94. "The condition precedent" for the payment of the grantor's debt

on the land, is held to mean by the grantee,—“not by anyone else or by using the property therefor”, and payment by “taking up the old mortgage” and “by giving a new mortgage” is not payment or performance of the condition.

95. “The conveyance of land by one person to another by deed, on condition of such other paying to a third person a specified sum of money, and acceptance of such conveyance, creates a lien upon the land in favor of such third person”, (cases);

96. “But where the payment is made contingent upon a condition precedent, the lien is likewise contingent and, if the time limited for such precedent event to occur expires without its happening, the possibility of the lien ripening into an absolute interest no longer exists”.

—*Krahn v. Goodrich*, 164 W. 600.

BONDS.

See also SURETIES.

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1. Approval of administration bond is directory. "Granting of letters without such approval in form" of the bond is "at most but an irregularity, which could only be taken advantage of by appeal from the order".

—*Cameron v. Cameron*, 15 W. 1, 5.

2. Of special administrator could not stand as bond as administrator "without the formal written consent of the sureties, or a re-execution of the bond by them."

3. Court cannot "dispense with the security prescribed by statute."

—*In re Fisher*, 15 W. 511, 521.

4. Action on bond by the heir for his share "is a cumulative remedy." See LIABILITY.

—*Williams v. Davis*, 18 W. 115.

5. The appeal bond in an incompetent proceeding, "should have been executed to the guardian, who, after his appointment and qualification, may properly be denominated 'the adverse party,'" and not to the petitioner.

6. On refusal of the county judge, the relator should apply "to the circuit court for an order that the county judge fix the penalty or approve the bond *; or the circuit court may itself fix the penalty and approve the bond, so that the right of appeal shall not be lost." Mandamus is not the proper remedy.

—*State ex rel. Tallmadge v. Flint*, 19 W. 621, 623.

7. Where the bond filed on sale of minor's real estate "was and still is sufficient," and the purchase money has "been faithfully applied

and fully accounted for," a failure to "formally approve" the same cannot collaterally invalidate the sale as "it is at most a mere formality, not affecting the validity of the sale."

—*Emery v. Vroman*, 19 W. 689, 700.

8. "When no exception is taken by the adverse party to the sufficiency of the sureties, and the county judge receives the appeal bond without objection, and places it with the appeal papers, this will be regarded as a sufficient approval" without formal "approval thereon endorsed in writing".

—*Bowles v. Page*, 20 W. 309.

9. An administrator de bonis non can bring an action on the bond of a deceased executor. See ADMR. DE BONIS NON.

—*Golder v. Littlejohn*, 23 W. 251, 254.

10. "This is not a personal privilege, which such attorneys may waive, but the law evidently intends to disqualify them from entering into such contracts". But the court was not "bound to take judicial notice of who were practicing attorneys in this state, and who were not".

11. The fact that a surety was a practicing attorney "should have been shown by affidavit. And, in the absence of all proof upon the point, the court was right in assuming that there was no legal objection to the sureties, and in holding the undertaking sufficient".

—*Cothren v. Connaughton*, 24 W. 134, 137.

12. The statute (sec. 2590) excluding attorneys from becoming sureties, "was, undoubtedly, intended, according to its plain import, to include every action, and to forbid a practicing attorney or counselor from becoming bail or security in any case", whether "professionally engaged or interested", or not.

13. "An attorney or counselor at law, practicing in any county of the state, can, under no circumstances, be taken or received as bail or security in any action, civil or criminal".

—*Gilbank v. Stephenson*, 30 W. 155, 156.

14. In an action on the bond, the executors having failed to render an account, "their failure to do so is a breach of the condition of the bond", and "judgment for the penalty named therein was properly rendered," but execution issued only for the sum unaccounted for with interest.

—*Golder v. Littlejohn*, 30 W. 344, 349, 356.

15. An action on an administrator's bond "is brought upon a sealed instrument, and the cause of action accrued" upon the date of settlement of his final account. It may be brought at any time within twenty years thereafter.

—*McGonigal, J. v. Colter*, 32 W. 614, 624.

16. In an action on an administrator's bond, the "certified copy of the order of distribution", "was competent evidence to show a breach

of the bond", without the production of "the records of the prior proceedings in the probate court".

17. The fact "that no demand was made upon the surety in the bond", is immaterial, the statute (sec. 4014) not requiring it.

18. "The demand was made by the attorney who appeared for the creditors in the probate court on the final accounting; and presumptively he had authority to make demand of payment on behalf of his clients. *Thomas v. Steele*, 22 W. 207".

19. The fact that "no notice was given the administratrix or the surety of this application for leave to commence the action", was immaterial, as "the statute (4016 Sec.) does not make such a notice necessary", and on default "the judge is then authorized to grant the permission *ex parte*". —*Elwell v. Prescott*, 38 W. 274, 278.

20. After an accounting in the county court, and judgment in the circuit court thereon against the guardian and a surety, such surety sued his co-surety for contribution; held,—

21. "The sureties were concluded by the order of the county court as to the amount due. The order shows that the sureties appeared by counsel before that court on the hearing and final accounting of the guardian".

22. "But even if they had not appeared at the accounting, we are still inclined to hold upon the authorities, considering the matter of their contract and the relation they occupied to the guardian, that their responsibility would be fixed in a proceeding to which they were not parties, and where they had no opportunity to contest the amount due".

23. Though, as a general rule, judgments bind only parties and their privies, yet, "it is conceded that whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment. (Wis. cases cited)".

24. "The sureties upon the bond of an administrator are bound by a decree against the administrator finding assets in his hands and non-payment of them over, to the same extent to which the administrator himself is bound. *Stovall v. Banks*, 10 Wall. 583; etc".

25. "The sureties are not to be concluded by a judgment suffered collusively by the administrator (cases); but as to all matters of defense going to the merits of the debt as between the original parties, the judgment against the administrator is held conclusive in an action upon the bond".

26. "The sureties, as well as the principal, are estopped from controverting the correctness of the order ascertaining the amount" found due on the accounting. —*Shepard v. Pebbles*, 38 W. 373, 378.

27. "Probably, in any case, the special administrator" as the adverse party prior to probate, is the proper party to whom "the appeal bond should run". See also APPEAL.

28. "Obviously a clerical mistake" in the given name of the special administrator in the appeal bond, is not "sufficient to defeat the bond".

—*Appeal of Mullins*, 40 W. 154, 155.

29. On demurrer sustained in an action on a guardian's bond, where the complaint sets out the bond and the penalty due, it is held that this is not an action "for the payment of money only", and that "in actions brought on official bonds, this court has held that a breach of the bond must be clearly shown (cases cited); and we see no ground for a distinction between those cases and this".

—*Carrington v. Bayley*, 43 W. 507, 508.

30. A complaint in an action on a bond is given a liberal construction, "but not more liberal than it should receive for the purpose of sustaining it when it is assailed for the first time on the trial", where the allegations are appropriate in part under one section, but construed as proper under another section for such action on the bond.

31. "The failure of the administrators to return an inventory of the estate of their intestate within three months, and their failure to render an account of their administration within" the time required by law, without citation, are held breaches of the bond.

—*Johannes v. Youngs*, 45 W. 445, 447.

32. Where a foreign guardian's bond under the statute "was made and delivered to the surrogate", previous to the appointment of the guardian, it is held: "But, without such statute, a bond so given would take effect upon the appointment of the guardian, and its date would be immaterial.

33. Besides, the sureties are estopped by the bond itself from denying its legal effect as a guardian's bond. *Single v. Barnard*, 29 W. 463".

34. Whether a suit by guardian on a bond "should have been brought in the name of the guardian as plaintiff, instead of the infant by her guardian, is not of much importance, and at most a mere formal irregularity", but "it is our opinion that this action is properly brought in the name of the ward by her guardian".

—*Vincent v. Starks*, 45 W. 458, 463.

35. The order disallowed the claim "as the claim of K & N", partners; "we think it was regular, therefore, for the claimants to give their bond (on appeal) in their partnership name, and that there can be no exception to it upon that ground.

36. As the bond was approved by the county judge, in the absence of all proof upon the subject, it must be presumed it was executed so as to bind both the partners.

37. A bond signed by one partner in the partnership name will bind all the partners consenting to such signature. (Cases).

38. If the partners are bound by the bond, then they have promised to pay, and have bound their heirs".

39. The word "as" inserted before "administrator", the adverse party in an appeal bond, is not necessary to the validity. See also *EXTRS. & ADMRS.*

40. "The rule applicable to bonds in cases of this kind is, that if the bond substantially covers the provisions of the statute, and secures to the appellee all that the law designed for him, it is sufficient. The language of the statute need not be adopted. (Cases)".

—*Kasson v. Est. of Brocker*, 47 W. 79, 85.

41. It is held "that the objection of want of authority to sue the bond (of administrators) is in the nature of a plea in abatement, and that, to entitle a party to the benefit of such a defense, he must specially set it up in his answer at the proper stage of the cause".

42. On petition for leave to sue, an order "on the back of a certified copy of the bond", "stating in substance, that it appeared to" the satisfaction of the probate judge, that petitioner was a creditor; that the administrators failed to file an inventory and render an account within a year, and that he therefore "authorized an action to be brought on the bond", signed by the judge, is "sufficiently formal to meet the requirements of the statute. (Sec. 4014)".

43. If "the county judge could revoke the authority granted after an action had been commenced for a breach of the bond", nevertheless "it was improper to raise any such issue after pleading in bar to the action and going to trial of the cause upon the merits".

44. As to entering judgment "for the penalty of the bond,—that would be the form of the judgment, undoubtedly, at common law;

But the question whether or no the rule has been changed by the" statute, was not discussed nor decided.

—*Johannes v. Youngs*, 48 W. 101, 103.

45. An additional bond is held valid as such, though "the bond given under the order of the court did not on its face recite that it was given as an additional bond by order of the court. It was in the same form as though it had been given as an original bond upon the appointment of the guardian".

46. "It is evident to us that the surety on this bond is not only liable for the failure of the guardian to account for the moneys received by him as guardian after the bond was executed, but he is equally liable for all money in the hands of the guardian belonging to the wards at the time the bond was executed". (Quoted approvingly in *Brehm v. U. S. Fidelity & G. Co.*, 124 W. post).

47. "To release the surety upon the subsequent bond, for money received by his principal before he became bound, either the evidence must show an actual conversion of such money by the principal, or such facts must be shown as raise a presumption of such conversion. This seems to have been the opinion of the supreme court of the United States in the case of *U. S. v. Giles*, 9 Cranch. 215, 237".

48. Where, at the time of giving the additional bond, the "account was examined and allowed by the court", and it "shows affirmatively that there had been no waste of the trust funds by the guardian", then "no presumption of any misappropriation of this trust money arises from the fact that some of it had been received", several years before.

49. The fact "that the guardian was insolvent at and before the time the bond in controversy was signed", is "not in any way inconsistent with the fact that he had on hand this trust fund."

50. "The surety upon the second bond given by the guardian was not liable for any default of the guardian, or waste of the trust funds, which took place before such second bond was executed;"

51. But such sureties "are liable for any subsequent waste of the funds on hand at the time the bond was given, as well as of the waste of the money which came to his hands after the signing of the bond."

52. It is held that a guardian's bond under section 3966, is not "classed among the bonds mentioned in secs. 4015 and 4017", relating to "those given by administrators, executors and testamentary trustees" to "the judge of the county court", where judgment cannot exceed the penalty and costs, but that such guardian's bond as to "form of the judgment" is ruled by sec. 2890 which "was not enacted" to define or limit the judgment thereon, but "that question must be determined upon general principles of law". (Whether the amendment to sec. 3966, by Ch. 351 L. 1899, changing the obligee from the ward to the "county judge," as in the other bonds, effects the foregoing, is doubtful).

53. "We think the authorities in this country establish the doctrine that when the damages resulting from the breach or breaches of the bond exceed the penalty, interest on the amount of the penalty may be recovered from the time of the breach in excess of the penalty."

54. This rule must be limited to cases where interest is recoverable against the principal upon the damages resulting from the breach of the condition of the bond. *U. S. v. Arnold*, 1 Gall. (U. S. C. C.) 348, 360; (other cases); *State v. Homey*, 44 W. 615, 621."

55. The court does "not determine" when the interest on the penalty begins, i. e. whether from "the breach of the bond" or from "the commencement of the action". (Referring to this case in *Whereatt v. Ellis*, 103 W. post, it appears that interest is recoverable from the time of the breach, "if the principal is liable for interest from that time").

—*Clark v. Wilkinson*, 59 W. 543, 546.

56. A bond on license to sell realty "is not a bond of indemnity to pay all damages which may result from the default of the administrator."

57. The liability in default, with costs of prosecution were allowed, but not counsel fees. See also CONTINGENT CLAIM.

—*Mann, Judge v. Everts*, 64 W. 372, 380.

58. "It seems to be quite well settled that the failure of the principal to execute a joint and several bond does not invalidate the same as to a

surety, unless there was an express agreement that the bond should not be valid until so executed"; and it is so expressly held as to a county treasurer's bond.

59. "Taylor v. Coon, 79 W. 76, was an action on an obligation not executed by all the persons named therein as obligors". It was there intimated "that the instrument was incomplete for that reason, and could not be upheld against an obligor executing the bond until all such persons had executed it, unless he consented to dispense with the signatures", but "in the light of our further investigation of the subject in this case we are constrained to withdraw such intimation".

—*Douglas Co. v. Bardon*, 79 W. 641, 644.

60. Where an administratrix fails "to make and return any inventory of the estate which came into her possession, within the time prescribed, or at all (sec. 3821)", and also fails to administer the estate, "such failures operated as a breach of the conditions of the bond, and authorized a recovery under the third subdivision of sec. 4014".

—*Ellis, Judge, v. Johnson*, 83 W., 394, 396.

61. As to the effect of a bond not being retroactive for prior acts of the person appointed guardian. See GUARDIAN AND WARD. SURETIES.

—*Holden v. Curry*, 85 W., 504, 510.

62. As to an undertaking by an administrator of one estate, on an appeal from a judgment in another estate, being necessary. See APPEAL.

—*In re Steiner's Est.*, 91 W., 399, 406.

63. An administrator, required to give an additional bond, left such bond, filled out except as to sureties, with the cashier of a bank, who obtained the signatures of two directors, J. and H., "with the understanding that he was to obtain the signatures of the other directors of the bank before delivering it," but, without so doing, the county judge called "and obtained the bond without knowledge of any condition affecting in any way its validity, filed and approved it," there being "nothing on the face of the bond indicating that the other sureties were expected to sign;" held,—

64. Generally, that "the courts are now well-nigh unanimous that, if a surety clothes his principal with apparent authority to deliver a bond bearing no indication on its face that others are to sign it, and it is delivered to the obligee and acted upon by him without notice of any condition, the surety is bound. In the present case", the situation is "the same, in legal effect."

65. And while the cases *Beloit & M. R. Co. v. Palmer*, 19 W., 574, and *Chipman v. Tucker*, 38 W., 43, may indicate a different rule, yet "they differ from the case in hand in that they involved business transactions between man and man only, where the grantee is perfectly able to ascertain and investigate the status of the transaction", while,

66. This case involves "the considerations of public policy and the preservation of the estates of widows and minors, which are" strongly set forth in *Dair v. U. S.*, 16 Wall. 1, and *State v. Peck*, 53 Me., 284, and "if it be necessary to draw a distinction between those cases and the present case, it may with justice be drawn at official and probate bonds." Sureties held liable, in an action on such bond. (Followed as to incorporation certificate, in *Rehbein v. Rahr*, 109 W., 136, 145).

—*Belden, J. v. Hurlbut*, 94 W., 562, 568-70.

67. Where a guardian of a supposed incompetent, was appointed by the order of the county court, "and he gave his bond, with the defendants as his sureties, and by means thereof obtained possession of \$20,000 worth of property", and which order appointing the "guardian was afterward adjudged void for want of jurisdiction, by the circuit court", —In an action by a judgment creditor of the ward, against the principal and sureties upon the guardian's bond, it was held that, "it was, within the rule of a vast number of authorities, a good voluntary bond in the hands of" the supposed ward, and good against the principal and sureties.

68. (In *Dudley v. Rice*, 119 W. post, in an action on the same bond, this case is distinguished from *Conant v. Newton*, 126 Mass. 105, contra, on the ground that the Wisconsin bond provides for settlement "either with the county court or with the ward, if she be of sound mind", while the alternative to settle "with the ward is not found in the Massachusetts bond").

—*Hazelton v. Douglas*, 97 W. 214, 217.

69. Where the undertaking on appeal "was in literal compliance with the statute, except that it omitted the words 'to effect,' " it is held to be a substantial compliance and sufficient.

70. "A substantial compliance with the statute (sec. 4032) is sufficient to confer jurisdiction on the appellate court. *Kasson v. Est. of Brocker*, 47 W. supra; *West v. Eau Claire*, 89 W. 31".

—*C. & J. Michel B. Co. v. Est. of Wightman*, 97 W. 657, 660.

71. The bondsmen and "the executor are concluded by the judgment of the county court", as to payment of claims, and direction to bring suit on the bond. See CLAIMS. JUDGMENTS.

—*Roberts v. Weadock*, 98 W. 400, 405.

72. It being discretionary for the court "to grant or refuse" a stay, "the security as a consideration for the stay" "was ample consideration for the bond" to pay a judgment if affirmed on appeal.

73. "The circumstance mentioned in the undertaking", having occurred, a "subsequent perpetual stay of execution" as to the principal, by reason of his discharge in bankruptcy, "did not affect the liability of the sureties", as the right "to proceed against the sureties on the undertaking had become a vested right of property and it could not be

divested by a discharge of the principal by operation of law. That is elementary". Brandt, Surety & G. 150. (Followed in Pope v. Title G. & S. Co., 152 W. 611, 618).

74. "The judicial rule here, as to interest, is that when the damages for the breach of a penal bond exceed the penalty, the obligee is entitled to interest on the penalty,

75. The interest period, however, to be controlled by the right of the obligee to interest upon the damages against the principal", Clark v. Wilkinson, 59 W. supra,

76. Under "the rule that the time of the breach of the bond fixes the beginning of the interest period; if the principal is liable for interest from that time. Suth. Damages, 477; U. S. v. Arnold, 1 Gall. 348".

77. Where "no demand is necessary to start the interest period against the principal, none is required against the sureties".

78. "The question of whether interest on the penalty was recoverable in this case (against such sureties) is determinable by the rules that govern other money demands on contracts", and "this subject was recently" "fully covered" in Laycock v. Parker, 103 W. 161 (See INTEREST).

—*Whereatt v. Ellis*, 103 W. 348, 352.

79. A bond by a corporation may be signed by the proper officers as such, without signing the name of the corporation. See OFFICERS.

—*Fond du Lac v. Est. of Otto*, 113 W., 39, 42.

80. It is mandatory for trustees under a will to give bond before acting, though title vests. See TRUSTS.

McWilliams v. Gough, 116 W. 576, 584.

81. In an action by the supposed incompetent ward against the principal and sureties on the bond given in void guardianship proceedings (see *Hazelton v. Douglas*, 97 W., supra), the bond though void as a guardian's bond,

82. It is held "that the bond may be enforced as a voluntary obligation to the extent" that the sureties by signing the bond "enabled D. (the guardian) to retain and collect the income of the plaintiff's estate under the promise that he would account with her and pay it back to her when she became of sound mind,

83. And we think that they ought not now to be heard to urge lack of jurisdiction in the court as a means of escaping from this definite agreement."

84. "The general principle is that a bond not required by statute is binding at common law if given voluntarily for a valid consideration, if it be not repugnant to the letter or policy of the law. (Citations)".

85. But as under sec. 3968 an action against the sureties not "commenced within four years from the time when the guardian shall have been discharged", is barred, and as "the guardian was in legal effect

discharged when the guardianship proceedings were reversed and held void", more than four years before, it is held,—

86. "The action is barred not because the statute of limitations operating on the guardian's bond, but because, in contemplation of law, the parties put this limitation in their (bond) contract, and it cannot be taken out of the contract, even though it be now discovered that it never was a guardian's bond".
—*Dudley v. Rice*, 119 W., 97, 100.

87. Attorney's fees of a defaulting administrator held a lien properly collectible from the surety. See ADMINISTRATION EXPENSES.

—*Carpenter v. U. S. F. & Guaranty Co.*, 123 W. 209, 212.

88. Where a guardian of an incompetent gives a new bond "pursuant to an order of the county court" reciting "that such bond was 'to take the place of a bond'" previously given, upon filing his account, which was filed, and approved by the order which thereupon released the sureties and principal "from any further liability on" the old bond,—

89. But no notice as to such new bond, under sec. 3967, "was ever given", and "no examination of the guardian's account was ever had, as prescribed by" sec. 3972, and no proceedings for a new bond and the discharge of sureties under sec. 4281b, were had; therefore,

90. "Since no steps were ever taken as prescribed by statute to relieve the sureties or to discharge" the guardian "as principal on the original bond, it is obvious that the bond in question must be regarded as an additional or cumulative bond, as mentioned in the statute. Sec. 3967".

91. *Holden v. Curry*, 85 W. supra, distinguished as applying to a person "intermeddling" before being appointed guardian, and *Clark v. Wilkinson*, 59 W. supra, quoted and followed making the guardian liable, the account not having been properly settled, for conversion and defalcation existing at the time such bond was given.

92. Notes payable to the guardian individually, are presumed "falsely credited in his account with the estate", or "previously converted" "to his own use from the estate", and such new surety held liable therefor;

93. And a note and mortgage executed by the guardian individually to the ward, being an attempt "to loan the funds of the ward to himself could not in any way lessen his liability, as such guardian, upon the bond in question, nor the liability of his surety thereon". *Hutson v. Jensen*, 110 W. 26 (See ACCOUNTS OF GUARDIANS).

—*Brehm v. U. S. F. & Guaranty Co.*, 124 W. 339, 347.

94. An undertaking in the sum of \$250 that appellants "would diligently prosecute their appeal to effect and to pay all damages and costs which might be awarded against them on such appeal", duly approved, "conformed strictly to the statute, sec. 4032," and was "sufficient to give the circuit court jurisdiction". (Many cases):

95. The provision of sec. 4013, as to "a bond running 'to the judge

of the county court',” is held to have “no application” to such undertaking.
—*Zahorka v. Geith*, 129 W. 498, 503.

96. “The surety on the bond given on appeal from the county to the circuit court” is “not liable on such bond for the costs incurred on the appeal to the supreme court”;

97. As the statute, sec. 4032, restricts “the obligation of the surety to the payment of the costs and damages awarded against his principal in the circuit court on appeal from the county court”.

—*Breed v. Weed*, 130 W. 264, 265.

98. The county judge has power to accept bonds and issue letters to executor after twenty days from an order appointing, and after stay granted. See also STAY OF PROCEEDINGS.

—*Schnorenberg v. Schnorenberg*, 150 W. 537, 539.

BOND TO PAY DEBTS AND LEGACIES.

Final judgment, effect, 6.

Property subject to debts, 7.

Remedy of creditors, 2.

Not limited to bond, 8.

Action in circuit court, 9.

Title: of whole estate, 1, 3.

Passes by the will, 4.

Further proceedings, 5.

1. As to a bond of the executor and residuary legatee, under sec. 3795, “to pay all debts and legacies of the testator”, it is said: “The effect of the bond is to pass to the executrix and sole legatee the absolute title to the whole estate, and to terminate the administration”.

2. That the claims became “claims against the sole legatee, and the remedy of general creditors of the estate was thereafter upon the bond or against the legatee, and not against the estate”. (Overruled in *Pym v. Pym*, 118 W. post).
—*Will of Cole*, 52 W. 591, 592.

3. “The mere ordering, receiving, and approving the bond” for the payment of debts and legacies, did not, ipso facto vest “the title to the whole estate, both real and personal, in the executrix absolutely and irrevocably,” under section 3795;

4. But, “such transfer is effected, if at all, by virtue of the provisions of the will as construed by the court upon (such) notice and opportunity for hearing, and not merely by reason of ordering, receiving, and approving of a bond of a particular form.” (Approvingly quoted in *Pym v. Pym*, 118 W., post).

5. Besides such sole or residuary legatee “bond, as well as the letters testamentary, contemplated further proceedings in the county court in the settlement of said estate”, and the executrix having died without further proceedings, it is held that other interested parties under the will

“are entitled to the appointment of an administrator de bonis non with the will annexed”.
—*Jones v. Roberts*, 84 W. 465, 470.

6. An order establishing a widow's right to take “as sole beneficiary” under sec. 3795, is in effect a final judgment, and appealable, and the will is construed determining the widow's right adversely. See also APPEAL. PRECATORY TRUSTS.
—*Swarthout v. Swarthout*, 111 W., 102, 106.

7. “It appears from the statutes (secs. 2270, 2277, 2281, 3862), as well as from the decisions in other states (Mass. Mich.) under similar statutes, that all property, not exempt, of which a testator dies seized is subject to the payment of his debts, whether the sole executor and residuary legatee gives the bond required by section 3795 or the bond required by the previous section. See, also, Sec. 3940. *Jones v. Roberts*, 84 W., supra.

8. In so far as” Will of Cole, 52 W., supra, is to the contrary, and as to “limit ‘the remedy of general creditors’ to proceedings ‘upon the bond or against the legatee’ personally, the same must be overruled”.

9. Where such residuary legatee bond is given, by the executrix, an action for “a just claim against the estate” was held properly brought in circuit court to “enforce payment of such claim out of the” realty not exempt. *Meyer v. Garthwaite*, 92 W. 571; (other cases. See CONCURRENT JURISDICTION).
—*Pym v. Pym*, 118 W., 662, 667.

BOOKS OF ACCOUNT.

See ACCOUNT BOOKS.

BOOKS OF SCIENCE.

Admissibility of, 3, 4.
Reading, discretion, 1.
Arguments to jury, 5.

Testifying to contents, 2, 6.

1. The reading in argument of books of science “is a matter generally within the discretion of the court, and therefore not the subject of a writ or error.”
—*Luning v. State*, 2 Pin., 215, 220.

2. It is held “that the court erred in permitting Dr. C. to testify as to what was said in standard medical works upon the subject” under consideration.

3. In *Stilling v. T. of Thorp*, 54 W. 528, “the question of the admission of medical works in evidence was fully discussed, and it was held that they were not admissible.”

4. This rule “was followed in the case of *Knoll v. State*, 55 W. 249,

256. The authorities cited clearly show the correctness of the rule stated by this court."

5. "It is apparent that if counsel are allowed to read extracts of medical authors in the argument to the jury, it would nullify the rule which prevents such extracts from being read in evidence."

6. "On account of the error in permitting the witness Dr. C. to testify as to what certain medical works stated upon the subject of inquiry, and for permitting the counsel for the state to read from medical works to the jury, the judgment of the circuit court must be reversed, and a new trial ordered."

—*Boyle v. State*, 57 W. 472, 478.

BROKERAGE.

See COMMISSIONS OF BROKERS, ETC.

BURDEN OF PROOF.

See AFFIRMATIVE. EVIDENCE. FRAUD. UNDUE INFLUENCE.

BURIAL EXPENSES.

See FUNERAL EXPENSES.

CALLING IN OTHER JUDGE.

See COUNTY JUDGE.

CEMETERY LOT.

See DEAD BODIES.

CERTIFICATE OF DEPOSIT.

See MONEY. PROMISSORY NOTES, ETC.

CERTIFICATE OF DESCENT.

See DESCENT AND DISTRIBUTION.

CERTIFIED COPIES.

See AUTHENTICATION.

CERTIORARI, WRIT OF.

See WRIT OF CERTIORARI.

CESTUI QUE TRUST.

See also TRUSTEES. TRUSTS.

Deceased cestui que trust, 1.
Extrinsic evidence, 3.

Parties to equity suits, 2.

1. The administrator of the deceased cestui que trust may obtain "an order from the county court" directing the trustee to pay over funds, "if it appears that his intestate left any debts which should be paid by this provision made for the mother (cestui que trust) in the will".

—*Batchelder v. Batchelder*, 20 W. 452, 454.

2. In general they must be made parties to suits in equity, subject to exceptions. See PARTIES.

—*Board of Suprs. v. Mineral Point Ry.*, 24 W. 93, 127.

3. Extrinsic evidence was "proper to point out and show who were the cestuis que trust intended", where referred to in a deed of a passive trust in language "otherwise unintelligible to the court". See TRUSTS.

—*Sydnor v. Palmer*, 29 W. 226, 243.

CHAMPERTY AND MAINTENANCE.

Appearance is authority, 9.
Champerty defined, 3, 11.
Contingent fee, 20.
Contributors to test case, 14.
Common interest, 15.
Common law in force, 1, 5.
Compensation of attorney, 4.
Dismissal of action, 7, 19, 21.
Division of proceeds, 10, 18.
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Interest in suit, 12, 13.
Knowledge of court, 17.
Maintenance defined, 8, 11, 16.
Percentage of proceeds, 6, 20.
Pleaded, need not be, 21.
Proved without an issue, 2.
Purchase of client's claim, 22, 23.
Stirring up litigation, 16.
Strictness relaxed, 1.
Transfer to attorney, 23.

1. While "the strictness of the law relating to champerty and maintenance has been greatly relaxed"; yet it is "an existing substantive part of the common law," and, "prevails in this state".

2. It may be proven informally without an issue, "if it comes to the knowledge of the court in any proper manner" during the progress of the cause. (Champerty and maintenance discussed.)

—*Barker v. Barker*, 14 W. 131, 142.

3. "Champerty is nothing else than an agreement to aid in a suit and then to divide the thing recovered. This agreement was to prosecute the action, pay the expenses, and divide the fruits of the litigation", and "was clearly champertous".

4. Though an agreement between attorney and client "is void for champerty, yet the attorney does not thereby forfeit his right to full compensation for his services, nor the client his right to the fruits of the litigation after paying for such services what the same are reasonably worth".

—*Stearns v. Felker*, 28 W. 594, 596.

5. "The common law in regard to champerty and maintenance, with the qualifications established by the modern authorities, is in force in this state".

6. An agreement for a percentage of the proceeds (in this case for one-half of the land recovered), is held champertous and otherwise by the authorities generally, but the court saying it was "at liberty to adopt and follow" either line of decisions, holds such an agreement not champertous, "although, under the authorities, it would be otherwise had the attorneys agreed to pay the expenses of the action".

7. If "it was proved that the attorneys were prosecuting this action pursuant to a champertous agreement with the plaintiff, the motion to dismiss should have been granted".

—*Allard v. Lamirande*, 29 W. 502, 505.

8. "Maintenance is defined to be an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. 4 Bl. Com. 134."

9. An attorney's "appearance is prima facie evidence of his authority and retainer until some contrary proof is made". "He had a perfect right" to decline "to answer a question put to him on argument" as to his retainer.

—*Andrews v. Thayer*, 30 W. 228, 233.

10. An agreement between attorney and client stated, as to the division of proceeds, etc., is held not champertous. See *LIENS*.

—*Kusterer v. Beaver Dam*, 56 W. 471, 475.

11. The definition of maintenance as adopted by Chief Justice Dixon, in *Andrews v. Thayer*, 30 W. supra, is approvingly quoted, as is the statement as to champerty in *Barker v. Barker*, 14 W. supra, the court saying "the same is doubtless true as to the kindred offense of maintenance".

12. "The terms of this definition obviously do not include all kinds of aid in the prosecution of defenses of another's cause, and it has therefore always been held not to extend to persons having an interest in the thing in variance, nor to persons acting in the lawful exercise of their profession as counsel or attorneys at law. *Bayard v. McLane*, 3 Har. (Del.) 208.

13. Nor does the doctrine of the common law as to maintenance apply to persons who either have a legal interest in the suit prosecuted by them or who act under the bona fide belief that they have. *McCall's Admr. v. Capehart*, 20 Ala. 526."

14. "We do not perceive how any principle of law or of public policy is violated in allowing a number of persons interested in the same question, and whose claims depend upon the same principle of law, to contribute to defray the expenses which must be incurred in the decision of such a question by a test case"; and so held here where the contributors had similar interests, but only a test case interest in the instant case.

15. "It appears to us they (the contributors) certainly had a common interest in the decision of such a question, because it concerns the interests of all of them. If so, the agreement to prosecute the action cannot be held to amount to maintenance. *Findon v. Parker*, 11 Mees. & W. 675; (other cases).

16. The arrangement made does not necessarily imply anything that the law condemns as maintenance. Says Lord Abinger, in *Findon v. Parker*, 'The law of maintenance, as I understand it upon the modern construction, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife encourages others either to bring actions or to make defenses which they have no right to make'." —*Davies v. Stowell*, 78 W. 334, 335.

17. The doctrine of *Barker v. Barker*, 14 W., supra, though doubtless against the weight of authority, as to champertous agreement, that, in a suit, "although no issue had been formed in regard to it, that, if, the fact came to the knowledge of the court in any proper manner, it would refuse longer to entertain the proceeding," is adhered to.

18. An agreement to pay the expenses, and divide the amount recovered, was held champertous, "within the rule laid down in *Stearns v. Felker*, 28 W. supra; (other cases)".

19. A proposition by the "attorney to cancel the agreement and proceed with the action"; the client not being there "to agree thereto," was held not available, and the action was held properly dismissed.

—*Kelly v. Kelly*, 86 W., 170, 172.

20. An attorney may contract "for a fee contingent upon his success", for a percentage or share recovered, "where he does not undertake to pay any part of the expenses of the litigation. (Cases)".

—*Dockery v. McLellan*, 93 W., 381, 388.

21. "Champerty need not be pleaded," but when apparent in the action, a dismissal "motion should be granted", or "the court may properly act on its own motion".

22. "The purchase by an attorney of the claim of his client in a pending suit, to be enforced in such suit at the expense and for the benefit of such attorney", is held champertous and void.

—*Miles v. Mutual R. F. L. Assn.*, 108 W., 421, 432.

23. Following *Miles v. Mutual R. F. L. Asso.*, 108 W. supra, "the transfer to defendants' attorney" of the realty in litigation, is declared void, and he is denied "the benefit of any defense he sought to make".

—*Emerson v. McDonnell*, 129 W. 67, 71.

CHANCERY COURT.

See EQUITY.

CHANGE OF VENUE.

See VENUE.

CHARACTER.

See also IMPEACHMENT OF WITNESSES.

Acquaintance with party, 1.

Knowledge of character, 2.

1. "In any case, where the character of a party if properly in question, as in this case, (one of slander), it is sufficient to prove such character by witnesses who are well acquainted with the party in the neighborhood of his residence, without first asking them if they know the character of such party."

2. In such a case, the question is not merely of reputation founded upon the speech of people, but of actual knowledge of the character of the party, and such knowledge is a proper subject of inquiry by any proper questions tending to that end. (Citations)".

—*Dufresne v. Weise*, 46 W. 290, 297.

CHARITABLE BEQUESTS.

See CHARITABLE TRUSTS.

CHARITABLE TRUSTS.

See also CY PRES. EQUITABLE CONVERSION. TRUSTEES. TRUSTS.

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1. "Account is an ancient and familiar branch of equitable jurisdiction. In cases of charity, to be administered by trustees, whether private persons or corporations, a court of equity has jurisdiction, at the instance of the attorney general or other proper party, to take an account, and to correct abuse or misuse of the trust funds; and even to remove delinquent or improvident trustees. Story's Eq. 1191".

—*In re Taylor Orphan Asylum*, 36 W. 534, 543.

2. In a devise of lands to two persons 'to hold the same in trust for the use and benefit of the order of St. Dominican and St. Catherine's Female Academy', held, "the trust is wanting in all the elements of certainty and precision essential to give it validity.

3. The words used are general and indefinite in their meaning. The trustees are to hold the legal title 'for the use and benefit' of the beneficiaries, unincorporated institutions or associations of individuals.

No active duty is imposed upon the trustees in respect to the management, disposition or use of the property. No provision that the trustees should take possession of the property, receive the rents and profits, and apply them to any specified purpose.

4. Instead of the trust being 'fully expressed and clearly defined' (Sec. 2081, subd. 5), there is a fatal uncertainty about it in every particular".

5. "In-incorporation obtained subsequent to the commencement of this action; and it is clear upon the authorities that the question presented is not affected by that circumstance."

6. It is indicated that by the statute (Sec. 2071) "uses and trusts, except as authorized and modified in this chapter, are abolished", and that charitable trusts were included. (The result in this case, but not the reasoning, seems to be accepted in *Harrington v. Pier*, 105 W. post.)

—*Ruth v. Oberbrunner*, 40 W. 238, 256.

7. A will which 'gives and bequeaths to the Roman Catholic orphans of the diocese of La Crosse, state of Wisconsin, all his real-estate', is held to be void because "it is impossible to determine from the language of the will who are the objects of the testator's bounty. There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust cannot be effectually carried out".

8. Where a "bequest to charity as vague and uncertain" has been sustained, it was in cases which "mainly rest upon the doctrine of cy pres, which is a doctrine of prerogative or sovereign function, and not strictly a judicial power. 4 Kent, 508", (Many cases).

9. It is indicated that the courts of this state are not "clothed with other than strictly judicial power", and have not "succeeded to the jurisdiction over charities which the chancellor of England exercises by virtue of the royal prerogative and cy pres power".

10. The court says that in *Ruth v. Oberbrunner*, supra, "it was held that ch. 84, R. S. (Sec. 2071), abolished all uses and trusts, including charitable uses and trusts, except such as were authorized by its provisions", and that while this view "would inevitably overthrow" this will, yet "our decision in this case will not be placed upon" that ground. (The result that "the donees were uncertain and unascertainable" seems to be accepted as a private trust, but not the reasoning in *Harrington v. Pier*, 105 W. post).

—*Heiss v. Murphey*, 40 W. 276, 289.

11. "From time immemorial the general inclination of the courts of equity has been" to lean in favor of "bequests for charitable uses", and against "claimants under the statutes of distributions".

12. Here "the testator gives the residue of his estate real and personal, to his executors, upon trust to pay it over to four institutions", "to apply and use for the education and tuition of worthy indigent females." Three of these beneficiaries are colleges in existence, and the fourth "shall be organized", as "an institution of learning" for females.

13. Held that the statute of mortmain "has never been adopted or in force here" and that all the bequests are valid and should be carried out. Ryan, C. J. See also MORTMAIN.

14. In response to "strenuous objections to the charitable bequests", "founded on the statutes prohibiting perpetuities, and regulating uses and trusts", it is said: "It is almost sufficient to say, for the purposes of this case, that both of these statutes are expressly limited to realty.

15. The English doctrine of perpetuities applied to estates both real and personal, and grew up by a series of judicial decisions. Perry on Trusts, secs. 377, 379. It appears to have been applied to private trusts, but not to trusts for charitable uses, which usually are essentially and indefinitely permanent. Perry, secs. 384, 687, 736."

16. "But were this otherwise, the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty. *Expressio unius exclusio alterius*".

17. The real estate under general power of sale, and direction to "pay over and deliver", is considered as "personalty only". See CONSTRUCTION OF WILLS.

18. As to definiteness, it is said: "Public charities, indefinite in terms, are necessarily limited in their administration by the amount of the foundation.

19. Where the founder does not provide a rule or order of selection, there is, therefore, in every public charity, a necessary power of selection of beneficiaries in the trustee.

20. If the power be abused, the state, in the exercise of its visitatorial power, will correct it. *Re Taylor Orphan Asylum*, 36 W., supra; Perry on Trusts, Sec. 732".

21. "When a trust defines the beneficiaries with certainty, it is rather private than public. As Mr. Perry remarks, charity begins where uncertainty of the beneficiaries begins. Sec. 687".

22. "It is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of charity. * * A good charitable use is 'public', not in the sense that it must be executed openly and in public; but in the sense of being so general and indefinite in its objects as (to) be deemed of common and public benefit'. *Saltonstall v. Sanders*, 11 Allen, 446". (Quoted approvingly in *Harrington v. Pier*, 105 W., post). p. 98.

23. As to the cases of *Ruth v. Oberbrunner* and *Heiss v. Murphey*, supra, in which "there are some passing remarks", "apparently more or less in conflict with what is now held", it is said: "No question of charitable use was in either case, and no question of trust in" the latter.

24. In the former case, "the trust appears to have been private, not public", and "apparently failed for want of any certain cestui que trust to take the legal title under the statute", it being "a passive trust".

25. In the latter case, "the devise was in fee directly" and "failed for want of known and certain devisees". p. 99.

26. "The fourth bequest was to a contemplated institution, not yet

in being", and "the words, institution and organized, appear to imply an incorporation". "In legal parlance, an institution implies foundation by law, by enactment or prescription".

27. "Failing the contemplated corporation, then the bequest is to be distributed to the three existing corporations. And so, under the will, there can be no failure of a trustee to take and administer the bequest".

28. "Bequests for charitable uses to be administered by a corporation are sometimes of such a character and extent as necessarily to require the creation of a new corporation to administer them.

29. "But had that provision (for a new corporation) been omitted, and had the charitable use lapsed for want of a trustee in esse, it would have been a reproach to the administration of justice.

30. The rule has the sanction of very high authority, that equity will not suffer a charitable use to be defeated for want of a trustee".

31. (This case and *Gould, Admr., v. Taylor Orphan Asylum*, 46 W., post, decided therewith, are discussed and approved as leading cases correctly stating the law as to charitable trusts, and the prior cases of *Ruth v. Oberbrunner* and *Heiss v. Murphey*; supra, criticised, in *Harrington v. Pier*, 105 W. post, *Becker v. Chester*, 115 W. 90 (See *PERPETUITIES*) and *Danforth v. Oshkosh*, 119 W. post.)

—*Dodge v. Williams*, 46 W. 70, 91.

32. As to a bequest to individuals, 'to hold in trust to erect an orphan asylum', 'to be paid to such asylum as soon as one shall be duly incorporated' (p. 107), it is held: "The corporation, when organized, takes title, not by the will, but by transfer from the trustee ad interim. This is not an executory bequest".

33. Under the principles of *Dodge v. Williams*, supra, held applicable here, and a general power of sale and "the whole scope and tenor of the will", though there was realty, it is "to be considered as a will of personalty only".

34. Upon a default or failure to act of such trustees, or any of them, the trust would not have lapsed, but the court would have supplied trustees, as "equity never suffers a trust to expire with the trustee".

35. "Failing the corporation, they (the trustees named) would have remained permanently clothed with the trust, with full power to administer the charity".

—*Gould v. Taylor Orphan Asylum*, 46 W. 106, 115.

36. Where an archbishop of the Catholic church holds the absolute title by warranty deed, of a local church property, it is held that the congregation, who contributed to the erection of the old church building and repaired and supported it, have no legal right, as against the bishop, to tear down such church, build another on the premises, or exercise acts of ownership thereof, and that such title cannot be shown to be in trust for such congregation.

—*Heiss, Arch. v. Vosburg*, 59 W. 532.

37. In the statute of perpetuities, sec. 2039, "the words 'charitable corporation' " do not "include what is generally called a religious corporation". See PERPETUITIES.

—*De Wolf, Extr., v. Lawson*, 61 W. 469, 480.

38. Where a bequest was made to "The O. & A. Union Cemetery Assn.", there being none such, but there were the "O. Cemetery Assn.," and "The Union Cemetery Assn.," both in the town of O., and the latter including incorporators in both O. and A., it was held that the latter was intended, and that "there can be no doubt but what extrinsic evidence was admissible to show which of the two cemetery associations was intended. (Cases): Such evidence removed the latent ambiguity which otherwise would have existed. (Many cases)".

39. It was similarly held in a bequest to the "First Presbyterian Church of the Village of O," there being none such, but "an incorporated religious society named 'The First Presbyterian Society of the Town of O', with its church edifice in the village of O, in said town and of which the testator was a member".

40. The direction to such Presbyterian Society to "use one half of the annual income of the bequest 'for the relief of the resident poor' of the town, was clearly a charitable purpose", "and was sufficiently definite and certain to be carried into execution", as much so as in the case of *Dodge v. Williams*, 46 W. supra, and distinguishable from the case in *Heiss v. Murphey*, 40 W. supra.

41. By the statute 43. Eliz. "it was made lawful for the 'Lord Chancellor, as keeper of the great seal, * to authorize four or more persons', in case of such general bequest, to devise and carry into execution a charitable scheme of the character indicated in the act".

42. "But in so far as that statute was merely confirmatory of such powers exercised by the Chancellor as were strictly judicial", not as "keeper of the great seal as the representative of the king", "it became, by judicial construction, interwoven in, and a part of, the common law of England, and to that extent is in force here. (Many cases).

43. Before that power can be exercised, however, the scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. *Redf. on Wills*.

44. The mere direction to expend money 'for charitable purposes' at large is too indefinite and uncertain to be so carried into execution, under the rulings of this court in the cases cited (supra), and hence that alternative must be held void for uncertainty. (Cases)". (Last two paragraphs are approvingly quoted in *Will of Kavanaugh*, 143 W. 90, 99).

45. As held in cases supra, the courts of this state have no cy pres "prerogative jurisdiction, but 'only a strictly judicial power' ". p. 391.

46. The clause, 'to be * given to any of my heirs who are in need, or not in very comfortable circumstances, as to my executors, seems fit and proper', is held to be sufficiently definite and certain to be carried into execution.

47. "This manifestly means those who upon the death of both of his grandsons (his sole heirs,) without issue, would be his other blood relations, and who might, under the other circumstances named, have become his heirs. It does not include all relations, however remote." (Cases)''.

48. "The limitation to such needy relatives, and those not in very comfortable circumstances, makes the bequest charitable in its purpose. (Cases)''.

49. The last two foregoing bequests, being in the alternative, one being void and the other valid, the latter is sustained, as both "are charitable in their objects and hence sustainable as such".

50. "Unquestionably, the purpose of establishing 'a school in O., or some other place in W. county, Wis., for the education of young persons in the domestic and useful arts,' was a charitable purpose, within the judicial sense. (Cases)."

51. Especially is this so, since there is no restriction or limitation as to the class of young persons to be thus educated."

52. "The language of the will seems to contemplate a school of the character indicated, to be incorporated," but does not say so in terms. "The mere fact that the corporation was not in esse on the death of the testator in no way frustrates the trust.

53. To establish such a school is to give it legal existence—that is to say, a corporate existence. (Cases cited, supra)." p. 397.

—*Webster v. Morris*, 66 W. 366, 379.

54. A bequest to 'the poor of the city of G. B.,' where "at the time of the death of the testator there were no city paupers or poor fund in the city," "and such poor persons are not certain, determined, or defined, and there is no way provided by the will for selecting them," is held void on the authority of *Heiss v. Murphey*, 40 W., and *Webster v. Morris*, 66 W., supra.

55. (Approvingly explained that the uncertainty causing invalidity, was as to the "donee or devisee in whom the title may vest," and not as to the individual beneficiaries, and "that the bequest would have been supported as a trust for charitable uses if a trust had been created so the court could have filled the office of trustee to administer the trust." —*Harrington v. Pier*, 105 W., post.) —*Est. of Hoffen*, 70 W., 522, 523.

56. "Under the repeated decisions of this court, we must hold that the mere fact that such church or religious society had not yet been incorporated at the time of the delivery of the deed in no way frustrated the trust thereby created, if such trust was otherwise valid. (Cases, supra).

57. The deed of the trustees "put the legal title to the land conveyed

in the trustees named therein, and their successors, for the uses and purposes therein mentioned," and,

58. "Upon the incorporation of the society, September 8, 1862, the legal title to such church property became vested in the corporation under the statutes." Sec. 2000, et al...

—*Fadness v. Braunborg*, 73 W. 257, 278.

59. Where the testator gave a sum in trust to deacons of a church and their successors in office, "to be funded with good security on improved land, and the interest to be paid annually to the A. B. P. Society, located at Philadelphia, Pa., to aid in the support of a Baptist colporteur and (or) missionary in the state of Wisconsin," the deacons not being incorporated and declining to accept the trust, it was held that the bequest "is void for uncertainty."

60. (In *Harrington v. Pier*, 105 W., post, it is said of this case that "the rule in *Webster v. Morris*, 66 W., supra,"—as quoted in the *Webster* case, par. 43, supra,—as to necessary incidents to validity, "was referred to and affirmed; but, as it seems, effect was given to the rule after the manner of private instead of public trusts."

61. And in *Hood v. Dorer*, 107 W., post, referring thereto, it is said: "In the recent case of *Harrington v. Pier*, 105 W., post, however, the doctrine of the *Fuller* case was substantially overruled.")

—*Will of Fuller* 75 W., 431 434,

62. A will bequeathed to executors, in trust, money, for the support, etc., "of such indigent orphan children," under fourteen, in R. county, "as, in the judgment of my said executors, may be most needy and deserving". The executors named, "resigned, both, as executors and as trustees, without having" qualified, and the circuit court found (1) the bequest void, and (2) that the administrator with will annexed could not execute the trust; held,—

63. "One of the essentials of a good bequest for a public charity is that there shall be some uncertainty as to who shall be its beneficiaries";

64. Citing *Dodge v. Williams*, 46 W., supra, and *Gould v. Taylor Orphan Asylum*, 46 W., supra, it is said, "it is no objection" "that its beneficiaries are uncertain", that the "power of selection" is "in the trustees," that "the scheme of the charity is definite and clear," and that it is "a valid charitable bequest";

65. The trust can "be executed by a trustee appointed by the court," there being nothing in the will to the contrary. "This will creates a mixed trust and power. The power joined with the trust, in such a case, is imperative, and must be exercised". *Osborne v. Gordon*, 86 W., 92 (See POWER.)

—*Sawtelle v. Witham*, 94 W., 412, 415.

66. A trust to a city to establish and maintain "a public library and a business men's club room", is upheld as to the "library" under the "general common law power" and city charter, and as to the "club

room" as being a "comparatively unimportant accessory" requiring little if any additional expense, and,—

67. Therefore, is not within the rule "that where a devise otherwise valid is inseparably coupled with a void devise, and is a mere accessory thereto, and the amount of the valid part cannot be ascertained, then both must fall together. *Chapman v. Brown*, 6 Ves. 404". It is held, "therefore, that the library scheme does not fail by reason of the fact that the city cannot maintain the club room".

68. A trust for "a home for aged and poor people of the city", is also upheld, and as being with the "library trust"; "both active trusts, and are sufficiently definite to be capable of enforcement". *Dodge v. Williams*, 46 W. supra; *Webster v. Morris*, 66 W. supra; *Sawtelle v. Witham*, 94 W. supra.

69. "Although there is no specific power to sell given, we think such power must result by necessary implication from the various provisions", and the will is so construed, after the city takes the trust;

70. And a provision that said realty "shall not be sold nor encumbered", is construed to apply to the executors as trustees, and not to the subsequent city trustee.

71. "The principle is well established that a city may accept devises of property made to enable it to carry out any of its legal duties or powers, and such devise may be made to the city in direct terms, or it may be made in trust for such uses (citations)". (Followed in *Maxey v. Oshkosh*, 144 W. post).

72. The devises of certain lands to the city, to "be perpetually used for the home for aged and poor people, and that the race track shall be perpetually used as a driving park and as agricultural grounds", "are void under secs. 2038, 2039, because the power of alienation is perpetually suspended",—The city not being "a literary or charitable corporation organized for 'their sole use and benefit'," and hence not within the exception in section 2039.

73. (In *Danforth v. Oshkosh*, 119 W. post, this last ruling is specifically upheld, with a vigorous dissent by Justices Marshall and Siebecker. However, a subsequent amendment (ch. 511, L. 1905) to section 2039 adding a realty devise "to a charitable use", as an exception, no doubt changes the foregoing rule, and now "the statute against perpetuities does not include devises to a charitable use". Will of *Kayanaugh*, 143 W. post). —*Beurhaus v. Cole*, 94 W. 617, 627-31.

74. Certain bequests to the bishop of a church, 'to be used by him for the benefit and behoof', of churches named, and to a bishop 'to be used and applied', 'for masses for the repose of my soul' and of others named,—are held to be "essentially trust provisions, and appear to be void for uncertainty and wholly incapable of being executed by a court of equity by virtue of its judicial jurisdiction over private trusts" "We hold that" they "are void trusts, and are not valid bequests".

75. (In effect overruled, at least as to the 'masses' provisions, it

being stated, in *Harrington v. Pier*, 105 W. post, as "placed on the ground that a trust for masses is private"; and it being held in *Will of Kavanaugh*, 143 W. post, that "while the masses may be intended to benefit the souls of the departed mentioned, the benefits are public as well, therefore come within the designation of a public charity", and such bequests are held valid).

76. "Such gifts or bequests (as to masses); when made in clear, direct, and legal form, should be upheld; and they are not to be considered as impeachable or invalid, under the rule that prevailed in England, by which they were there held void, as gifts to superstitious uses. No such rule or principle obtains here". (Followed in *Will of Kavanaugh*, 143 W. post. —*McHugh v. McCole*, 97 W. 166, 173.

77. (In this case, *Harrington v. Pier*, the previous cases are exhaustively discussed, distinguished, endeavored to be harmonized, parts thereof disapproved, and the principles as to public, as distinguished from private, trusts, set forth for future guidance; it is believed that the foregoing codification of cases with modifications as there indicated, by the instant and subsequent decisions, together with the paragraphs following, correctly indicate the rulings of law still applicable and useful for present and future purposes.)

78. Personal and real property, the latter to be converted into money, was left, three-fourths thereof, to trustees named, to be 'expended for temperance work' in M. 'as their best judgment shall dictate', the greater portion for the benefit of two named incorporated temperance organizations, the whole "to be expended in temperance work within five years", and the residue was left to individuals.

79. After distinguishing and harmonizing the cases, it is said: "With a single exception", *Fuller's Will*, 75 W. supra, in effect overruled,— "the decisions of this court from *Dodge v. Williams*, 46 W. supra, to the present time, are in harmony, and it must be held that such case states the law of this state as understood from the time it was decided".

80. "*Dodge v. Williams*, and the cases expressly ruled by it, correctly state the law on the points essential to the conclusion here reached", upholding the trust, "and whatever there is in other cases, decisions, or reasons for decisions, inconsistent therewith, must yield to that view.

81. It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust,

82. Want of a trustee if there be a trust in fact, or

83. Indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or

84. Indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses.

85. Given a trust, with or without a trustee, a particular purpose—as education, or relief of the poor, as distinguished from a bequest to charity generally,—and a class great or small, and without regard to location, necessarily, as 'worthy indigent females', or 'indigent young

men studying for the ministry' or 'resident poor', or indigent children of R. County', or 'the boys and girls of California' (People ex rel Ellert v. Cogswell, 113 Cal. 129), and we have a good trust for charitable uses.

86. The court, through its strictly judicial power, may fill the office of trustee if necessary.

87. The trustee can select the immediate beneficiaries or objects within the designated class and scheme;

88. He can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly;

89. And the proper public agency, if necessary, can invoke judicial power to enforce such execution". (Followed and approvingly quoted in Hood v. Dorer, 107 W. post; re-stated in Richtman v. Watson, 150 W. 385, 399).

90. As to personal "property at least, it was plainly and correctly decided in Dodge v. Williams, 46 W. supra, that the statutes of perpetuities and uses and trusts have no application to gifts for charitable purposes". Not decided whether "to such gifts of real estate". (But see Beurhaus v. Cole, 94 supra, here evidently overlooked). See also EQUITABLE CONVERSION. —Harrington v. Pier, 105 W. 485, 513.

91. Where the testator, after a life estate to his wife, his sole heir, provided that his real and personal estate, "be invested in a fund provided for that purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ", and the will was construed in 1883, such 'superannuated preachers' generally and two members of the church being made defendants, and the bequest was held void by the circuit court, there being no appeal,—in an action of ejectment years later after the death of the widow who had sold the realty,—it was held, following Harrington v. Pier, 105 W. supra:

92. That such devising "clause amounts to a direction to convert the real estate", and that "the doctrine of equitable conversion applies";

93. That such bequest is a valid trust provision, and "the proper court has power to appoint" a trustee to carry it out. Sawtelle v. Witham, 94 W. supra.

94. That "the 'superannuated preachers' were not a corporate body, and hence not capable of being sued under such a general designation", and that, therefore, such prior construction was of no effect.

—Hood v. Dorer, 107 W. 149, 152.

95. A testatrix gave personalty and realty to trustees, to hold in trust, for founding 'and maintaining perpetually a public library' on her 'homestead lots', and on condition of an equal amount provided otherwise within three years, 'then the property so hereby given' to such trustees, to be by them conveyed 'and set over absolutely' 'to the city of Oshkosh, or any lawful trustee' by it selected, and if not so used, the

property to revert to the heirs of the testatrix and her husband. Such amount was raised, and the trustees duly transferred such property to the city of O. Held:

96. That by "all the prior decisions", and as an original proposition, the statute, sec. 2039 (as then existing), against perpetuities applies "to grants for charitable purposes". (Probably as a result of this decision, the rule was changed by amdt. of ch. 511, L. 1905, to sec. 2039, making "a charitable use" an exception. See note to *Beurhaus v. Cole*, 94 W. supra.).

97. Following *Kopmeier's Will*, 113 W. 233 (See CONSTRUCTION OF WILLS), the suspension of alienation during the three years while in the hands of the trustees, did not invalidate the devise, suspension being permitted for, "twenty-one years".

98. "The fund to be realized out of" the realty and personalty "apart from the homestead," is not within the statute, as following *Becker v. Chester*, 115 W. 90 (See PERPETUITIES), "neither statute nor rule of common law in this state prohibits perpetuities in personalty".

99. The power of sale is not suspended "when a trustee or other donee of the legal title is given power and authority to sell and make conveyance of complete title".

100. As the homestead is "to be conveyed to the city of O. for its own corporate use as a municipal corporation", "both legal title and beneficial interest are held by it in the same, to wit, its corporate capacity. Hence no trust is created nor imposed upon it," and its title is "a fee".

101. "If the restraints upon use or disposal of the homestead are limitations merely, they are so repugnant to the grant as to be void;

102. And if a condition subsequent is imposed thereby, so that on breach of these limitations the fee is to determine, the future estate in possession dependent upon such condition is so vested that the absolute power of alienation is not meanwhile suspended";

103. "The devise first to trustees, and then to the city of Oshkosh, is valid".

104. "The obvious distinction between" *Beurhaus v. Cole*, 94 W. supra, and this case, "is that in the present we conclude that no trust was created, while in the former it was conceded by both litigants and assumed by the court that the only title conferred on the city was in trust and as trustee, so that express or necessarily implied prohibition against alienation was effectual". See also TRUSTS.

—*Danforth v. Oshkosh*, 119 W. 262, 267-280.

105. Referring to *Harrington v. Pier*, 105 W. supra, in "which our attitude is so unambiguously declared", it is held that a devise to trustees of a 'fund for the charitable purpose of relieving the wants, distress, and suffering arising from' 'catastrophes resulting from the actions of the elements', they being enjoined 'to select subjects worthy of assistance', with 'no restrictions upon' locality,—

106. Is a valid charitable bequest "narrower than the field of charity

generally", and limited "to an ascertainable class of beneficiaries", to "subjects worthy of assistance", so that the money be of benefit to 'suffering' humanity".

107. "As has often been said, precedents are useful only slightly, or not at all, upon questions of construction. (Cases). Arguments are hardly more so".
—*Kronshage v. Varrell*, 120 W. 161, 164.

108. A will on a printed blank, which, after payment of debts, etc., gives 'to the poor fund of Ness, with the understanding: I give, devise and bequeath for the most needy of same, and that shall be a special fund to them. So all the regular poor tax shall be paid or apportioned same as foregoing, without reference to this money'.

109. There were other printed paragraphs with blanks unfilled. The heirs were not near relatives, and the net for distribution was \$380. Judgment "giving the entire estate in trust for the poor at Ness", was sustained "with some hesitation", it being "a choice between certain defeat of the testamentary purpose and mere possibility of such defeat."
—*In re Hegna's Will*, 133 W., 513, 515.

110. A will gives 'real estate and personal property, for masses for the repose of my father's and mother's and sister's and brother's and my own soul. The masses will be said according to the directions of F. and W. and I hereby appoint them to direct where and when to say said masses'. W. is also appointed executor. There were no further provisions. The county and circuit courts held the will 'void'. Held valid.

111. It being shown that masses are said "not alone for" "the deceased members mentioned, but for the benefit of all mankind", they "therefore come within the designation of a public charity" (Many cases).

112. "A gift to be applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion is a charity. *Jackson v. Phillips*, 14 Allen, 539".

113. "The question", of "charitable trusts", "has been so exhaustively treated in *Dodge v. Williams*, 46 W. and *Harrington v. Pier*, 105 W., supra, that further discussion seems unnecessary".

114. "A bequest for masses is a charitable bequest and valid as such, although the repose of the souls of particular persons be mentioned", and "the statute relating to trusts (sec. 2081) does not apply" as to "certainty" "required in regard to private trusts". (Cases, supra).

115. There is a "distinction between a private trust and a public or charitable bequest. In the former, statutory certainty is required, while in the latter it is not".

116. "It is apparent that conversion of the real estate was necessary to carry out the terms of the will. Consequently the doctrine of equitable conversion applies. (Cases)".

117. "Charitable trusts" "are not controlled by our statute of uses and trusts", and "a charity will not be allowed to fail for want of a trustee.

118. The person named in the will to execute the charity will be held to be the trustee, and, if necessary that he hold the title for the purpose of carrying out the provisions of the will, he will by implication hold such title". (Cases).

119. "The statutes respecting perpetuities" do not apply because of equitable conversion, and because the amdt. of sec. 2039, by ch. 511, L. 1905, "by adding to the exceptions from the operation of that section real estate devised to a charitable use".

120. "In so far as *McHugh v. McCole*, 97 W. supra, conflicts with anything said in this opinion it must be regarded overruled".

—*Will of Kavanaugh*, 143 W. 90, 97.

121. Testatrix gives to S. and H. realty and personalty, 'in trust for' 'founding, etc.' 'and maintaining perpetually a manual training school' in the city of O., 'upon the express condition that within three years' the 'city of O.' or others 'shall raise' and donate \$50,000 for the same purpose, and then the property to be transferred to the 'city of O., or any lawful trustees by' it selected, the whole, except for buildings, to 'be a perpetual fund to be used and enjoyed' for such 'manual training school'.

122. And with a further condition as to 'name' and 'that a tuition fee shall be charged' as the city or trustees shall deem 'sufficient' for the purposes designed. The city duly accepted, and issued bonds for \$50,000. Bequest held valid.

123. There "is no express provision for a reverter in the event of a diversion of the fund, and none can be implied under the law of this state. (Cases)".

124. While in *Danforth v. Oshkosh*, 119 W. supra, it was held "that no trust was created and that the title passed charged only with a condition subsequent", there being a provision for reversion,

125. "We conclude here that it was the intention of the testatrix to create a charitable trust, public in its character".

126. "No great amount of formality in the use of language is necessary in order to create a public charitable trust. The courts look to the purpose for which the gift was made.

127. In order to create such a trust there must be some public benefit open to a vague and indefinite number of persons until they are selected or appointed to be the particular beneficiaries of the trust for the time being. (Citations); *Dodge v. Williams*, 46 W.; *Harrington v. Pier*, 105 W.; *Sawtelle v. Witham*, 94 W.; supra.

128. Gifts to institutions of learning and for educational purposes are almost invariably held to be gifts for charitable purposes. (Citations)".

129. "That a city may become the trustee of a charitable trust, where

the donation is made to aid some public purpose charitable in its nature which it is the legal duty of the city to support and provide for, does not admit of doubt.

130. When the trust is accepted the city assumes the same obligations and becomes amenable to the same regulations that apply to other trustees of such trusts,

131. And among them is the obligation to perpetually administer the charitable fund in accordance with the express wish of the testator. (Many cases)".

132. "Manual training" is held to be a "practical and useful course of instruction" to be taught in public school,

133. Which "the city has the right to maintain" "as part of its general system of education", and "to vote the bonds involved".

134. As to the condition "to perpetuate the name of her husband" in the school, it is held it "may be lawfully made and lawfully complied with. (Cases)".

135. While the city may have "no power to raise a fund to be invested in perpetuity for such purpose", it is held that the purpose "will be carried into effect by the city using the fund raised by it to build and equip the school building".

136. It is held that "the testatrix intended" tuition to "be exacted only from such pupils as the city of O. could legally exact such a fee from. The will does not undertake to specify to whom the charge shall be made".

137. While the donation of the testatrix "was the impelling cause which" caused the city to raise the extra money, and ordinarily "corporate action is said to be void under such circumstances",

138. Yet such rule is held not to apply here, as "the testatrix herself could reap no material benefit from her offer", there being "no children" or "relatives", and "she had no ulterior or vicious motive in doing what she did".

—*Maxcy v. Oshkosh*, 144 W. 238, 249.

139. Personalty bequeathed in trust to an incorporated Synod church, for specified "charitable work" of other "organizations", some being unincorporated, some under the Synod's control, and some to which the church "makes yearly contributions",—held valid.

140. "The trusts created" "are trusts in personal property alone, not in real estate, hence the statute of uses and trusts (sec. 2081) has no application to them. *McWilliams v. Gough*, 116 W. 576 (See Trusts)".

141. "All that is required of a valid trust in personal property is that it shall be for a lawful purpose and be sufficiently definite and certain so that the court can deal with it in the exercise of its judicial functions and enforce it.

142. The trusts before us are plainly not private trusts but public trusts charitable in their nature and for the benefit of certain classes;

143. Such trusts, whether in real or personal property, are necessarily somewhat indefinite and vague.

144. The individuals can never be named, but if the class and the general limits of the testator's purpose be ascertainable by any reasonable means the wishes of the testator will be carried out by the courts.

145. Were the trusts private trusts different considerations would arise." (See also amdt. of sec. 2081, by ch. 170 L. 1917, adding subd. 7, as to indefiniteness with power of designation of purpose.)

146. The clause "authorizing the Synod to declare forfeited the bequests to Gale College and the Preus Academy in case those institutions cease to be conducted in the interest and under the auspices of the Synod",—is held valid. —*Rust v. Evenson*, 161 W. 627, 631.

CHattel Mortgage.

After acquired goods, 5.

Subsequent mortgage, 6.

Continuation of business, 3.

Expenses of family, 3.

Crop before existence, 2.

Crop sharing agreement, 7.

Discretion in mortgage, 4.

Fixture, to vendor of, 1.

Mortgagor may sell, 11.

Title: legal in mortgagee, 8.

Equitable in mortgagor, 10.

Interest is special, 9.

Purchaser, how obtain, 12.

Vendee may protect interest, 12.

1. A chattel mortgage to the vendor of a fixture attached to the premises with his consent, is not valid against a prior mortgagee of the realty. See also **FIXTURES**. —*Frankland v. Moulton*, 5 W. 1.

2. "A chattel mortgage can only operate upon property in actual existence at the time of execution, and cannot be given, * upon a crop before it can be said to be in existence."

—*Comstock v. Scales*, 7 W. 159, 160.

3. A chattel mortgage upon a stock of goods, allowing continuation of business, and payment of expenses of business and family out of the proceeds, the excess to be paid to the mortgagee, is upon its face fraudulent in law and void as to creditors.

—*Place v. Langworthy*, 13 W. 629.

4. As to a chattel mortgage containing "clauses that, upon default at maturity, the mortgagee might take possession and sell, and that, if the mortgagee should at any time deem herself insecure, she might in like manner take possession and sell, we can have no doubt that the latter clause operates to vest an absolute discretion in the mortgagee". It is not a question of the reasonableness or of the fact.

—*Huebner v. Koebke*, 42 W. 319, 321.

5. "A chattel mortgage of after-acquired goods does not create a lien, legal or equitable, by force of the mortgage, upon after-acquired goods". Many cases, adhered to.

6. Where "the original chattel mortgage contained an express covenant for further assurance, to extend the lien to after acquired goods; and a new mortgage was actually executed upon after acquired goods, to one of the mortgagees, to secure a separate debt"; "we cannot doubt that the second mortgage enured as additional security to the original mortgage", for the benefit of all the mortgagees. See also JOINT OBLIGATIONS.
—*Hunter v. Bosworth*, 43 W. 583, 591.

7. Parties to a crop sharing agreement may as between themselves stipulate as to the legal title of crops to be grown. See RENTS AND PROFITS.
—*Lanyon v. Woodward*, 55 W. 652, 656.

8. "A mortgagee of chattel property holds the legal title thereto, but nevertheless, till default and actual possession of the property in himself,

9. His interest, as against the mortgagor or any person claiming under him, is special. It is limited to the amount of the mortgage indebtedness.

10. The general property and the equitable title being in the mortgagor or those claiming under him.

11. The mortgagor may sell the mortgaged property and convey a good title thereto subject to the mortgage", and "he may place a second mortgage thereon,

12. And the subsequent vendee or mortgagee may protect his interest and clothe himself with a full legal title by paying off the first incumbrance." (Cases).

—*Illinois T. & S. Bank v. Alex. Stewart L. Co.*, 119 W., 54, 65.

CHECKS.

Acceptance by bank, 8, 17.

Action on check, 6, 7.

Administrator's rights, 10.

Assignment, pro tanto, 3, 4, 8.

Conversion of checks, proceeds, 18.

Decease of maker, 15.

Contract payment, 13, 16.

Depository, safely pay, 13, 14.

Notice of revocation, 14.

Depository's rights, 6.

When liable to holder, 9.

Effect of, check, 11.

Impliedly asserts funds, 8.

Present, reasonable time, 1.

Closing hours, next day, 2.

Revocable as such, 12.

Contract effect, 12, 13.

Notice of revocation, 14.

Splitting up debt, 5.

Transfer pro tanto, in equity, 3.

1. The settled law "is that, if a person receives a check on a bank, he must present it for payment within a reasonable time; in order to preserve his right of recourse on the drawer in case of non-payment by the drawee;

2. And that, when such person resides and receives the check at the same place where such bank is located, a reasonable time for such

presentation reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays. (Citations); *Lloyd v. Osborne*, 92 W., 93." —*Grange v. Reigh*, 93 W., 552, 553.

3. "A check for a part of a bank credit, intended to transfer such credit, pro tanto, operates that way in equity as against any subsequent claimant thereof, saving the rights of the drawee, particularly as to being obliged to pay such part of the fund twice." Questions fully discussed. *Skobis v. Ferge*, 102 W., 122. —*Dillman v. Carlin*, 105 W., 14, 17.

4. "As is now fully settled in Wisconsin, the giving of such check (on a bank) will be construed to intend an assignment of the fund pro tanto as between the maker and payee. *Pease v. Landauer*, 63 W. 20."

5. As "a debtor or depositary owing one debt and subject to only one action therefor, cannot, without his consent, be subjected to the splitting up of that indebtedness so as to be liable to several actions",

6. Hence, "an assignment of a part of a fund, while effective as between the assignor and assignee, cannot be enforced by direct suit at law against the depositary without his consent.

7. It can only be enforced" in an action against all claimants in equity. *Skobis v. Ferge*, 102 W. 122.

8. "One who draws a check upon a bank impliedly asserts that he has a fund in the hands of that bank out of which it is expected to be paid, and therefore that he assigns so much of that fund as the check calls for".

9. "By the new Negotiable Instruments Law (Laws of 1899, ch. 356, sec. 1684-5) it is provided that the bank shall not be liable to the holder of a check unless and until it accepts or certifies it".

10. "An administrator's rights are the same", as "the original depositor". He "stands in the shoes" of his intestate".

11. "A check is, and always has been, primarily an authority from the maker upon which his banker may rely, but in which the latter has no interest until he has acted thereon".

12. While as such it is revocable, yet, where "a check for a valuable consideration works an assignment of a deposit, equitable or legal", "it also evidences a contract between the maker and payee, and, if that contract is a valid and irrevocable one, the check cannot be revoked as between them.

13. If, by that contract, the payee has become the owner of the fund, the bank may safely pay it to him, not by virtue of the check as an authority alone, but by virtue of his actual ownership".

14. Before notice of revocation, the check protects him; but after such notice, "he then pays at the peril of being able to establish a valid and irrevocable contract of assignment".

15. "In this view, then, we need not consider whether the death of the drawer revokes the check".

16. And a bank's payment of checks after the decease of the maker,

and after protest, they being on a valid contract consideration, is upheld against the administrator in a suit brought by him for the funds.

—*Raesser v. Natl. Exch. Bank*, 112 W. 591, 593.

17. "Acceptance of a check on a bank is in the nature of a conditional payment, which becomes complete when accepted and when the amount due on it is actually paid, and" "such payment relates back to the time of its delivery. (Citations)". See also SUNDAY.

—*Jacobson v. Bentzler*, 127 W. 566, 568.

18. As to recovery for conversion, on wrongful obtaining of checks, and the proceeds, See ACTIONS BY EXTR. OR ADMR.

—*Meyer v. Doherty*, 133 W., 398, 403.

CHOSE IN ACTION.

Covenant against incumbrances, 2.
 Executor receiving, in payment, 3.
 Informal transfer, 5.

Not specific legacies, 4.
 Subscription paper, 1.

1. A subscription paper is held to be a chose in action. The assignee thereof takes it "subject to all the equities between the original parties at the time of assignment".

—*Rockwell v. Daniels*, 4 W. 432, 438.

2. Covenant against incumbrances when broken, "is a chose in action, not assignable at common law".

—*Pillsbury v. Mitchell*, 5 W. 17, 21.

3. "We are not aware of any rule prohibiting" an executor on a sale from receiving "in payment a chose in action."

—*Roys v. Vilas*, 18 W. 169, 174.

4. A chose in action "from its very nature, does not admit of use, enjoyment and sale in the sense in which those terms are evidently used in the will", as relating to personal chattels; and the same language is held to intend the latter to be specific legacies, and the choses in action as not.

—*Golder v. Littlejohn*, 30 W. 344, 353.

5. No "particular formality is necessary to effect a transfer of" a chose in action.

—*Chapman v. Plummer*, 36 W. 262, 265.

CIRCUIT COURT.

See also APPEAL. CONCURRENT JURISDICTION. EQUITY.

Appeal after sixty days, 9.
 Abuse of discretion, 15.
 Bad faith and laches, 10.
 Counter affidavits, refusal, 9.
 Requirements of justice, 16.
 Appeal bond, county court, 1.
 Appellant jurisdiction, 2.
 Claim: pending action, 7.
 Claims against decedents, 12.
 Creditors' action for assets, 14.
 Custody and guardianship, 19.

Findings in equity cases, 21.
 Jurisdiction with county court, 4, 11.
 Decedent estate claims, 12.
 Dissipation of trust funds, 17.
 Enforce trust in lands, 8.
 Equitable claim, not filed, 18.
 Guardianships, 5, 19.
 Legacy and trust matters, 13.
 Without statutory authority, 6.
 Land contract, county court, 3.
 Will, probate appeal, 20.

1. May fix appeal bond, on refusal of the county judge to do so. See BONDS.

2. "Has, by the constitution, 'appellant jurisdiction from all inferior courts and tribunals, and a supervisory control over the same'".
 —*State ex rel Tallmadge v. Flint*, 19 W. 621, 623.

3. "It is very clear to us that the adjudication of the county court upon this claim (for balance on land contract) is a bar to this action" thereon in the circuit court. See CLAIMS. —*Gale v. Best*, 20 W. 44, 47.

4. "It is the policy of our law that a court of equity should not entertain jurisdiction when a complete, adequate and full remedy can be obtained from the county court".
 —*Batchelder v. Batchelder*, 20 W. 452, 454.

5. "The jurisdiction conferred upon the county judge is concurrent with that of the circuit courts over" "appointing and removing guardians over the persons and estates of infants".
 —*Glasscott v. Warner*, 20 W. 654, 656.

6. The license for the sale of real estate to pay debts, granted by the circuit court when requested by the county judge, because the latter "had been of counsel for some parties interested in the matter", being without statutory authority, "must be treated as an order made coram non iudice, and void".
 —*Morgan v. Hammett*, 23 W., 30, 41.

7. The commencement and the pending of an action in the circuit court on the decease of a defendant, "could not be properly considered," on the filing of a claim against the estate in the county court. See CLAIMS.
 —*Jones v. Est. of Keep*, 23 W. 45, 50.

8. "Has jurisdiction" to enforce a trust created by a charge upon lands. See TRUSTS.
 —*Powers v. Powers*, 28 W. 659, 662.

9. On application to the circuit court, after sixty days, to allow an appeal from the county court, "counter affidavits" were properly refused, and it was intimated that such application might "be entirely ex parte". See also APPEAL. —*Groner v. Hield*, 22 W. 200, 202.

10. An order of the circuit court granting an appeal after sixty days, where the assignee of the sole heir made the application, but without mentioning the assignment in the petition as a reason, or then filing the same, but falsely alleging sole heirship in himself, was reversed, because "of bad faith and laches by claiming as heir and failing to disclose the assignment", though the assignment was later filed before such order was actually entered and the order recites only leave for filing.

—*Downer, Admr. v. Howard*, 47 W. 476, 478.

11. "Section 8 of article VII of the constitution provides that 'the circuit court shall have original jurisdiction in all matters, civil and criminal, within this state, not excepted in this constitution and not hereafter prohibited by law, and appellant jurisdiction', etc." See also PROBATE COURTS.

12. The jurisdiction as to claims in decedent's estates has been taken away from circuit court where notice to creditors has been given in the county court, and it is necessary to plead the absence of such notice to establish a cause of action. See CLAIMS. JURISDICTION.

—*Lannon v. Hackett*, 49 W. 261, 267.

13. In proper "matters of legacy and trust", "the jurisdiction of the circuit court is not taken away by that statute". See CONCURRENT JURISDICTION.

—*Catlin v. Wheeler*, 49 W. 507, 522.

14. Creditors' action to recover assets may be had in circuit court, under proper conditions. See CREDITORS' ACTIONS.

—*German Bank v. Leyser*, 50 W. 258, 264.

15. The order of the circuit court refusing an appeal after sixty days, was reversed as "an abuse of discretion". See APPEAL.

—*Jamison v. Snyder*, 79 W. 286, 288.

16. In granting an appeal from the county court, the necessary facts seem to be absence of neglect of the applicant, and the requirements of justice. See APPEAL.

—*Marsh v. Briesen*, 84 W., 618, 619.

17. The circuit court properly took jurisdiction to prevent dissipation of a trust fund income. See CONCURRENT JURISDICTION.

—*Lamberton v. Pereles*, 87 W., 449, 456.

18. Jurisdiction of an equitable claim not filed in the county court. See CONCURRENT JURISDICTION.

—*Gianella v. Bigelow*, 96 W., 185.

19. As to the circuit court's powers, as to custody and guardianship of a child. See CUSTODY AND COMMITMENT.

—*In re Stittgen*, 110 W., 625, 628.

20. "On an appeal from an order or judgment admitting or refusing to admit a will to probate, the circuit court proceeded as a court of equity. *Bryant v. Pierce*, 95 W., 338".

21. "In equity cases the mere absence of findings of fact does not, of itself, necessitate a reversal; if the evidence supports the judgment. (Cases)".

—*Flood v. Kerwin*, 113 W., 673, 678.

CITATION.

See DISCOVERY.

CLAIM FOR SERVICES.

See SERVICES.

CLAIMS.

See also ACTIONS AGAINST EXTR. OR ADMR. AMENDMENT. CONCURRENT JURISDICTION. CONTINGENT CLAIM. DEBTS. LIMITATION OF ACTIONS. PLEADINGS. SERVICES. SETOFF.

Accrual: at time of loan, 106.
 Arising after death, 108.
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 Of surviving partner, 70.
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 Duty to defend; expenses, 65.
 Premature disposal of assets, 126.
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Against ward's estate, 134.
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 Barred: by disallowance, 4, 5.
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 Against deceased co-surety, 53.

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- Coverture defense, not apply, 113.
- Deceased stockholder's liability, 82.
 - Against residuary legatee, 83.
 - Dividends fraudulently pd., 85.
 - Fraudulent stock sub., 84.
- Defective proceedings, 47.
 - Erroneous filing, 112.
 - Order and notice together, 62, 63.
- Deficiency; judgment, 59, 90.
 - Of assets, how ascertained, 60.
 - Premature legacy payment, 126.
- Disallowance, bar, 4.
 - Method, in part, 10.
 - Reason, immaterial, 5.
- Equitable claim: not filed, 46, 69.
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- "Estate," creditor and person, 113.
- Evidence: of no claims, 30.
 - Inherently improbable, 68.
- Exceptions, as to filing, 24, 25.
- Execution of instrument, 67.
 - Common law proof, 67.
- Executor's claim, a debt, 128.
 - Payment without filing, 129.
- Express trust claim, 56.
- Extending time: specific claim, 9.
 - Abuse of discretion, 58.
 - On facts alleged, only, 115.
 - Verified petition; answer, 114.
- Foreign: disallowance, 66.
 - Allowance; not filed, 76, 80.
- Fraudulent release of mort., 100, 101, 102.
- Funeral and last sickness, 130.
- Husband for wife's support, 117.
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 - Different status, 136.
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- Interest: ten per cent, 33.
 - Judgment, legal rate, 33.
- Irregular filing as claim, 131, 132.
 - Allowance affirmed, 133.
- Joint and several claim, 13.
 - Contribution to estate, 36.
 - Discharge of all, 35.
 - Filing, a new remedy, 14.
 - Payment by executor, 34, 37.
 - Revivor of suit brought, 13.
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 - Other courts, limited, 51.
- Land contract claim, 5.
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 - Judgment against executor, 123.
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- Partnership transaction, 28.
 - After estate settled, 70.
- Payment: extinguishes, 1.
 - Before time, without filing, 128, 129.
 - Effect of order for, 71, 125.
 - Notice of application, 72.
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 - Premature fund disposal, 126.
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 - Policy to so confine, 50.
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 - Facts otherwise; pleaded, 122.
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- Remedy; exclusive, 2, 77.
- Sale of realty for claims, 61.
 - Before claims allowed, 127.
 - Limited to three years, 61.
- Setoff in an action, 43, 116.
 - Right of filing exist, 44.
- Specific realty or personality, 24.
- Subrogation claim, 93, 94.
 - Mortgage lien right, 95, 96, 97.
- Support, absolute right, 87.
- Title: claim contest, 8.
 - Without administration, 91.
- Volunteer personal attentions, 92.
- Wife's subrogation claim, 93.
 - Mortgage lien right, 95, 96.

1. Claims paid by the administrator are extinguished and cannot be purchased by him. See PAYMENT. —*Gillett v. Gillett*, 9 W. 194, 197.

2. The remedy in county court "is exclusive in its character." Allowance "has all the force and effect of a judgment." There can be no further action on the claim in circuit court against the administrator and on failure to "pay according to the order he shall be personally liable."

—*Price v. Dietrich*, 12 W. 626, 627.

3. "The presentation of the note to the county court for allowance was unquestionably the commencement of an action."

—*Boyce v. Foote*, 19 W. 199, 204.

4. "If the county court erroneously disallowed the claim because it considered that it had no jurisdiction in the matter, or for any other insufficient reason, * * so long as the decision stands unreversed, it concludes the parties," and such adjudication is a bar to action thereon in the circuit court.

5. "It is quite immaterial what reason the county court gave for its decision. The claim was the amount due upon the land contract, and this claim against the estate the county court had a most undoubted jurisdiction over, and could have allowed."

6. It was unnecessary to make "tender of a deed" before allowing such claim.

7. "If it had been necessary * to make and tender a deed before receiving the money," the county court had authority to direct "the amount to be paid on condition that a proper deed of conveyance was executed and tendered."

—*Gale v. Best*, 20 W. 44, 47.

8. The title in a contested claim may be claimant vs. "Estate of M. deceased." See APPEAL.

—*McNight v. Estate of McNight*, 20 W. 446, 447.

9. Where an order extending the time for filing claims "only extended the time for the petitioner to present his claim," it was held to be "merely an irregular or erroneous exercise of the power on the part of the county court, and did not go to the question of jurisdiction," and such order was sustained.

—*Tredway v. Allen*, 20 W. 475, 478.

10. "It is more strictly correct to" disallow a claim in part, than to say payments "were allowed," in a judgment on claims.

—*Parry v. Wright*, 20 W. 483, 485.

11. "The presentation of the note to the county court for allowance was unquestionably the commencement of an action within the meaning of" the statute of limitations.

12. A note not barred at the decease, but the six-year limitation having expired before filing in county court within the time there limited, is held not barred for allowance, being presented "within one year after issuing letters of administration," under section 4234.

—*Boyce v. Foote*, 19 W. 199, 204.

13. "At common law, in case of a several contract, or one joint and several, if one of the parties die, the executor of the deceased might be sued at law in a separate action"; and while "on the decease of one of the several defendants thus liable in a pending action, such action cannot be revived as a joint action," yet there is "no objection to the revivor of the suit in such a case as against the representatives of the deceased party as a separate action. And we suppose the same might be done under our statute."

14. Where such action against joint defendants was pending in the circuit court, and one of them died, the plaintiffs in filing the claim against his estate, "sought to avail themselves of a new remedy. So far as that proceeding was concerned, the statute of limitations was a complete defense. The pendency of the action in the circuit court could not properly be considered." Held, that the claim was properly disallowed as "the period of limitation had run when the notes were presented * for allowance." —*Jones v. Est. of Keep*, 23 W. 45, 49.

15. A claim duly presented for allowance, but not acted upon for several years, "was sufficient to prevent the statute of limitations from running on it."

16. "By the presentation of the claim to the probate court at one of the days fixed to receive and examine claims, the bar of the statute was prevented from running upon it. It was equivalent to the commencement of an action upon the demand (19 W. 199; 23 W. 45) and is attended with the same legal consequences so far as the statute of limitations is concerned." —*Large v. Large*, 29 W. 60, 64.

17. Where a claimant to a "sum of money" in the hands of executors as assets, obtains judgment therefor on appeal, on the ground that it is not a proper asset of such estate, and the same not being liable for debts, it was held that "the circuit court may as well direct" the payment thereof to the appellant "as to send the case back to the county court." See JURISDICTION. —*Tryon v. Farnsworth*, 30 W. 577, 583.

18. Action against the heirs may be brought by a creditor, where the will was probated but no further proceedings were had. See HEIRS. —*McGonigal, J. v. Colter*, 32 W. 614, 625.

19. A judgment concluding "for which amount judgment is now rendered in favor of the plaintiffs and against the defendant," is held "to be sufficiently formal. It amounted to an allowance of the claim against the estate." —*Lenz v. Brown, Admr.*, 41 W. 172, 177, 185.

20. An appeal from the allowance of a claim for money loaned, does not authorize the circuit court to adjudicate as to the disallowance for services as a distinct part of the claim not appealed from by the claimant. See APPEAL. —*Moerchen v. Stoll*, 48 W. 307.

21. By the "provisions of our laws, the property of a deceased person, except his real estate, and that to a limited extent, passes into the possession of the executor or administrator, when one is appointed, and under the control of the county court of the proper county;

22. And all persons having claims against such deceased person, which ought to be paid out of his estate, must proceed to have their claims allowed and paid through the instrumentality of the laws regulating the procedure in that court.

23. The fact that the claim is one which can be enforced in a court of equity alone, is no reason for the proceeding in the circuit court. The county court has ample power to determine equitable as well as legal claims.

24. The only exceptions are those expressly mentioned in the statutes (actions as to specific real or personal property. Sec. 3845), and possibly actions to ascertain an equitable claim, and then enforce it as a lien upon the specific personal property or real estate which may have come to the hands and possession of the executor or administrator as a part of the estate of the decedent."

25. Except as such specific property, "in all cases", under section 3844, "when a time is fixed in pursuance of the statute, within which claims may be presented, and notice of such limited time is given as prescribed by law, a party who fails to present his claim within the time so fixed is forever barred of any action against the executor or administrator".

26. Under Sec. 3845 "it would be necessary to allege that no time had been fixed by the proper court within which creditors might present their claims against the estate, or that no notice of such limitation had been ordered or given as required by law".

27. And no notice to creditors being alleged, "and the subject matter of the action being within the exclusive jurisdiction of the county court which granted the letters testamentary, the complaint states no cause of action against the executor, and consequently none against the widow and heirs who are joined as defendants with her, and against whom no relief is demanded."

28. The fact that the claim arises out of a partnership transaction on which deceased was to account for profits, etc., and though "it may be necessary that the court should find these matters as facts existing, in order to entitle the plaintiff to an accounting and judgment for the amount found due him thereon," this not being a preferred claim nor against specific property, the circuit court has no jurisdiction. See also JURISDICTION. (But, see explanation in *Gianella v. Bigelow*, 96 W. 185, under CONCURRENT JURISDICTION).

—*Lannon v. Hackett*, 49 W. 261, 270.

29. Where "no objection was made either in the county or circuit court that" a claim "had not been filed within the six months fixed" by the order, "we must presume it was filed within that time".

—*Oakes v. Est. of Buckley*, 49 W. 592, 600.

30. "Administration, with the proper notices, and no claims having been presented, would seem to constitute the only satisfactory evidence that there were no claims against the estate. *German Bank v. Leyser*, 50 W. 258" (See CREDITORS' ACTIONS).

—*Murphy by Gdn. v. Hanrahan*, 50 W. 485, 490.

31. "There is no question but that" the allowance of a claim "by the county court is to all intents and purposes a judgment of record, excepting that an execution cannot be issued thereon.

32. The claim, whether of account or note, is merged therein, and, so far as the estate is concerned, it is extinguished thereby, and that such allowance is a full, complete, and final adjudication thereof, as in cases in other courts having jurisdiction thereof".

33. Where a joint and several note bearing interest at ten per cent. until paid, was allowed as a claim in the estate of a deceased maker, it is held "that such allowance was a judgment and bore only seven per cent. interest (the then legal rate),

34. And that its full payment and satisfaction by the executor of the estate of B. deceased, discharged this defendant (co-maker) from any further liability to the plaintiff on the note".

35. "The full payment and satisfaction of a judgment for the whole debt against one of several persons jointly and severally liable for the same debt, operates as a discharge of all of them".

36. "As soon as that judgment was paid, the estate had the only surviving right of action against this defendant, as a joint and several maker with the deceased, for contribution, and that right is also based upon the satisfaction of the entire claim of the plaintiff".

37. "When payment has been made by one jointly and severally liable on a note, he is entitled to the possession of the note in order to sue the others for contribution".

—*Jameson v. Barber*, 56 W. 630, 633.

38. "A general creditor of the estate" of a deceased person, "can only enforce payment of her claim in the county court through the process of administration upon the estate of the latter".

39. "On the authority of *McGonigal v. Colter*, 32 W. supra, probably" a creditor of the deceased, "could maintain an action at law against the respondent, as sole heir of" the deceased, "on proof of the facts required by the statute (sec. 3277), without first administering her estate".

—*Israel v. Silsbee*, 57 W. 222, 231.

40. On failure to present claims in the county court, "and the time allowed by law for so presenting them having elapsed, such claims were absolutely and forever barred, either as the basis of an action or a set-off.

41. Section 3844 did not merely affect the remedy; it extinguished the right. *Brown v. Parker*, 28 W. 21.

42. From thenceforth the defendant had no claim against the deceased; no mutual claims existed between them".

43. While section 3847 gives "an option to set off against the demand upon which the administratrix has brought suit", "instead of presenting it to the court", yet, "this plainly implies that the right of so presenting the claim sought to be set off must have existed when the action was commenced". (Approved in *Rust v. Fitzhugh*, 132 W. post.)

44. The general statutes of limitation as to bringing actions after death, secs. 4234 and 4260, are subject to "the specific provisions of" the chapter as to payment of debts, etc., and "both the right of action and set-off are taken away by secs. 3844 and 3845, and to that extent the general provisions referred are modified and limited".

—*Carpenter v. Murphey*, 57 W. 541, 544.

45. Where a decedent had been in possession of realty under a mortgage thereon held by him, and an agreement to apply the profits upon the note and mortgage, and failed to so apply them, the right to have the profits so applied is not a claim which would be barred on failure to present it for allowance;

46. "For in equity, as well as by force of the agreement", such profits were "to be applied in payment of the note and mortgage, and when it should be thus applied it would extinguish so much of the mortgage debt", and the defendants had no "claim against the estate" to be presented.

—*Ford v. Smith*, 60 W. 222, 227.

47. Where the order for notice, and the notice itself, to creditors, were not made within the time prescribed in the statute, and notice was published but three weeks, it was held that such proceeding did not bar a claim under sec. 3844.

—*Gardner v. Est. of Callaghan*, 61 W. 91, 96.

48. "The demands and claims spoken of" in sec. 3838 to be received by the county court for adjustment, "are only such as existed at the time of the death of decedent, or such as result from contracts entered into by decedent in his lifetime,

49. And not claims or liabilities incurred by the executor or administrator in executing his trust, and arising after the death of the decedent. (Citations)". See also ACTIONS BY EXTR. OR ADMR.

50. "It has been and is the clear policy of the law of this state to confine, as far as can be reasonably done, the settlement of all claims against the estates of deceased persons to the county courts, acting as courts of probate;

51. And the jurisdiction of all other courts", "is taken away, except in a few specified cases, whenever the proper county court, assumes jurisdiction by taking the proper steps to do so. See *Lannon v. Hackett*, 49 W. supra; *Carpenter v. Murphey*, 57 W. supra".

—*McLaughlin v. Winner*, 63 W. 120, 128.

52. "Every claim 'proper to be allowed', not exhibited 'within the time limited for that purpose', is forever barred. Sec. 3844; *Carpenter v. Murphey*, supra".

53. As to recovery of contribution by co-surety on executor's bond against a deceased surety. See CONTINGENT CLAIM.

—*Ernst v. Nau*, 63 W. 134, 136.

54. Where on petition of one of two heirs, partition of real estate, the only estate of a deceased, is had in county court, such petitioner is not estopped from afterward beginning administration proceedings and having a claim allowed and paid though the other heir had conveyed his interest in the realty.

55. "It is sufficient to say that the partition and the conveyances are subordinate and subject to the settlement of the estate", "and the payment of claims against it". —*Pierce v. Pierce*, 64 W. 73, 75.

56. "The county court has full power to consider and allow" a claim arising out of an express trust, under the decision in *Lannon v. Hackett*, 49 W. supra. —*Bostwick, Admr. v. Est. of Dickson*, 65 W. 593, 594.

57. On appeal, the trial in circuit court is de novo, and recovery there is not limited by the sum allowed in county court. See APPEAL.

—*York v. Orton, Admr.* 65 W. 6, 8.

58. Where a claim on a foreign judgment was afterward declared void, it was held an abuse of discretion not to allow an extension within the time limit, to enable filing on the original debt.

—*Smith v. Grady, Extr.*, 68 W. 215, 220.

59. A judgment for deficiency obtained in a foreclosure action pending at the time of decedent's decease, "stands upon the same footing as any other judgment recovered in an action pending against a decedent at the time of his death. It is plain that the statute (sec. 3846) intends it shall be paid with other allowed claims", in the county court, and have no preferential lien.

—*Rienig v. Hartman, Extr.*, 69 W. 28, 31.

60. To enable an administrator to proceed to recover realty, it is held he "can readily ascertain, by the inventory of the property and the claims presented, whether there will probably be a deficiency of assets in his hands or not", and that it is not necessary for the claims to be allowed "that the deficiency of assets should be ascertained".

—*Andrew v. Hinderman*, 71 W. 148, 150.

61. A claim having been duly filed and allowed in the county court, and the estate settled without payment thereof, and there being insufficient personalty to pay debts, it is held that realty may be pursued in a suit against the heir under sections 3274, et al., and that sec. 3873a, only limits the power of the county court to "sell the real estate after three years from the death of the deceased". See also LIEN. REAL ESTATE.

—*Fisk v. Jenewein*, 75 W. 254, 257.

62. Where the order limiting the time for claims to be presented failed "to 'appoint convenient times and places,' " for receiving and adjusting claims, but the failure is supplied by the notice signed 'by the court', at the same time, we must "regard both papers or orders together as really constituting one order in law and hence effectual".

63. The case of *Brill v. Est. of Ide*, 75 W., 113, is distinguished, the notice being "made by the 'county judge' instead of 'the county court';" and the "soundness" of the decision, "especially in so far as it is there indicated that such appointment could only be effectual when actually incorporated in the order of limitation itself," is doubted and questioned.

—*Austin v. Saveland's Est.*, 77 W., 108, 112.

64. "The presentation of a claim" is the commencement of an action, "in effect; a civil action or suit at law", and adverse examination under sec. 4096, may be had therein. See DISCOVERY.

—*Frawley v. Cosgrove*, 83 W. 441, 443.

65. "By reason of his trust ownership", it was the duty of the administrator to preserve the estate, and "to defend the estate against claims which he honestly, or upon reasonable grounds, believed to be unjust, and these expenses should be reimbursed, even though the suit be lost, and certainly if the estate benefit by it". *Schouler*, Extrs. 544; *Ammon's Appeal*, 31 Pa. St. 311". See also LIABILITY.

—*Müller v. Tracy*, 86 W. 330, 333.

66. Judgment of disallowance of a claim in Minnesota, is held conclusive as to estate in Wisconsin. See FOREIGN JUDGMENTS.

—*Sanborn v. Perry*, 86 W. 361, 365.

67. The execution of a written instrument (a due bill here), filed as a claim, must be "proved as required at common law. 1 Greenl. Ev., 557," and its execution under sec. 4192, will not be presumed, as it would be as "between living parties". —*Campion v. Schinnick*, 93 W., 111, 112.

68. A disallowance of claims is sustained, though "there is evidence on the part of the claimant which is not specifically contradicted by any witness", such evidence being "inherently improbable and incredible".

—*Daniels v. Smith*, 95 W. 639.

69. As to equitable claim, not filed in the county court, and estate held liable in circuit court, and judgment executed in county court. See CONCURRENT JURISDICTION.

—*Gianella v. Bigelow*, 96 W., 185.

70. Actions of surviving partner against heirs, after estate settlement, and before partnership adjustment. Demurrer sustained. See SURVIVING PARTNER.

—*Blakely v. Smock*, 96 W. 611, 613.

71. Where, under sec. 3853, the county court orders the payment of claims and finds sufficient assets in the executor's hands, and the time fixed having expired, then, under sec. 3856, the executor is personally liable therefor, and on his bond, though there may be insufficiency of assets, there having been no appeal from such order,—and on suit on the bond, under section 4014 with permission of the court, claimants are held entitled to recover;

72. "There is no requirement for the giving of notice of the application for the order of judgment, any more than for the application for leave to sue under sec. 4014, and while it was proper to give such notice, it was not requisite to the jurisdiction of the court. *Elwell v. Prescott*, 38 W. 274 (See BONDS); *Landon v. Comet*, 62 Mich. 80".

73. "Demand for payment" having been "alleged in the complaint and not denied by answer, it stands" as admitted. "Moreover, it is considered that the order for leave to bring the suit, until set aside or vacated on appeal or some proper proceedings, is conclusive on that question". So also, as to sufficiency of assets, "such judgment is conclusive for the purposes of this case". See also JUDGMENTS.

—*Roberts, Judge v. Weadock*, 98 W. 400, 403.

74. Claims of resident creditors not presented under "sec. 3844 are forever barred; not only is the remedy cut off, but the right of action is extinguished. *Carpenter v. Murphey*, 57 W., supra; *Austin v. Saveland's Est.*, 77 W., supra," and "non-resident creditors are governed by the same rule."

75. These 'statutes of non-claim' "are generally applied more rigorously than the general statutes of limitation."

76. In an action against the heir, of a non-resident claimant, whose claim had been duly allowed in a California domiciliary administration, but which was not filed in Wisconsin ancillary administration, he was held barred from recovery. —*Winter v. Winter*, 101 W., 494, 496.

77. "The remedy thus provided (by sec. 3840) is the sole remedy for the collection of claims against an estate in the courts of this state where notice has been given of the time limit for the filing of claims as therein provided. (Cases, supra).

78. It applies to non-residents as well as residents. (Cases, supra).

79. And that, and sec. 3844 extinguishing claims, so far as enforcement thereof is concerned in the courts of this state, not filed as provided by sec. 3840, admit of no exception in favor of non-residents. *Winter v. Winter*, 101 W. supra."

80. So held as to a judgment on a claim properly allowed in Minnesota, and failure to duly file here in county court, where collection was attempted after the time limit.

81. "The bar of the statute absolutely extinguished the claim. It could not be waived by any failure to plead the statute in the county court, or by any act on the part of the executor". (Rule 13, sec. 6,

of the old county court rules, repealed in 1892, eight years before this decision, is cited as authority for this ruling as to "failure to plead"; but sec. 3841, providing that "no claim barred by the statute of limitations shall be allowed", nevertheless upholds the ruling. See *Martin v. Est. of Martin*, 108 W. 284, 289, under SERVICES.)

—*Fields v. Estate of Mundy*, 106 W. 383, 386.

82. The statutory liability of a deceased stockholder in an insolvent bank, may be enforced in a creditor's action in circuit court, "instead of the presentation of claim in the county court against" the estate,

83. And where the estate has been distributed, likewise against the residuary legatee, and on the decease of such legatee against her personal representative. *Gianella v. Bigelow*, 96 W., supra.

84. And a stock subscription liability where a balance on the stock was fraudulently paid by the corporation on unearned profits, is also properly enforced in such an action, without filing in county court. *Morey v. Fish Bros. W. Co.*, 108 W., 520.

85. But as to dividends fraudulently paid to the deceased stockholder, it is held that this "demand in favor of the corporation was one provable in county court," and there being no allegation under sec. 3845 of no time having been fixed or notice given in county court, and as "the liability to the corporation has been extinguished"; by county court proceedings, recovery cannot be had in such equitable action. *Lannon v. Hackett*, 49 W. supra; (other cases).

86. Whether failure to plead the statute of limitations under sec. 3841, ought to govern the action of the circuit court, when it "takes jurisdiction to adjudicate claims against estates of decedents", is not determined.

—*Gager v. Paul*, 111 W., 638, 646.

87. Where the intestate H. was entitled to "support during his natural life" out of his deceased father's estate, before the division of such estate among the heirs, and claimant had furnished H. such support, the latter "had the absolute right to such support out of such estate, independently of any contract with any one authorized to represent the estate" of the father, and claimant is held entitled to recover out of the father's estate on his claim filed against the estate of H., without a contract "with any one authorized to bind" the father's estate.

—*Warburton v. Williams*, 116 W., 557, 560.

88. Expenses of a revoked administration, held properly disallowed as not being a claim under sec. 3838. See ADMINISTRATION EXPENSES.

—*Brown v. McGee's Est.*, 117 W., 389, 392.

89. An action on a claim in circuit court against an executor who gave a residuary legatee bond, was held properly brought to recover out of non-exempt estate. See also BOND TO PAY DEBTS, ETC.

—*Pym v. Pym*, 118 W., 662, 669.

90. Where no claim was filed, and the time for filing had expired, a deficiency judgment against an executor in a foreclosure of the mortgage, is erroneous. See *MORTGAGES*.

—*Pereles v. Leiser*, 119 W., 347, 352.

91. A claimant cannot recover as sole heir of his deceased parent, he not having received title through administration proceedings. See *TITLE*.

—*McKenney v. Minahan*, 119 W., 651, 659.

92. A claim of a volunteer for necessary personal attentions to an incompetent ward, otherwise provided for by the guardian, held properly disallowed against the deceased ward's estate. See also *GUARDIAN AND WARD*.

—*Schranek v. Shepeck*, 120 W., 643, 644.

93. Where a wife, in 1870, "to prevent a foreclosure", "paid a mortgage on the homestead of herself and husband, placed thereon by another before the title came to him", which mortgage "he assumed and agreed to pay", and after his death in 1902, she filed a claim for the sum against his estate,—judgment therefor is reversed, and the claim disallowed;

94. On principles of subrogation, "the equitable assignment went no further than the mortgagor's interest in the property, the debt itself being merely kept alive so far as necessary to support the lien, not so as to constitute in the hands of" the wife "any legal claim whatever".

95. "In any view of the law", "the only right respondent (the wife) acquired by the act of her having paid the debt of her husband secured upon the homestead was limited to an enforcement of the mortgage lien as to the mortgaged property, or its equivalent in a changed form into which it could be traced and identified".

96. "It would seem", "and the authorities so hold", "that the principles of subrogation should apply" to this case, but whether "such payment created" a legal claim, that can be allowed, generally, independent of the property lien in specie,—is not determined.

97. The twenty-year statute of limitation (sec. 4220), having commenced to run before her payment in 1870, as "the mortgage had previously matured", and having expired before his death in 1902, and as claimant "if she could recover at all, could only do so in the right of the mortgagor to whom she made the payment", the claim was held barred,—

98. The statute having once commenced to run, and therefore continuing after the payment, and the cause of action not arising out of a transaction with the husband. See also *LIMITATION OF ACTIONS*.

—*Charmley v. Charmley*, 125 W. 297, 303.

99. Failure to present a claim (note) within the time limited, is, under sec. 3844, "a bar" "as effectual as a payment. It cuts off any remedy for its enforcement, and extinguishes the right of action on a claim which

might have been presented against the estate. *Eingartner v. Illinois S. Co.*, 103 W. 373 (See LIMITATION OF ACTIONS)".

100. The fact that "the deceased was guilty of a fraud by wrongfully obtaining and recording" a release of the mortgage securing the note, does not enable recovery on such claim, as contingent or otherwise;

101. But such release having been placed with a loan agent to be delivered on payment of the debt, and having been fraudulently obtained "and recorded without payment of the debt", and "contrary to the condition of the deposit", "it therefore never had any force or effect", "obtained no legal existence,

102. And the recording of it is no more a protection to subsequent innocent purchasers for value than the recording of any paper that has never come into legal existence". Foreclosure judgment against the land sustained.
—*Franklin v. Killalea*, 126 W. 88, 94.

103. A claim on a promissory note 'payable after my demise, out of my estate', is held invalid. See GIFT.

104. "Being sued as administrator in a pure action at law" on such claim, "he cannot be held as an individual upon an entirely different cause of action in equity", or upon a trust relation.

—*Tyler v. Stitt*, 127 W. 379, 381.

105. Where a wife, about a year before her death in 1893, loaned her husband \$850 payable on demand, and he dying in 1901 without repayment,—a claim filed against his estate, after the time limited therein to file claims, by the administrator of the wife's estate appointed after the expiration of such time, is held barred by secs. 3840, 3844.

106. "Upon well-established principles of law, the cause of action to recover money loaned upon demand accrues at the time of the loan. (Many cases).

107. 'A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it'. *Murphy v. Omaha* (Neb.), 95 N. W. 680; (many cases)".

108. "The decision in *Stehn v. Hayssen*, 124 W. 583 (see SURVIVING PARTNER)",—"That a cause of action which arises after death cannot accrue until there is some person in existence who can bring it",—"is strictly confined to causes of action which arise after death, and,

109. Therefore, has no application here where the cause of action accrued before the death of either" of the parties.

110. "Such statutes (secs. 3840, 3844) are known as 'statutes of non-claim', and are generally applied more rigorously than the general statutes of limitation, and in the absence of a saving clause run against all persons. *Winter v. Winter*, 101 W. supra.

111. Such statutes have been held to bar married women, infants, and non-residents, where there is no saving clause in their favor. (Many citations)".

112. And the bar is held to apply here, though the time for filing expired pending an erroneous filing and attempt at recovery by a guardian ad litem. See *McKenney v. Minahan*, 119 W. supra.

113. "The defense of coverture does not apply at all under this 'non-claim' statute", and "the estate" "was a creditor and person having a claim within the meaning of these statutes. (Cases)".

—*Barry v. Minahan*, 127 W. 570, 573.

114. Where the answer of the administrator "did not wholly destroy the probative force of the verified petition" for the extension of the time for filing claims, there being "good cause" alleged,

115. The county court may, in its discretion, make "its order extending the time", on "the facts therein alleged", though "the allegations of the petition were not substantiated by proof" otherwise.

—*Seidemann v. Karstaedt*, 130 W., 117, 120.

116. While in an action by an executor, the defendant may interpose as a set-off, only a claim which would be "enforceable" as a claim in the county court, yet he is not "required to plead affirmatively." See also ACTIONS BY EXTR. & ADMR.

—*Rust v. Fitzhugh*, 132 W., 549, 554.

117. A husband cannot recover from his wife's estate, for her support, care and nursing, either on express or implied contract. See MARRIAGE CONTRACT.

—*Ryan v. Dockery*, 134 W., 431, 434.

118. "This court has held that the provisions of sec. 3844, apply to non-resident as well as to resident creditors,

119. And to property rights involved in an ancillary administration as well as to those in a domiciliary administration; at least so far as the courts of this state are concerned". *Winter v. Winter*, 101 W. supra; (other cases). See also ANCILLARY PROCEEDINGS.

120. Where "the ancillary administration was closed and the property of the estate" "distributed by final order", it is held, in an action against his heir on a claim upon decedent's property, that,—

121. "In the absence of anything appearing in the complaint to the contrary it must be presumed that the time was limited for creditors to present their claims and notice duly given (*Lannon v. Hackett*, 49 W. supra)",

122. And that, in view of sec. 3838, requiring proceedings for claims, and taking away "the right to bring an action", unless such claim proceeding and notice is given, "it should be made to appear in the complaint", showing that "facts exist taking the case out of the general rule". (Cases). See also CONTINGENT CLAIM.

—*Davis v. Davis*, 137 W., 640, 647.

123. A circuit court judgment against the executor, is held properly allowed by the county court, though claims have become barred. See MORTGAGES.

—*Pereles v. Leiser*, 138 W., 401, 403.

124. The county court primarily held to have jurisdiction of claims of the county for the support of insane persons. See *INSANE PERSONS*.

—*Washington Co. v. Schrupp*, 139 W. 219, 222.

125. Where an executor had sufficient "personal property" "far in excess of" all allowed claims, and the time for filing had expired, it is held the county court properly entered an order requiring payment of the claims "after due notice and reasonable opportunity for the executor to be heard",

126. Notwithstanding, "before the time for filing claims had expired" the executor had "paid to specific and residuary legatees all moneys in its hands in an amount far in excess of the claims", and "that certain real estate still remains undisposed of, but of problematical value".

—*Citizens Trust Co. v. Scheftels*, 141 W., 307.

127. Whether the filing of claims and statement thereof as unpaid in the petition for sale of realty, sufficiently complies with sec. 3881, as to 'debts justly due and owing',—is undetermined. See also *SALE OF REALTY*.

—*Milwaukee Trust Co. v. Clark R. Co.*, 146 W., 230, 236.

128. "A valid debt or claim which the executor had against the deceased and subsisting as such at the time of her death is clearly a debt or claim against her estate, therefore comes within the provisions of the statute", sec. 3930a, as to payment without filing before time expired.

129. And "crediting upon the note", held by the executor as such against himself personally, "of the several items", "amounted to a payment of these claims within the meaning of the statute".

—*Est. of Morgan*, 152 W. 138, 142.

130. Where a widow, prior to administration, used estate assets in payment of funeral and last sickness expenses, and thereafter failed to duly file a claim therefor, the administrator could not recover from her. See *ACTIONS BY EXTR. OR ADMR.*

—*Merrill v. Comstock*, 154 W. 434, 443.

131. Where an administratrix, in properly continuing the business of the deceased, incurred an indebtedness for a bill of goods, and a claim therefore was filed and allowed against the estate,

132. While "this claim was not properly filed against the estate (cases)" and was one against the administratrix, yet as such allowance "was a mere irregularity", and "all parties interested" were duly represented; the estate solvent, and no one prejudiced, it is held,—

133. "The error has not affected the substantial right of any party and the judgment must be affirmed. Sec. 3072m; *Crawley v. Am. Soc.*, 153 W., 13". See also *RULES OF PRACTICE*.

—*C. W. Beggs, S. & Co. v. Est. of Behrend*, 156 W., 34, 35.

134. As to claim against a ward's estate, both before and after decease. See GUARDIAN AND WARD.

—*Gardner v. Young's Est.*, 163 W. 241, 245.

135. As to inconsistent claim of personalty, and claim for money invested therein, defeating recovery, and,

136. As to the different status of a claim for a husband's services against the estate of his deceased wife. See HUSBAND AND WIFE. SERVICES.

—*Est. of Simonson*, 164 W. 590, 594.

CLERICAL ERRORS.

See MISTAKE.

CODE, THE.

Abolish all distinctions, 3.
Broad as old practice, 4.
Change of form only, 2.
Complete substitution, 6.

Cross bills abolished, 5.
Enacted in 1856, 1.
Father of our code, 8.
Old bill of review, 7.

1. "The Code was enacted and became the law of this state as chapter 120, Laws of 1856. It professed to regulate the manner of conducting all civil actions and proceedings whatever". Dixon, C. J.

—*Buckstaff v. Hanville*, 14 W. 77, 78.

2. The Code "has not enlarged the jurisdiction of equity, nor abridged that of the law". There has been change of form only. See EQUITY.

—*Deery v. McClintock*, 31 W. 195, 203.

3. "The framers of the Code clearly intended to abolish all distinctions between actions at law and suits in equity, to abolish the forms of all such actions, and to provide that, in this state, there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action. Sec. 2600".

4. "The Code is quite as broad as the old practice, so far as relates to parties plaintiff and defendant".

5. "The forms of pleading in all actions are prescribed by the Code, and that alone", and "cross bills, strictly so called, were done away with by the Code".

—*Kollock v. Scribner*, 98 W. 104, 112.

6. "The prime idea that must be kept in mind is that the Code was intended to be a complete system in itself, and a complete substitute for the old forms of actions and methods of practice.

7. There is absolutely no reason for claiming that the old bill of review exists under our present system". So held.

—*Crowns v. Forest Land Co.*, 102 W. 97, 100.

8. In a memorial address, concerning the late Chief Justice Cole, by Judge George C. Clementson, incidental reference is made of—"Joseph T. Mills, the father of our Code of procedure and for twelve years judge of the Fifth circuit".—119 W., p. XXXIV.

CODICILS.

See also CONSTRUCTION OF WILLS. WILLS.

Cut down positive gift, 8.

Positive terms required, 9.

Evinces a desire, 5.

Not effective on will, 7.

Words precatory, 6.

Not based on valid will, 2.

Nuncupative codicil, 1.

Two wills, as will and codicil, 3.

1. A nuncupative codicil though properly proven cannot be allowed. See NUNCUPATIVE WILL.

—*Brook v. Chappell*, 34 W. 405, 409.

2. As to an instrument of testamentary character admitted as a codicil, without being based upon a valid instrument as a will. See EXECUTION OF WILLS.

—*Skinner v. American B. Socy.*, 92 W., 209, 212.

3. Two wills, admitted as will and codicil. See PROBATE OF WILLS.

—*Dicke v. Wagner*, 95 W., 260, 263.

4. Where the will gave the widow and two sons, each one-third of the residue absolutely, and a "codicil of the testator declares: 'I * hereby further provide * that my son, E., buy out and pay off the others to the extent of their shares so that E., will be the owner of the home farm which I value at about \$6000'";—it is held.

5. That "the phraseology employed" "evinces a desire that E., buy out and purchase from the wife and other son the interest in the farm devised to them.

6. This in effect renders the words precatory in their nature, and they are operative only as a recommendation by the testator to his devisees, but they leave compliance discretionary with the parties."

7. "The terms of the codicil, when considered in connection with the devises under" the will, "fail to cut down the gifts made" therein, and "the widow and the two sons" take "the farm in common and" each owns "one third thereof absolutely in fee."

8. "It is a well-recognized rule that language in a provision of a will is not to be so construed as to cut down a gift made in positive and clear terms in a prior provision,

9. Unless it does so by the use of words definite in meaning and in positive terms expressive of such an intent". (Cases).

—*Moore v. Moore*, 138 W., 602, 604.

CO-EXECUTOR.

See EXECUTORS AND ADMINISTRATORS.

COLLATERALLY.

Conclusive, when, 3.

Judgment not impeached, 1.

Jurisdiction, 3, 4.

Probate not avoided, 2.

1. The decree of a court having jurisdiction of the subject matter and of the parties cannot be impeached collaterally, or "treated as a nullity merely because it was made improvidently, or in a manner not warranted by law, or the previous state of the case."

—*Tallman v. McCarty*, 11 W. 401, 406.

2. The probate of a will cannot be avoided collaterally in a legal action on account of omission by mistake. See PROBATE OF WILLS. OMITTED CHILD.

—*Newman v. Waterman*, 63 W. 612.

3. "The general rule is that when a court has jurisdiction," its judgment is conclusive as to collateral attack. See JUDGMENTS.

—*Roberts v. Weadock*, 98 W. 400, 405.

4. "Upon collateral attack the question is not whether the judgment was obtained by fraud, but whether it was rendered without jurisdiction".

—*Cody v. Cody*, 98 W. 445, 452.

COLLATERAL SECURITY.

See also MARSHALLING ASSETS.

Estate assets pledged, 7.

Executor's personal use, 7.

Liability of estate, 9.

Executor's powers, 8.

Pledgor and pledgee, 5.

Reasonable diligence, 1.

Recover entire amount, 3.

Surplus for principal, 4.

Trustee less power, 8.

Neglect and delay, 2.

Without defense notice, 6.

1. "A creditor who holds notes or other obligations for the payment of money, assigned to him by his debtor as collateral security, is bound to use reasonable diligence to collect such collaterals when they fall due.

2. If he neglects to do so—if he unreasonably delays to take the necessary steps to enforce payment thereof at maturity,—and a loss results from such neglect and delay, he must bear the loss".

—*Charter Oak L. Ins. Co. v. Smith*, 43 W. 329, 331.

3. "The general rule is, that a plaintiff recovering on an instrument held as collateral is entitled to recover the entire amount. (Cases). It is true that Dixon, C. J., throws some doubt on the rule in *Kinney v. Kruse*, 28 W. 183; and there are cases elsewhere in conflict with it. But the rule has been established in this court for twenty years, and still appears to be the proper one".

4. "If the holder of the collateral recover more than his principal debt, he recovers it for the use of his principal debtor. *Plant's M. Co. v. Falvey*, 20 W. 200."

5. "But there are exceptions to the rule. As between the pledgor and pledgee, when the securities pledged are the obligations of the pledgor, the pledgee can only recover his principal debt. *Jesup v. Bank*, 14 W. 331."

6. "So where the collateral is in the hands of a bona fide holder, without notice of a good defense against his assignor, the general and better rule appears to be, that the pledgee can recover the amount of his principal debt only. (Cases)." "And this court holds this to be a proper exception to the general rule".

—*Union Nat. Bank v. Roberts*, 45 W. 373, 378.

7. Where an executor borrowed money on his personal note, assigning a note and mortgage of the estate as security therefor, the pledgee not knowing that the money was for the executor's "own personal use and not for the purposes of the estate", but it was represented to the pledgee, "in effect, that the money was borrowed for the purposes of the estate", and there were no facts to "put a reasonable man upon inquiry, or raise a suspicion", "the law is quite well settled to the effect that the pledge was valid. The principle is well expressed in the case of *Smith v. Ayer*, 101 U. S. 320, 326". (Other citations).

8. "The powers of an executor with regard to the sale or pledge of assets are much broader than those of a trustee, because the executor takes title to the personal property and is presumed to have the right to transfer. *Schouler Extrs.* 350.

9. It does not necessarily follow from the fact that the pledge was valid that the estate is liable for the loan, nor is that point decided in this case".

—*Hemmy v. Hawkins*, 102 W. 56, 60.

COMMISSION FOR DEPOSITION.

See DEPOSITIONS.

COMMISSIONS OF BROKERS, ETC.

- Abandonment, 60.
- Procuring cause, 62.
- Strategic purposes, 61.
- Acceptance, construed as, 35.
- Agent for both parties, 5, 9, 11, 49, 50.
- Assent of both principals, 10, 21, 51.
- Ignorance of other party, 22.
- Pay from each, 6.
- Procure interview, 7.
- Broker as purchaser, 8.
- Jointly interested, 65.
- No recovery, 65.
- Broker: defined, 24, 27.
- Custody or possession, 20.
- Payment for property, 28.
- Name of principal, 25.
- Conveyance to another party, 39, 40.
- Custom relied on, 15.
- Evidence of purchaser, 52.
- Exchange of properties, 13, 14.
- Exclusive agency, 34, 53, 58.
- Sale by principal, 59.
- Failure to disclose principal, 57.
- False representations, 63.
- As to other brokers, 63, 64.
- Favorable to broker, 32.
- Fixed price by seller, 47.
- Pay from both parties, 50.
- Many agents, for sale, 54.
- Middleman, 57.
- Other offers, 56.
- Payment to one, 55.
- Middleman merely, 23, 44, 50.
- Assurance of broker, 46.
- Failure to disclose principal, 57.
- Fixed his own price, 47, 48, 51.
- Take pay from both, 45, 49.
- Money to be raised, 41.
- Pecuniarily able, 43, 63.
- Principal makes sale, 59.
- Principal reduces price, 3, 16, 18, 19.
- Procurement: of broker, 3, 4, 16, 32, 63.
- Of interview only, 7.
- Produces party ready, 1, 12, 29, 30, 36, 38, 41.
- Purchase at lower price, 53.
- Another agent sells, 53.
- Refusal of principal, 2, 12, 42.
- Requirements stated, 33.
- Satisfactory deal, 44.
- Several brokers recover, 63.
- Signs for purchaser, 20.
- Special contract, 17.
- Title: failure of, 31, 36.
- Bank held liable, 37.
- Performance made impossible, 40.

1. "A broker, employed to make a sale at a price satisfactory to the seller, is entitled to his commissions when he produces a party who makes the purchase. And it is in general enough, in such case, that the broker produces a party ready to make the purchase at a satisfactory price;

2. And the principal cannot relieve himself from liability by capricious refusal to consummate the sale, or by a voluntary act of his own, disabling him from performance. 31 N. Y. 462; *Kock v. Emmerling*, 22 How. (U. S.) 69".

3. "And where the price or other terms of sale are fixed by the seller, in accordance with which the broker undertakes to produce a purchaser, yet if, upon procurement of the broker, a purchaser comes with whom the seller negotiates, and thereupon voluntarily reduces the price of the thing to be sold, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that a sale is consummated, or terms or conditions offered which the party proposing to buy is ready and agrees to accept, then and in either such case the broker will be entitled

to his commissions at the rate specified in his agreement with his principal”.

4. “The authorities cited show that wherever the sale is effected through the efforts of the broker, or through information derived from him, so that he may be said to have been the procuring cause of it, his services are regarded as highly meritorious and beneficial, and the law leans to that construction which will best secure the payment of his commissions, rather than the contrary”.

5. “A person cannot at the same time be both agent for the seller to make the sale, and purchaser of the property to be sold. The relations are wholly incompatible with each other, and cannot be combined in the same person. The law will not permit it. Assuming the character of purchaser, the person so acting necessarily abandons that of agent, and can claim nothing in the latter capacity in his negotiations with his former principal. Such is the undoubted general rule”.

6. “The general rule is, that a person cannot be agent for both purchaser and seller, and earn a compensation from each. The reason of this rule is the same as that for the other, which, in general, forbids the agent or broker from becoming the purchaser”.

7. “But to this rule an exception arises whenever the reason fails. If the agency or office of the broker is merely to procure an interview between his two constituents or principals, who themselves negotiate and conclude the sale or exchange, the broker is entitled to his customary compensation from each”.

8. “These decisions tend very strongly to sanction the rule, that where the broker merely engages to find a purchaser at such price as may be agreed upon, if he presents himself as such purchaser, and the seller, with full knowledge of that fact, so receives and enters into negotiations with him, and a sale is consummated, the broker may recover his commissions. But the proof in such case should be clear, and the knowledge and intent of the seller satisfactorily established in the mind of the jury.” Dixon, C. J.

—*Stewart v. Mather*, 32 W. 344, 349.

9. “To this extent the cases are in accord, that the agent of one person cannot, without his knowledge and consent, act for the other party in the same transaction, where the interests of the opposite parties are adverse”.

—*Meyer v. Hanchett*, 39 W. 419, 425.

10. On the former appeal “it was there in effect decided, that the plaintiffs could not act as the agents of the seller and purchaser without the knowledge and assent of both principals that they might undertake such neutral agency and receive commissions for their services.

11. The law will not allow a person to assume such a double agency, or hold the inconsistent and repugnant relations which it imposes, certainly not without the full consent of both parties freely given”.

—*Meyer v. Hanchett*, 43 W. 246, 249.

12. "The rule of law, as laid down by this court, applicable to this class of cases is", as stated in *Stewart v. Mather*, supra (quoting pars. 1 and 2 above).

13. This was an action for commissions according to contract, apparently on quantum meruit, where there was evidence that an exchange was agreed upon, but the defendants "appear afterwards to have refused to exchange, of their mere will, without reason assigned", and there being a non-suit, it was held the matter should have been submitted to the jury.

14. "If the respondents consented to an exchange of properties, instead of sale for money, it is difficult to understand why they should be heard to contend that such an exchange would not entitle the appellants to compensation". —*Delaplaine v. Turnley*, 44 W. 31, 41.

15. Where proof of custom of a percentage was relied on and failed, nominal damages can only be recovered, and not upon a quantum meruit. See *USAGE*. —*Hinton v. Coleman*, 45 W. 165, 170.

16. "The proposition of law laid down by the chief justice", in *Stewart v. Mather*, 32, supra, (par. 3, above), "is doubtless sound when applied to the facts and agreement he was considering", that being in "an action on a quantum meruit".

17. "But here the defendant claims that there was a special contract by which the plaintiff undertook to furnish him a purchaser who should be willing and ready to pay the full amount due on his securities, for which service he was to receive \$500. If this was the contract it was incumbent upon the plaintiff to produce such a purchaser, or he was not entitled to recover the stipulated compensation.

18. If the plaintiff produced such a purchaser, and the defendant, knowing that fact, went and made a sale at a less price, this, doubtless, would amount to a waiver".

19. But it is held, in effect, that as the purchaser produced would not pay the stipulated price, but did pay a less price to the vendor, the broker is not entitled to a commission thereon under his special contract.

—*McArthur v. Slawson*, 53 W. 41, 44.

20. Where "the price was fixed by the defendant (vendor), and the plaintiff procured the purchaser T., to accept these terms", and T. asked the agent to "sign his name to the contract in his absence, which he did in the presence of the defendant, after T. had personally accepted the terms proposed, after inspection of the land", held, that the agent was entitled to his commission from the vendor.

21. "If the contract to employ and pay a compensation by either party is made with the knowledge and assent of the agent's employment by the other party in the same transaction, of course he cannot complain, and should be held to pay the compensation agreed upon;

22. But when otherwise it is a fraud upon the party, and he is exempt from liability to the agent". —*Barry v. Schmidt*, 57 W. 172, 174.

23. One who "acted as a middleman merely", and not as agent for either party, the parties making their own agreement, as to an exchange of land, is held to recover commissions from both parties. (Cases, *supra*). —*Orton v. Scofield*, 61 W. 382, 384.

24. "A broker is an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called brokerage.

25. He is not authorized to buy or to sell property in his own name, but only in the name of his principal.

26. He is not intrusted with the custody or possession of the property bought or sold, and consequently has no special property or lien upon it.

27. He is strictly, therefore, a middle-man, or intermediate negotiator between the parties.

28. Ordinarily he has no authority merely by virtue of his agency to receive payment for property sold by him. Story on Agency; Price v. Wisconsin M. & F. Ins. Co., 43 W. 276". See also TITLE FACTOR.

—*Edgerton v. Michels*, 66 W. 124, 130.

29. "The plaintiffs produced the purchaser ready and willing to purchase on the terms fixed, and the defendant revoked their authority to sell on those terms, and refused to carry out the sale as in *Kelly v. Phelps*, 57 W. 425.

30. The plaintiffs performed their contract, and were as entitled to receive their compensation as the plaintiff in *O'Connor v. Semple*, 57 W. 243, or as the assignee of the middleman in *Orton v. Scofield*, 61 W. *supra*; (other cases)". So held. See also PAROL.

—*Magill v. Stoddard*, 70 W. 75, 79.

31. Where an agent for the sale of lands agrees to pay a broker a commission "if he would find a purchaser," he is liable for the commission where such purchaser is procured, though he then discovers that the "land was not the property of his principal." (Approvingly cited in *De Wolf v. Wis. L. I. & C. Co.*, 141 W., *post*.)

—*Barthell v. Peter*, 88 W., 316.

32. Where, by effort or information, a broker is the procuring cause of a sale, "the law leans to that construction of his contract with the vendor which will secure the payment of his commission, rather than to the contrary construction". *Stewart v. Mather*, 32 W., *supra*; *Orton v. Scofield*, 61 W., *supra*; *McKenzie v. Lego*, 98 W., 364.

33. In a late case it is said by Mr. Justice Marshall, speaking for the court: "All that is required, to entitle an agent to his commission for selling land, is employment, for a compensation, to make the sale, and

the production of a purchaser ready, able, and willing to take the property at the price named.' *Donahue v. Padden*, 93 W., 22".

—*Bell v. Siemens & H. E. Co.*, 101 W., 320, 323.

34. A "so-called option" for four months, construed as "a promise of exclusive agency during its period".

35. "The immediate performance of work by the plaintiffs (brokers) in pursuance of such employment being at once brought to the knowledge of the defendant (principal) was undoubtedly an acceptance, and created mutuality to such contract. (Many cases)".

36. A real-estate agent finding "a customer ready, able, and willing to pay" the amount, and being "employed to find a customer at a net price to the seller, earns the agreed commission whether sale is consummated or not, and although failure to make sale is due to the owner's inability to make good title. (Cases)".

37. A bank held liable for the act and mistake of the cashier, as to such attempted sale, the bank not in fact having title. See also OFFICERS.

—*Arnold v. Natl. Bank of W.*, 126 W. 362, 365.

38. "The plaintiff (broker) had performed his part of the contract when he procured the purchaser. It then became the duty of the defendant to make the proper transfer.

39. And whether the transfer was made direct from defendant to the purchaser, or through mesne conveyances from the defendant, was wholly immaterial."

40. "The defendant could not escape liability for the payment of commission by transferring the property to another or by putting it out of its power to perform its part of the contract. (Many cases)."

—*De Wolf v. Wis. L. I. & C. Co.*, 141 W., 239, 242.

41. "If the purchaser has his arrangement made so that the money will be forthcoming at the moment the deed is passed to him, no reason is perceived why he may not truly be said to be ready, able, and willing to complete the deal, although a part of the money comes from one who at the same moment receives a mortgage of the newly purchased premises."

42. Where "his principal refuses to carry out" the deal, the broker "is simply required to show that he procured a purchaser who was ready, willing and pecuniarily able within the time fixed to take and pay for the property. (citation).

43. 'Pecuniarily able', in this connection, must of course have a reasonable construction", and means "that he is able to command the necessary money".

—*McCabe v. Jones*, 141 W., 540, 542.

44. Where a broker is employed to find a purchaser 'for the sale of' property, 'provided a satisfactory deal can be made by' a certain date, he "was employed as a mere middleman", and is entitled to recover his

commission, and it is immaterial "regarding his having taken pay from" the purchaser also.

45. "A middleman, employed by a party to merely find a purchaser satisfactory to his employer, may produce another by whom he is also employed and properly take pay from both, if such purchaser proves satisfactory to such person".

46. And it is immaterial that the broker "added his assurance to that of the proposed buyer, in order to make him a satisfactory purchaser", there being no fraud.
—*Kilpinski v. Bishop*, 143 W. 390, 392.

47. "The defendant had fixed his own price at \$2,000 per acre, and the only duty which plaintiff (broker) owed defendant was to produce a purchaser able, ready, and willing to pay \$2,000 per acre.

48. When he had done this he had performed his contract with defendant, and was entitled to his commission regardless of any contract which he had with the purchaser. *Kilpinski v. Bishop*, 143 W. supra; *Donahue v. Padden*, 93 W. 20.

49. Where the character of the employment of the agent is such that compensation from the purchaser cannot affect his fidelity in the performance of his duty to the seller,

50. As for example where he is a mere middleman, or employed only to produce a purchaser at a fixed price, the rule that he cannot act for both parties does not apply. *Tasse v. Kindt*, 125 W. 631". *Stewart v. Mather*, 32 W. supra.

51. Broker held entitled to recover from the seller, though he did not inform the seller that he had an agreement to receive commission from the purchaser.
—*Tasse v. Kindt*, 145 W. 115, 119.

52. "We see no objection to permitting a party who has made an offer for property to testify that he was able to pay for it"; and on this testimony alone, and that he was ready and willing, recovery was sustained for broker's commission.

—*Ahearn v. Borngesser*, 151 W., 194, 197.

53. Where "the agent undertook to sell the property at a stated price", he "did not fulfill such a contract" by furnishing a purchaser at a lower price, and, not being an exclusive agent, he is held not entitled to a commission, where the owner later sells to such purchaser at a lower price, in good faith, through another agent. *McArthur v. Slauson*, 53 W. supra; (other cases).

54. "Defendant (owner) might place his property in the hands of as many agents or brokers as he saw fit, so long as no exclusive agency was given.

55. When one of them produced a purchaser he was at liberty to deal with him and to pay the agreed commission in case of a sale,

56. Without ascertaining whether any other agent or broker had

offered the property to such customer, the owner being ignorant of such an offer having been made.

57. Even if the contract should be construed as one to bring buyer and seller together at a price satisfactory to the seller, there could be no recovery, because the agent never disclosed the name of his customer to his principal".

—*Terry v. Bartlett*, 153 W. 208, 212.

58. "If the owner of property appoints another his exclusive agent to negotiate for sale of a particular piece of property",

59. He does not "thereby disable himself from selling it to a third person, with whom such other has no connection, free from any claim for compensation by such other". *Ingold v. Symonds*, 125 Ia. 82; (other cases).

—*Greene v. American M. Co.*, 153 W. 216, 221.

60. "Abandonment of negotiations is one thing, abandonment of the purpose to buy or sell another".

61. Where "the first negotiations" between the principals "had been abandoned and broken off, whether with intent to give up the idea of buying and selling or for strategic purposes",

62. And "the plaintiff's (broker's) efforts were the procuring cause of the sale which was afterward consummated upon terms better for the seller than those theretofore offered by the purchaser", he was held entitled to commissions.

—*Meldrum v. Southwick-Sellers L. Co.*, 157 W. 367, 375.

63. Where each of two brokers with "several contracts", in different actions "satisfied the court that they had obtained M. as a purchaser ready, willing, and pecuniarily able to purchase at a price agreeable to plaintiff", "this gave them (each) a right to a commission as against plaintiff" (*McCabe v. Jones*, 141 W. supra), though he paid another, R., full commission on false representation "that R. alone was instrumental in procuring the sale to M."

64. It is held that plaintiff, for "expense and damage" in defending suits against such two brokers, can recover of R., but not "the amounts paid to satisfy those judgments".

65. R. having been in fact "jointly interested in the purchase" with M., it is held plaintiff can recover the commission paid him. "The law refuses to give such undisclosed purchaser any right to commission. *Stewart v. Mather*, 32 W. supra; *Tasse v. Kindt*, 125 W. 631, 633".

—*Sterling E. & C. Co. v. Miller*, 164 W. 192, 195.

COMMITMENT.

See CUSTODY AND COMMITMENT.

COMMON LAW.

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- Not by implication, 20, 38.
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1. "Probate courts are only, in a qualified sense, the mere creatures of the statute. They are as truly as any other judicial tribunals, the offspring of the common law." —*Brunson v. Burnett*, 2 Pin. 185, 189.

2. At common law, twenty year stale claims are presumed to be paid, and the rule is still in force. See PRESUMPTION.

3. Twenty years residence within the state is not necessary to enforce the common law presumption of payment.

—*Sanderson v. Olmsted*, 2 Pin. 224.

4. Arbitration and award may be had orally as at common law, notwithstanding the statutory provisions.

—*Winne v. Elderkin*, 2 Pin. 248.

5. "Set-off is given by statute, and did not exist at common law." See SET-OFF.

—*Pierce v. Hoffman*, 4 W. 277, 278.

6. Rent paid by tenant in advance cannot be recovered in case of destruction of the tenement by fire. See RENTS AND PROFITS.

—*Cross v. Button*, 4 W. 468, 484.

7. Husband and wife took estates by entirety and the survivor took the whole.

—*Ketchum v. Walsworth*, 5 W. 95.

8. "The legal existence of the wife was, for most purposes, merged in that of the husband. She was not allowed to hold property to her separate use; and * she was denied the capacity to contract."

—*Conway v. Smith*, 13 W. 125, 128.

9. The common law privilege for infants is personal and for their benefit only, their contracts on their side only being voidable.

—*Davies v. Turton*, 13 W. 185.

10. At common law, and until the statute of 1872 "the earnings" of a married woman "are the absolute and unqualified property of the husband."

—*Elliott v. Bentley*, 17 W. 591, 595.

11. "There is perhaps no rule better established than that which holds that the common law, so far as applicable to our condition, exists in the states of this country, except those whose system was based upon the civil law or some other foreign code."

12. In Wisconsin "the existence * of the common law * must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the revolution. * The revolution itself is the dividing line which the reasoning of these cases would suggest for us."

—*Coburn v. Harvey*, 18 W. 147, 148.

13. Court may vacate or correct a judgment at a subsequent term under common law rules. See VACATING JUDGMENT.

—*Ætna Life Ins. Co. v. McCormick*, 20 W. 265.

14. The rule that husband and wife cannot testify against each other, is changed by statute only "so far as to permit them to testify when parties to actions." See HUSBAND AND WIFE.

—*Farrell v. Ledwell*, 21 W. 182, 184.

15. "The real estate descended to the heir immediately", and the personal representative "had nothing whatever to do with the lands". See REAL ESTATE.

—*Jones v. Billstein*, 28 W. 221, 227.

16. There is no "presumption in favor of jurisdiction", of a probate court at common law, "where its records fail to show it." See JURISDICTION.

—*Blodgett v. Hitt*, 29 W. 169, 176.

17. "The common law in regard to champerty and maintenance, with the qualifications established by the modern authorities, is in force in this state".

—*Allard v. Lamirande*, 29 W. 502, 505.

18. "The general rule of the common law is, that property held in common can only be divided by the consent of the owners, or by a proceeding in a court of equity".

19. But, "the right of severance, amongst tenants in common, always existed at common law as to all property in its nature severable".

—*Newton v. Howe*, 29 W. 531, 535.

20. "The maxim of construction is familiar, that a statute to abrogate or change any rule or principle of the common law, must be clearly expressed so as to leave no doubt of the intention of the legislature. Repeals or changes by implication are not favored".

20a. At common law no action could be brought, "unless it existed in a perfectly actionable form at the time the suit was commenced".

—*Orton v. Noonan*, 29 W. 541, 545.

21. "The rules of the common law respecting the validity of usages" and proof thereof "have been long established".

—*Lamb v. Klaus*, 30 W. 94, 97.

22. "The rule fixing the period of our revolution as the time from which the English statutes and acts of parliament shall be considered as part of the common law of this country", "is a general one", subject to exceptions.

23. "The fundamental idea represented by the rule and upon which it is based is, that those statutes which were so enacted and which were suited to the condition and circumstances of our colonial ancestors, had been received, acted upon and ratified by them as part of the jurisprudence and laws of the colonies before the separation from the mother country, and which, upon the separation, the colonists took with them as the still continuing law, except where subsequently repealed or modified by positive legislative enactment."

24. Statutes "enacted on the very eve of the revolution," as in 1774, when the colonists "could not have become familiar with or have ratified or adopted" them, "would seem to" be excluded under this rule.

—*Spaulding v. C. & N. W. R. Co.*, 30 W. 110, 117.

26. "At common law a deed was valid without attesting witnesses". See DEED.

—*Gilbert v. Jess*, 31 W. 110, 115.

27. "It is well settled at common law, that a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made".

—*Eldred v. Leahy*, 31 W. 546, 551.

28. "In the construction of pleadings, the maxim of the common law is, that everything shall be taken most strongly against the party pleading". This is "abrogated by the code". See PLEADING.

—*Hazleton v. Union Bank*, 32 W. 34, 42.

29. "At the common law, a plaintiff had the absolute right to discontinue"; likewise in equity, but a cross bill was not carried with the dismissal. See DISCONTINUANCE.

—*Bertschy v. McLeod*, 32 W. 205, 210.

30. At common law, "where no time of payment was fixed", demand and refusal was necessary to recover interest; "not allowed on unliquidated demands".

—*Marsh v. Fraser*, 37 W. 149, 152.

31. At common law one could not "be held liable for the consequences of the vicious or mischievous act of his dog, unless he had previous knowledge of the vicious or mischievous propensities of the animal".

—*Slinger v. Henneman*, 38 W. 504, 507.

32. But where it is shown that an "allegation as to breaking the close and killing the cow there was proven", then the plaintiff could "recover, though he did not show that the defendant knew the dog was accustomed to bite and kill domestic animals".

—*Chunot v. Larson*, 43 W. 536, 541.

33. At common law "a feme covert can do no act to bind herself", and her acts in general are void, not voidable. See MARRIED WOMAN.

—*Petesch v. Hambach*, 48 W. 443, 449.

34. "To inquire in a summary manner", is "certainly not a mode of trial known to the common law". See WORDS AND PHRASES.

—*Schafer by Gdn. v. Luke*, 51 W. 669, 675.

35. In "special proceedings outside and in derogation of the common law practice of the courts", the "statute, as well as the proceedings under it, must be strictly construed. Freem. on Judg. 543 and cases cited".

—*Sloane v. Anderson*, 57 W. 123, 131.

36. Election for insane person is made by "a court of equity". See WIDOW.

—*Van Steenwyck, Exr. v. Washburn*, 59 W. 483, 504.

37. "At the common law the testimony of a party to the action was absolutely excluded", but the agent was competent even in transactions with deceased persons. See also TRANSACTIONS WITH DECEASED PERSONS.

—*Hanf v. N. W. Masonic Aid Assn.*, 76 W., 450, 453.

38. "The common law is not subject to change by mere implication. A statute to accomplish such a change 'must be clear, unambiguous and peremptory'. (Citations)". See also HUSB. & WIFE.

—*Richardson v. Stuesser*, 125 W. 66, 72.

39. "That law being in a degree progressive, the term 'common law' is somewhat ambiguous, for the common law of the seventeenth century is not in all details that of the nineteenth, nor the common law of England in all details that of the United States, nor the common law of one state in all details that of another.

40. This difference in detail is frequently all-important". "The constitution of this state (sec. 13, art. 14) provides that such parts of the common law as are now (1848) in force in the territory of Wisconsin not inconsistent with this constitution shall be and continue part of the law of this state until altered or suspended by the legislature.

41. Viewed objectively and at large as a system of deducing from litigated instances just, reasonable, and consistent rules of decision suitable to the genius of the people and to their political, social, and economic conditions, the common law never changes;

42. But with reference to the rules so deduced we may say with Francis Bacon: 'As waters do take tincture and taste from the soil through which they run, so do laws vary according to the region where they are planted though they proceed from the same fountains'.

43. A rule of the common law which has come down to us practically unchanged made it the duty of every man to keep his cattle (herbivorous domestic animals) within the limits of his own possession". Rule as modified by statute and cases considered. TIMLIN, J.

—*Metropolitan C. I. Co. v. Clark*, 145 W. 181, 182.

COMMUNICATIONS WITH DECEASED PERSONS.

See TRANSACTIONS WITH DECEASED PERSONS.

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1. The executor is entitled to compensation though "he did not intend to" charge the same.

2. A partner of the executor is not entitled to share in the fees, though the executor "intended to share it with him".

—*King v. Whiton*, 15 W. 684, 688.

3. On the facts and where "there has been property found in four states, and looked after with diligence by the executor," extra compensation, under the statute, sec. 3929, in the sum of \$3000, is upheld at that sum, though "all the witnesses" on the question fixed the value at double that sum or more.

4. It "would be the better practice" to itemize such claim, though neither the statute nor court rule seem to require it, and being "itemized on the trial", such objection is not fatal, especially as "a bill of particulars" might have been moved for.

5. "We do not consider it absolutely binding on the court," to accept the full statements of the experts, the statute making the amount discretionary, being such "as the county court shall judge reasonable."

6. "The court is fixing the value of the labor of its own officer in the transaction of the business of the court," and the matter is not "on the same footing" as services between persons. "The final test is, What does the court in view of the evidence and its own knowledge of the facts, 'judge reasonable'."

7. Where "none of this litigation was commenced by or on behalf of the minor, but he was a necessary party thereto," and defense was

necessary, the "attorney's fees and disbursements incurred by the guardian ad litem," in administration litigation and construction of the will, were held properly allowed out of the estate generally, "not as costs, but as a part of the expenses of settlement of the estate." (In effect over-ruled, in *Stephenson v. Norris*, 128 W., post.)

—*Ford v. Ford*, 88 W. 122, 130.

8. As to allowance for extraordinary services, not in compliance with the court rule. See ACCOUNTS OF EXTES. AND ADMRS.

—*Schinz v. Schinz*, 90 W., 236, 248.

9. Referring to the duties set forth in *Tyson v. Tyson*, 94 W. 225, (See GUARDIAN AD LITEM), the guardian ad litem "was entitled to a reasonable compensation for his services and his reasonable disbursements,

10. And it was the plain duty of the court, whose officer he was, to examine his claim for such compensation and disbursements, and to audit and allow it at the proper sum,

11. And also to use its power so far as reasonably necessary to enforce payment of such allowance out of any property of defendants (the wards) controlled by the court or protected by its decree, in accordance with settled principles of judicial administration". (Followed in *Stephenson v. Norris*, 128 W. post, as "payable only out of the infant's property", and not out of the estate).

12. And the court has power "to make the same a lien upon the title of the" ward's personalty or realty, "and to make proper directions for the enforcement of such lien".

13. "It should evidently not go beyond control of the income of (realty) the property where that will be reasonably sufficient to satisfy the claim within a reasonable time", and otherwise "some portion of the property itself must necessarily be sold" for the purpose.

14. "A lien upon the estate in remainder" is directed, and "unless paid within one year" with interest, "that the lien may be enforced by foreclosure and sale according to the rules and practice of the court and the statutes on the subject of foreclosure of mortgages".

—*Tyson v. Richardson*, 103 W. 397, 400.

15. As to costs and counsel fees, authoritatively set forth. See COSTS AND FEES.

—*In re Donges's Est.*, 103 W. 497, 513.

16. As to a trustee of an implied trust, it is said: "Obviously, if a trustee be guilty of a breach of trust, he cannot charge his cestui que trust for services rendered in the course of committing the breach".

—*Jordan v. Est. of Warner*, 107 W. 539, 558.

17. "We have pointed out in *Richardson v. Tyson*, 110 W., post, that guardians ad litem are public officers, and should be compensated in analogy to official emoluments.

18. The same is true, though perhaps in less degree, of receivers, trustees, and other like officers of courts.

19. They should be restrained to reasonable charges, measured not by the highest salary which large establishments may pay, but by analogy to compensation which the law allows to public officers having similar duties".

—*Speiser v. Merchants' E. Bank*, 110 W. 506, 513.

20. Referring to *Tyson v. Tyson*, 94 W. 225 (See *GUARDIAN AD LITEM*), and *Tyson v. Richardson*, 103 W. supra, as to his duties and rights, it is stated that a guardian ad litem "is a public officer,—a trusted attorney, aiding his own court as an official duty cast upon him by its appointment, a duty which no lawyer can with propriety decline, even though it may be compensated inadequately or not at all".

21. "It is a professional duty to aid the court as guardian ad litem, either without compensation if the case requires it, or, when funds exist, for compensation to be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will",—as for illustration, "comparison should be made", rather with the emoluments of the judge trying the case, than with private contracts. See also *Speiser v. Merchants' E. Bank*, 110 W. supra.

22. Where a contract for a definite sum was made, and the situation changed "radically from that within the contemplation of both" parties,—a large additional compensation was allowed.

23. The guardian ad litem himself is expected "to render the professional services necessary to any ordinary situation.

24. Hence the employment of additional counsel can only be justified by unusual or extraordinary circumstances.

25. If the guardian takes such step without an order of court, he assumes the peril that it may be disapproved, and he be left to bear the expense personally".

26. It is "the better practice" to apply for leave to employ counsel, and for the court, in advance, to "fix the amount" to be so expended;

27. "Nevertheless, if, after the fact, it appears that such" employment "was reasonably necessary", "and such as the court would have authorized in advance", the expense therefore is allowable, without advance leave, on like considerations as suggested in "taking appeal in *Tyson v. Tyson*, 94 W. 225, (See *GUARDIAN AD LITEM*); (cases)".

28. And the court has the power, and may exercise its discretion, as to making allowance for guardian's services, and "for attorney's fees paid in the hearing on his account", which was contested, and such allowances are held proper "when the officer acts fairly, makes full disclosure, and does not make unreasonable demands for credit or allowance. (Cases)".

—*Richardson v. Tyson*, 110 W. 572, 578-586.

29. Where the administrator was an attorney and included in his account a claim for "extraordinary services", mostly for legal work,

and "performed, generally, all the legal services of settling up the estate", "none of such services, under the circumstances of this case, was within the ordinary duties of respondent's (the administrator's) office.

30. The performance of legal services was wholly outside thereof. If respondent had employed an attorney, as is usually done in such cases, and as the county court might properly have authorized him to do, the charges incident thereto "would have amounted to quite a sum".

31. Sec. 3929 authorizes the court to allow reasonable compensation "for all extraordinary services". "Legal services are extraordinary services within the meaning of such statute, and so are all other services involving special skill or learning. 2 Woer. Am. Law of Admn, 529".

32. While a claim for extra services "should be required to be presented in such form that the questions involved can be passed upon in detail", yet under the trial court's "broad discretionary power", its allowance here is approved though the "claim was not so presented in all respects." See also ACCOUNTS OF EXTRS. AND ADMRS.

—*Sloan v. Duffy*, 117 W., 480, 485.

33. As to disallowance for maladministration and bad faith, and as to discretion so to do. See ACCOUNTS OF EXTRS. & ADMRS.

—*Mackin v. Hobbs*, 126 W. 216, 222.

34. Recognizing *Ford v. Ford*, 88 W. supra, as contra, approving the principles of *In re Donges's Est.*, 103 W. supra, and following *Tyson v. Richardson*, 103 W. supra,—allowance of guardian ad litem fees, in a will construction case, "out of the body of the estate" is reversed, though "the interests of the minors are problematical and distant", and "the minors have been brought into court by the executors simply as a necessary incident",

35. And judgment is directed "that the sums allowed be paid out of and made a lien upon the respective interests in the estate to which said minors are entitled".

36. (Under subd. 2, sec. 4041b, created subsequently by ch. 267, L. 1907, allowance to guardian ad litem, in probate, construction, and estate settlement, is allowable 'out of the body of the estate', 'if the infant has no available property'. Applied and discussed in *Will of McNaughton*, 138 W. post). See also CONSTRUCTION OF WILLS.

—*Stephenson v. Norris*, 128 W. 242, 263.

37. Neither the amendment by ch. 267, L. 1907, of sec. 4041a (now subd. 2, sec. 4041b), "modifying the rule" of *Stephenson v. Norris*, 128 W., supra, nor other statutes, can be "construed as authorizing an allowance (to a guardian ad litem) before the services have been rendered or the expenditures have been made, as the court must determine the value of such services and the necessity for such expenditures", and

the allowance must be made "by judgment, as provided in sec. 4041". Such advance order, reversed. See also *APPEAL*.

—*Frame v. Plumb*, 135 W., 24, 30.

38. Following cases supra, discussing the general principles, and citing among others, *In re Donges's Est.*, 103 W. *Tyson v. Richardson*, 103 W. and 110 W., and *Stephenson v. Norris*, 128 W., supra, in a will contest, where the circuit court allowed a guardian ad litem and associate counsel for the unsuccessful contestants the sum of \$3,000 for services, besides disbursements, for eight days trial and ten to twenty days preparation therefor, there being about \$40,000 involved, "out of the estate",—by virtue of Ch. 267, L. 1907 (subd. 2, sec. 4041b),—it is held,

39. That "\$500 must cover the pecuniary reward for services in both courts", circuit and supreme, besides "necessary expenditures for litigation", "the whole to be paid out of the body of the estate", the infants having 'no available property' subject to 'be directed by the court'.

40. "The great weight of authority goes to the full length of our adjudications that, without legislative authorization, no compensation whatever can be allowed to an unsuccessful guardian ad litem standing for an infant contestant of a will, or any party, similarly situated, payable out of the general fund or any part of it not belonging to the infant. (Many cases)".

41. Under ch. 267, L. 1907 (subd. 2, sec. 4041b), the "view would seem to be the correct one", that "the words 'may allow', etc.", should be construed not mandatory but according to "a sound legal discretion", and,

42. "We adopt it both as regards power to determine whether compensation shall be allowed or not and the amount thereof".

43. "The rule was firmly established here long before the law was passed that the basis should be that ordinarily paid to compensate for official services of a somewhat similar character. (Cases)".

44. (Cited and applied in *Est. of Wells*, 156 W. post, a very large estate, where guardian ad litem fees of "\$33 per day for days spent in court and \$17.50 per day for days spent out of court", were held "too large by nearly or quite fifty per cent".)

45. "The guardian ad litem was appointed, we must assume, because of his well-known fitness for the position, so he did not need any assistant" "to charge liberally because of his professional ability, for his services".

46. "We do not overlook the" "consent of the attorneys for the proponent", but "the attorneys had no power whatever to stipulate away the trust fund, and their attitude in that regard should not have been recognized by the court".

47. "The law is very explicit that the allowance in any instance is 'to be fixed by the court in which the proceedings or litigation is had'."

"So the trial court acted without jurisdiction in making allowance for litigation occurring here".

48. "Competent and definite proof" as to each item of "allowable expenditures" "should be required" and notice given to adverse parties, but taxation "according to the practice for taxing statutory costs" is not intended.

49. "'Necessary expenditures' of the guardian ad litem", "does not include a judgment for costs against the ward. A guardian ad litem is not liable for such a debt". —*Will of McNaughton*, 138 W. 179, 191.

50. In a controversy as to construction concerning funds of a trust estate, as between the life tenant and remaindermen, being "a bona fide dispute", the "judgment of the trial court directing that the compensation of the trustee be paid equally out of the corpus and income must be sustained." See also TRUST FUNDS.

—*Miller v. Payne*, 150 W., 354, 384.

51. "If he did a large amount of the work which properly belonged to the attorneys for the executors or to the executors themselves, as probably was the case, the compensation due to him as guardian ad litem does not properly include it". p. 477.

52. Where the trustees "were all adverse to such restoration" of a depleted trust fund, "the cestuis que trustent possessed the right to act in place of the trustee." "The work performed was, in practical effect, for the trustee as well as for the beneficiaries."

53. "Reasonable attorney's fees for services actually and rightfully rendered, doing that which is reasonably necessary in conserving a trust estate, are allowable to the trustee as expenses, and may be allowed direct to the attorneys, chargeable to the trust fund.

54. They are always within the discretion of the court,—not controlled by contract. (Citation)".

55 "They are also to be fixed upon the basis of compensation for somewhat similar services in official life, rather than the customary charges as between attorney and client". (Cases).

56. Within the rules mentioned it is proper for this court to fix the amount" "for counsel fees in this court and the trial court as well, since the record satisfactorily shows all the facts",—for such services for the cestuis que trustent. See also ADMINISTRATION EXPENSES. GUARDIAN AD LITEM. PROBATE OF WILLS. —*Will of Rice*, 150 W. 401, 487.

57. As to proportionate division of fees and expenses of executors acting also as trustees, charging to the corpus the regular administration services, and to the income the trustees' share,

58. And as to the court not being "bound by the testimony of witnesses". See TRUST FUNDS.

59. "Guardians ad litem are in a true sense public officers, and not merely that but public officers of justice", and the rule of *Will of*

McNaughton, 138 W., and other cases, supra, that their compensation should be "measured more nearly by" that of "public officers having similar duties", is stated and followed.

60. In an estate involving millions, having numerous guardians ad litem, fees of "\$33 per day for days spent in court and \$17.50 per day for days spent out of court", are held "too large by nearly or quite fifty per cent", and so accordingly reduced.

—*Est. of Wells*, 156 W. 294, 314.

61. As to compensation of administrator with will annexed, acting without appointment as "trustee or agent for" the widow, a life beneficiary. See TRUSTEES.

—*Est. of Hemphill*, 157 W. 331, 340.

62. "This court has power under sec. 4041b to make proper allowance to the guardian ad litem for services and disbursements in this court".

63. "Any allowance for services and disbursements in the county and circuit courts must be adjusted and allowed by such courts".

64. For "two days at Madison", and "twenty-eight days" "time expended in getting out bill of exceptions, preparing record and briefs, and consideration of the case for this court",—"we think \$500 a reasonable allowance for services", besides disbursements. Construction case.

—*Will of Allis*, 163 W. 452, 465.

COMPETENCY OF WITNESSES.

See EVIDENCE. HUSBAND AND WIFE. IMPEACHMENT OF WITNESSES. OBJECTIONS. TRANSACTIONS WITH DECEASED PERSONS. WITNESSES.

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1. "To constitute a valid compromise and adjustment" "which will not be opened or allowed to be disturbed by the courts against the will of either party, it is in general only necessary that there should in good faith have existed a controversy between the parties upon some subject of pecuniary value and interest to themselves, and with regard to which their rights or the claims respectively set up by them, or by one of them and denied by the other, may be said to have rested in some degree of doubt or uncertainty at the time, and thus to have been proper matters for amicable arrangement and pacification, or for judicial investigation in case no arrangement had been made".

2 "To close the doors of dispute, therefore, and preclude all future investigation into the merits of the claims settled, these things only are requisite; that the claims should have been in some doubt, and their validity controverted; that they should have been asserted in good faith; and that there should have been no fraud, undue advantage or mistake in the settlement".

3. With such understanding, "the settlement is a complete bar to such inquiry and examination". Per Dixon, C. J.

—*Kercheval v. Doty*, 31 W. 476, 485.

4. A receipt in full for part payment is conclusive only "when the payment of the part is in compromise of the whole". See SETTLEMENT.

—*Catlin v. Wheeler*, 49 W. 507, 524.

5. The law of compromise, per *Kercheval v. Doty*, 31 W. *supra*, quoted and followed.

—*Zimmer v. Becker*, 66 W. 527, 531.

6. "A composition is defined to be 'an agreement, made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, whereby the latter, for the sake of immediate payment, agreed to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole.' Black. Law Dict. See 3 Am. & Eng. Ency. of Law, 385.

7. It is well settled," "that the payment of a part of an undisputed liquidated debt does not discharge the debt altogether, even where it is expressly received in satisfaction of it. *Otto v. Klauber*, 23 W., 471; (other cases.)

8. The reason of this rule is that the payment of a part of an admitted debt which the debtor is bound to pay is no consideration for relinquishing the balance of the debt, nor can it be a satisfaction to such creditor for the whole debt." *Ibid.*; (citations.)

9. "It follows that there can be no binding composition of such a debt by such a debtor and a single creditor." But, it is stated, that it may be binding with several creditors less than the whole, as well as with all.

10. "A compromise is defined to be: 'A settlement of difference by mutual concessions'. Century Dict. 'A mutual yielding of opposing

claims; the surrender of some right or claimed right in consideration of a like surrender of some counterclaim'. Ander Law Dict.

11. The dispute or opposing claims may arise from some uncertainty in regard to the facts or the law and the facts together. Black Law Dict.

12. A settlement may be made in the same way; and, even where there is no dispute or controversy, as by accounting together and striking a balance, or agreeing upon the amounts to be paid upon an unliquidated claim. Ibid." See also ACCORD AND SATISFACTION.

—*Continental Nat. Bank v. McGeoch*, 92 W., 286, 310.

13. Where "the jury has on sufficient evidence negatived fraud in the transaction which resulted in the settlement", the latter is upheld as to an injury resulting twelve days before, though after "complications" "rendered the plaintiff's injury much more serious than" his physician "supposed it would prove when the settlement was made" at which he was present.

14. "Compromise settlements are favored in the law when fairly made.

15. The signing of an instrument raises a strong presumption that its contents are understood,

16. And such presumption is not overcome by a mere statement of the signer that he did not understand the nature of the document which he signed. (Many cases)".

—*Rayborn v. Galena I. W. Co.*, 159 W. 164, 169.

COMPUTATIONS OF ESTATES, ETC.

Complicated computations, 4.
Mortality tables, 2.

Present value of estates, 3.
Wife's inchoate dower, 1.

1. The method of computing a wife's inchoate dower interest is indicated and citation given to formulas "by which the present value of an annuity can be calculated which is to commence at the death of one individual and terminate at the death of another". See LAND CONTRACT.

—*O'Malley v. Miller*, 148 W. 393, 394.

2. While "mortality tables are not conclusive as to expectancy of life", "they are persuasive evidence of it, and unopposed to any other evidence, should be controlling. This court has used them as a basis for compensation and so have others. 1 Joyce Dam. Sec. 661".

—*Secord v. John Schroeder L. Co.*, 160 W. 1, 7.

3. (For the method of computing "the present value of any estate, annuity or interest of beneficiary", together with the American Experience Table of Mortality,—see Zimmerman's Probate Practice, p, 364,

4. And for authority to submit more complicated computations to the commissioner of insurance for ascertainment,—see the statute, sec. 3871m.)

COMPUTATION OF TIME.

♦ See TIME.

CONCURRENT JURISDICTION.

See also CIRCUIT COURT. EQUITY. JURISDICTION.

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| <p>Adequate and complete remedy, 13, 17, 22, 23.</p> <p>Action to enforce trust, 15.</p> <p>Executor of different estates, 39.</p> <p>Insolvent bank suit, 34.</p> <p>Items considered, 30.</p> <p>Phrase defined, 29.</p> <p>Sales of realty set aside, 16.</p> <p>Statutory rule as to, 42.</p> <p>Circuit Court: powers, 2, 4, 7, 9, 14.</p> <p>Cannot be taken away, 36.</p> <p>Decline, ordinarily, 35.</p> <p>General original juris., 21.</p> <p>Claims statutes, 36.</p> <p>Not barred in action, 37, 38.</p> <p>Not filed; time expired, 37.</p> <p>County court powers, 6.</p> <p>Plenary jurisdiction, 13.</p> <p>Settlement of estates, 14.</p> <p>Trust execution, 14.</p> <p>Construe will, estate pending, 46, 47.</p> <p>Final disposal of questions, 49.</p> <p>Deceased stockholder, 33, 40.</p> <p>Fraudulent dividends, 41.</p> <p>Discovery: in county court, 27.</p> <p>Action in circuit, 28.</p> <p>Administration pending, 48.</p> <p>Economy of time, 43.</p> <p>Estates in different counties, 39.</p> <p>Foreign will trust, 19.</p> | <p>Guardians: equity court, 2.</p> <p>Action for mismanagement, 4.</p> <p>Cite to account, 1.</p> <p>Extraordinary cases, only, 2.</p> <p>Guardian, but a trustee, 5.</p> <p>Neglected infant, 31.</p> <p>Ordinarily in probate, 3.</p> <p>Principle as in estates, 50.</p> <p>Insolvent bank suit, 32.</p> <p>Deceased stock holders, 33.</p> <p>Enforced only in equity, 34.</p> <p>Legacy payment action, 8.</p> <p>Circuit Court, 10.</p> <p>County, not exclusive, 12.</p> <p>Nature of trusts, 9.</p> <p>Receipts in full, 8.</p> <p>With county court, 11.</p> <p>Partnership accounting, 45.</p> <p>Preferred claim, 51.</p> <p>Residuary sole legatee, 24.</p> <p>Action for personality, 26.</p> <p>Personal estate, 25.</p> <p>Sales of realty set aside, 16, 17.</p> <p>Settlement of estates, 7, 14.</p> <p>Special circumstances, 35.</p> <p>Suspended jurisdiction, 22.</p> <p>Title to personalty directly, 44.</p> <p>Trust, after estate settled, 18.</p> <p>Prevent dissipation, 19.</p> <p>Trust enforcement, 15.</p> <p>Trust execution, 14.</p> <p>Waiver, failure to raise, 23.</p> |
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1. While the probate court undoubtedly has power, “to cite the guardian to render an account of the property and estate of the ward in his hands”, yet “its powers in that respect are not exclusive.”

2. “Courts of equity still have jurisdiction over guardians, and may control them and compel them to account (2 Kent, 227; Willard’s Eq. Jur. 621); but they should not exercise this jurisdiction except in

extraordinary cases, or when some special reasons are shown to exist why the matter should be withdrawn from the probate court”.

3. “Where no such reasons exist, and it appears that the probate court can afford complete relief, there is no necessity for the circuit courts entertaining jurisdiction in such matters in the first instance”.

4. For an accounting for mismanagement, and awarding damages for waste, brought in the circuit court, it is said: “Perhaps the probate court could settle and determine all such questions, but the jurisdiction of the circuit court, as a court of equity, is clear, and it would seem to be the most fit tribunal for the exercise of this authority”.

5. “The guardian is but a trustee and is amenable in that character for a violation of his trust to a court of equity, like other trustees, and can be removed and another appointed in his stead”.

—*Willis v. Fox*, 25 W. 646, 648.

6. Much of the jurisdiction of county courts “is necessarily concurrent with that of courts of equity”. See JURISDICTION.

—*Tryon v. Farnsworth*, 30 W. 577, 581.

7. The jurisdiction of a court of chancery is “concurrent, merely, in any matter pertaining to the settlement of estates of deceased persons.” See JURISDICTION.

—*Brook v. Chappell*, 34 W. 405, 412.

8. In a suit in circuit court to recover full legacies, where receipts in full have been given for part thereof, it is said: “When the rights of the parties have been adjudicated and determined by the proper judgment in this case, the county court, sitting in probate, may proceed, at the instance of these plaintiffs or the executors, to execute such judgment in the manner directed by the statute”.

9. “The jurisdiction of a court of chancery of the execution of trusts, and the payment of legacies which are in the nature of trusts, has been too long exercised to be now questioned;

10. And no court except one of plenary and general jurisdiction in equity, and governed by the established rules and practice of such courts, can so well and so fully exercise it in such a case, to the end sought.

11. It has already been decided by this court that the county courts have jurisdiction in such matters concurrent with the circuit court, or court of chancery proper, by force of the statute;

12. But it will require the strongest, clearest and most unequivocal language of the statute to make such a jurisdiction of the county courts in probate exclusive, and no such language is found in the present statute”. “This court has virtually decided the question in *Brook v. Chappell*, 34 W. supra”.

—*Catlin v. Wheeler*, 49 W. 507, 519.

13. While “the county courts under our statutes have plenary jurisdiction in all matters pertaining to the administration, settlement, and

distribution of estates of deceased persons," yet when "special facts are stated showing that a complete and adequate remedy cannot be had in the county court," "there a court of equity will take jurisdiction and grant the proper relief.

14. For, while it has been decided that the county courts, under the statutes, have jurisdiction ordinarily in the administration and settlement of estates and enforcing the due execution of trusts created by wills, still that jurisdiction is not exclusive, but concurrent with the circuit court. *Catlin v. Wheeler*, 49 W., *supra*.

15. In this case the jurisdiction may be safely rested upon the ground that the action is to enforce a trust, and the power of the county court is inadequate to protect the rights of those interested."

16. Where "the executor as trustee has made fraudulent sales of real estate, and it is sought to have these sales set aside and the contract and deeds mentioned declared void," it is held in effect that the county court would have no power "to set aside these sales if found fraudulent, and cancel the contract and conveyances,"

17. And that in such case involving real estate, the county court could not adjust the matter in the settlement of the final account by charging the executor "with the proceeds or with the value of the real estate which he sold in violation of his trust." —*Hawley v. Tesch*, 72 W. 299, 304.

18. Where "the estate has been fully and finally settled in" the county court, and "nothing remains but for the trustees to execute the trust as directed by the will", "there is no longer any particular reason in this case why such jurisdiction should be confined to the county court".

19. And the circuit court was justified "in taking jurisdiction" "to prevent the diversion or dissipation of the income of the trust fund, or control the direction of its payment". (Cases *supra*).

—*Lamberton v. Pereles*, 87 W. 449, 456.

20. The circuit court "has full and plenary power" to administer a trust estate of a foreign will duly filed in the register of deeds office, under sec. 2295. See FOREIGN WILLS.

—*Wells Fargo & Co. v. Walsh*, 88 W. 534, 538.

21. "It seems to be settled in this state that the circuit court, as a court of equity, has a general, original jurisdiction over matters arising in the administration of estates, concurrent with the county courts. (Pomeroy Eq. Jur., and cases *supra*).

22. Yet that jurisdiction is practically suspended to this extent: that the circuit court will decline to take jurisdiction over such matters unless such special facts appear as show that a complete and adequate remedy cannot be given by the county court. (Cases *supra*)". (Followed in *Wisdom v. Wisdom*, 155 W. 434, 437).

23. "So the circuit court should decline to take jurisdiction", though

"this question of jurisdiction has been waived by the defendant by omitting to raise it by answer or demurrer, 'unless it also appears' that the remedy in county court would be inadequate.

24. Where the residuary legatee is also executor, has qualified as such "but did nothing about the administration", it is held that such personal estate left in his hands at his decease is unadministered assets which "pass to the administrator de bonis non, to be administered by him," and for which he "has a cause of action against" third persons in possession thereof.

25. "When personal property is disposed of by a residuary legacy, it does not vest at once in the legatee, but in the executors, by operation of law, subject to distribution, as in case of intestacy. *Melms v. Pfister*, 59 W. 186".

26. In such action by the administrator de bonis non, it is the proper remedy to proceed in equity "to recover a fund, of the amount, form, and condition of which the plaintiff is ignorant, so that a discovery is necessary", "and equity alone could furnish efficient relief".

27. "A proceeding in the nature of a discovery may be had in the county court, under section 3825. But if property is discovered, there is no remedy to enforce its delivery or restoration to the estate. *Sadlington's Estate v. Hewitt*, 70 W. 240".

28. And as in such case "another action must be brought for its recovery, in a court of general jurisdiction, either at law or in equity," requiring circuity of proceeding, "clearly the remedy which the county court can afford is not equally practicable, efficient, and prompt as the remedy in a court of equity".

29. "By the phrase 'adequate and complete remedy' is meant a remedy 'as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity'.

30. When 'time, expense, and a multiplicity of suits will be saved by it, and the rights of all concerned will be settled in one litigation', a court of equity has jurisdiction. *Gullickson v. Madsen*, 87 W. 19; 1 *Pomeroy Eq. Jur.* 180, 243." —*Meyer v. Garthwaite*, 92 W. 571, 573.

31. Guardian appointed by the circuit court, where the county judge had designated a custodian for a neglected infant. See CUSTODY AND COMMITMENT. —*In re Gdnsp. of Klein*, 95 W., 246, 251.

32. In an action by a creditor of an insolvent bank, for himself and all other creditors, against the bank, and stockholders, including executors of the estates of C. and S., deceased stockholders, to recover and to enforce the statutory personal liability against stockholders, it is held:

33. The liability of deceased stockholders "remained against their respective estates, the same as any other liability or debt, to be enforced, through such personal representatives, by some court having adequate equity jurisdiction. To this end, no assignment of the stock is necessary."

34. As this liability "can be enforced only in equity", and as "the bank and all its stockholders must be parties defendant", "the jurisdiction of the circuit court in the present case may well be rested upon the inability of the county court to afford to the plaintiff any adequate remedy in the regular course of administration;

35. And the circuit court will decline to take jurisdiction in matters arising in or relating to the administration of the estates of decedents, except where special circumstances show that a complete and adequate remedy cannot be given by the county court. *Hawley v. Tesch.*, 72 W., supra; *Meyer v. Garthwaite*, 92 W., supra."

36. "The case of *Lannon v. Hackett*, 49 W., 261 (See CLAIMS), must therefore be understood accordingly", and that "secs. 3844 and 3845 apply only within the legal competency of their jurisdiction". "The power of the legislature to take away the jurisdiction of the circuit court in legal or equitable actions is not absolute, but is subject to the condition that a substantial remedy must be" provided.

37. As to the fact that no claim was filed in the county court, and the time for such filing has expired, it is said that a claimant is not "bound to present his claim to a tribunal for allowance, which has no power to adjudicate it, or, failing to do so, that he shall be barred of his right".

38. "And it is no objection to the jurisdiction that when the right of the plaintiff shall have been determined the judgment will have to be executed by the county court in probate, in the manner directed by the statute. *Catlin v. Wheeler*, 49 W., supra."

—*Gianella v. Bigelow*, 96 W., 185, 193, 198.

39. Where the defendant was executor of two estates in different counties, "and the relief sought really requiring a settlement of appellant's (defendant's) accounts in both estates, that was sufficient justification for the exercise of jurisdiction by the circuit court, to the end that the whole controversy might be settled in one suit in one court". Action to have property inventoried in one estate, adjudged as part of another estate. *Meyer v. Garthwaite*, 92 W. supra.

—*Burnham v. Norton*, 100 W. 8, 15.

40. As to liabilities of the estate of a deceased stockholder in a bank, and of his residuary legatee, and of such legatee's personal representative, in equity for stock liability, and for fraudulent payments for the stock, without first proceeding in county court.

41. And as to fraudulent dividends not being so collectible in an equity action by creditors. See CLAIMS.

—*Gager v. Paul*, 111 W., 638, 646.

42. Chap 5, L. 1899, amending sec. 3845, allowing actions against executors, etc., when "the county court could not afford a remedy 'as adequate, complete, prompt or efficient as the circuit'", "was manifestly intended to put prior judicial rules on the subject into statute

law and furnish a definite legislative guide in the administration of justice. In doing so the broadest possible view, so to speak, of the effect of the decisions of this court, was taken.

43. While "mere economy of time" is probably insufficient, yet it is held material, "by reason of peculiar circumstances", there having been delay of many years with various large property interests involved, authorizing jurisdiction in this action involving the validity of involved parts of a will, and estate interests of magnitude to be settled.

—*Becker v. Chester*, 115 W., 90, 103.

44. As to a court of equity passing title to personalty in the hands of the administrator, directly to the heirs in a suit by the latter. See SURVIVING PARTNERS.

—*Rowell v. Rowell*, 122 W. 1, 9.

45. The circuit court has jurisdiction of a partnership accounting against a surviving partner. See SURVIVING PARTNER.

—*Stehn v. Hayssen*, 124 W. 583, 587.

46. As to power of circuit court to construe will, notwithstanding estate pending in county court. See CONSTRUCTION OF WILLS.

—*Stephenson v. Norris*, 128 W. 242, 253.

47. It is held, though the administration is pending, that "the fact that the question may arise in the county court on distribution is no objection to the determination of the question when presented in the circuit court for construction",—of a will in an original action there brought for that purpose. *Miller v. Drane*, 100 W., 1 (See EQUITY); (cases, supra)". See also CONSTRUCTION OF WILLS.

—*Pabst v. Goodrich*, 133 W., 43, 63.

48. In an action for discovery and accounting in circuit court, the rights of all the parties, should be determined, though administration is pending. See DISCOVERY.

—*Eisentraut v. Cornelius*, 134 W., 532, 538.

49. "In an action to construe a will the circuit court should, whenever possible under the issues made and presented, finally dispose of all questions relating to the descent and distribution of the property." See also VESTING OF ESTATES, ETC.

—*Williams v. Williams*, 135 W. 60, 67.

50. "The principle" of *Meyer v. Garthwaite*, 92 W., and other cases, supra, "is equally applicable to matters of guardianship, in which jurisdiction has been extended to the county courts." See also INSANE PERSONS.

—*Washington Co. v. Schrupp*, 139 W., 219, 222.

51. In a case "properly in the circuit court, that court has jurisdiction to administer complete relief" where the county court could not, as to a preferred claim paid out of estate assets and not filed. See ACTIONS BY EXTR. OR ADMR.

—*Merrill v. Comstock*, 154 W. 434, 442.

CONDEMNATION.

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|--------------------------------|------------------------------------|
| Benefits: to offset value, 1. | Notice of time and place, 3. |
| Excess of land taken, 2. | Not waived by demand, 4. |
| Under different statutes, 22. | Owner or occupant only, 25. |
| When no damages, 24. | Public good only, 17. |
| Damages sustained, 23, 24. | Private considerations, 18. |
| Depreciation, 5. | Rule of damages, 5. |
| Elements or items, 6. | Value of land, 9. |
| Liberal discretion, 7. | As between parties, 12. |
| Evidence in, 6, 11. | Other realty, 15, 16. |
| Examination, 7. | Recitals in deeds, 11, 12, 13, 14. |
| Liberal rule, 10. | Verdict must contain, 23. |
| Expert testimony, 8. | View of premises, 8. |
| Value of other realty, 15, 16. | Court's statement, 21. |
| Inducements of any kind, 19. | Use knowledge, 20. |

1. "There exists no valid legal or constitutional objection" to condemnation proceedings allowing the benefits of the land-owner, for the construction or widening of highways across his land, to be offset against the value of the land taken.

2. And the land-owner "could be charged for benefits over and above the value of the land taken, and taxed or required by law to pay for the same." (But, see *Zwietusch v. East. Mil.*, 161 W. post).

—*Holton v. Milwaukee*, 31 W. 27, 40.

3. The constitutional provision (Sec. 2, Art. 11) that "no municipal corporation shall take private property for public use against the consent of the owner, without the necessity therefor being first established by the verdict of a jury", requires that the owner must have "notice of the time and place of the meeting of the jury to inquire into and determine upon the necessity."

4. Such notice was not waived because claimant made a demand "for greater damages than were offered him by the trustees".

—*Seifert v. Brooks*, 34 W. 443, 446.

5. "It is settled that the rule by which the damages to plaintiff's land adjoining the defendant's railway is to be determined, is the depreciation of the market value of such lands caused by the" railway, "less any special benefits which may thereby accrue to the plaintiffs.

6. Also that witnesses may, after stating the amount of depreciation, testify as to the elements or items which make up that amount", not "as the basis for assessment of damages, but only as aiding the jury to determine the weight they ought to give to the direct testimony of depreciated value".

7. The court has a "liberal discretion in the matter of admitting or excluding such testimony", and "the party might, in this class of cases, test the value of the testimony of his witness by a sort of cross examination".

8. Opinion as to "facts within the knowledge of the jury" obtained

from a view of the premises, "in respect to matters concerning which the jury could form an opinion as intelligently as could the witnesses", "are entirely outside the range of authorized expert testimony".

9. Objection to "competent witnesses to testify to the value of plaintiff's farm, and the depreciation in such value caused by the railroad, is not well taken". —*Neilson v. C. M. & N. R. Co.*, 58 W. 516, 520.

10. "A very liberal rule of evidence prevails in this state in the investigation of values in condemnation proceedings. Great latitude is allowed in the examination of witnesses as to value, both on their direct and cross-examination; but there are limits to such examination". (Cases).

11. Recitals in deeds "of the consideration paid" "are nothing more than ex parte statements of the grantors and grantees that the considerations named were paid and received for the respective lots.

12. As between the parties thereto each of these conveyances would be evidence of the consideration paid and received, because it is an admission of the fact by all parties to it.

13. But it is not conclusive evidence. Either party may show that the true consideration was greater or less than that named in the deed".

14. "As to a stranger to the deed, however, such evidence is purely hearsay". —*Seefeld v. C. M. & St. P. Ry. Co.*, 67 W. 96, 99.

15. "To test the competency of the witness as an expert", where he "gave an opinion, on his direct examination, of the value of the land condemned", he may, on cross examination be permitted to be asked, and to give, "his opinion, as to the value of other real estate in the same vicinity, without any showing that the same was similar in character and value to the condemned property."

16. As to the admissibility of such evidence "on the direct examination of an expert", "without proof that the other real estate concerning which he is interrogated is similar in character, location, and value to the land in question", it is said, "probably it is not. *Washburn v. M. & L. W. Ry. Co.*, 59 W. 364".

—*Uniacke v. C. M. & St. P. Ry. Co.*, 67 W. 108, 114.

17. "Highways are only to be laid out when the public good will thereby be promoted.

18. Private considerations or inducements cannot rightly enter into the question in any degree".

19. "Bargains with public officers" and "inducements of any kind tending to influence their free action", "not only are" "void as against public policy, but official action based thereon ceases to be based solely upon the public welfare; and becomes tainted with some degree of private interest". —*State ex rel. Dosch v. Ryan*, 127 W. 599, 601.

20. "The court and the jury viewed the premises and the machines in question. The knowledge which jurors acquired from such view they had the right to use in determining the credibility of the evidence offered. (Many cases).

21. This being so, they had the right to use such knowledge in determining whether the court made a correct statement of fact".

—*Solberg v. Robbins L. Co.*, 147 W. 259, 262.

22. "The special benefits" "charged" "in the proceedings for condemnation under sec. 899, and the special benefits" "under sec. 903", assessed for "this public improvement, embrace and cover the same thing", as to the owner's property, and such double assessment is held invalid, and the collection of the last enjoined.

—*Stoughton S. B. v. Stoughton*, 159 W. 330, 332.

23. In village condemnation proceedings under sec. 899, "the verdict must contain two separate findings, namely, the value of the land taken and the damages. The last mentioned is followed by the relative clause 'in estimating which they shall deduct therefrom the special benefits, if any'."

24. While 'the value of the land taken' was found to be \$600, yet "the jury having found no damage to the residue, there was nothing against which benefits could be offset",—the offset relating back merely to the 'damage otherwise sustained' 'by reason of the taking thereof'.

—*Zwietusch v. East Mil.*, 161 W. 519, 521.

25. The statutes for condemnation proceedings require notice only "to the owner or occupant", and are held valid though there is "failure to require notice to lienholders. (Many cases)".

—*Connell v. Kaukauna*, 164 W. 471, 489.

CONDITIONS.

See BOND FOR MAINTENANCE. CONSTRUCTION OF DEEDS. CONSTRUCTION OF WILLS. DEVISES. VESTING OF ESTATES, ETC.

CONSENT.

See AGREEMENT. JURISDICTION. STIPULATION.

CONSIDERATION.

See also FRAUDS, STATUTE OF.

- Additional, parol evidence, 6, 14.
- Love and affection, 7.
- Antecedent indebtedness, 20.
- Part payment, 27.
- Consideration defined, 1.
- Burden or benefit, 27.
- Debt extinguished, 39.
- By operation of law, 40, 41.
- Decedent's notes, heir, 23.
- Extension of time, 21.
- Failure; parol evidence, 4, 18.
- Between original parties, 22.
- Immaterial, when, 37.
- Verbal agreement, 8.
- For value received, 11.
- Future sales, memoranda, 2.
- Husband to wife, 7.
- Care and attention, 35.
- Not a valuable, 36.
- Inadequacy of, 15, 31.
- Badge of fraud, 16.
- Exception to pay money, 34.
- Extreme case, 34.
- Inadequacy of—continued
- Fraud, makes void, 32.
- Prima facie valid, 33.
- Modify agreement, 17.
- Original illegal contract, 9.
- Past consideration, 10.
- Parol evidence, 4, 6, 8, 14, 22, 25.
- Partial failure, pro tanto, 3.
- Particularly set out, 12.
- Proof of failure, 13.
- Additional, 14.
- Promise for promise, 44.
- Realty conveyance, 29.
- Recitals in deed, 5, 30.
- As having been paid, 42.
- Entire contract, 26.
- Inconsistent with, 25.
- Not conclusive, 24.
- Release of third party, 28.
- Service agreement, 38.
- Personal services, 43.
- Silent on subject, 19.
- Valuable, however small, 31.

1. "Consideration to support a promise * must be some matter of benefit to him who makes the promise, or of loss or disadvantage to him to whom it is made; and * it must appear that it arose or was moved at the express or implied request of the promisor".

—*Eylesheimer v. Van Antwerp*, 13 W. 546, 547.

2. Written memorandum signed and dated, 'I will be responsible for the purchase of goods from W. Co. for D. or by his order, until I give them notice to the contrary,' held to be "equivalent to saying, if you will sell D. goods, in consideration thereof, I will be responsible for the amount of the sales until notice to the contrary", and "that such memorandums relating to future sales, do express * the consideration, and are valid."

—*Williams v. Ketchum*, 19 W. 231, 232.

3. "A partial failure of consideration is a good defense pro tanto to an action upon" a note.

4. "Parol evidence to show a partial or total failure of consideration is not within the rule which excludes such evidence to vary or contradict the terms of a written contract".

—*Peterson v. Johnson*, 22 W. 21, 26.

5. "The recitals in a deed are not conclusive between the parties as to the consideration or its payment."

6. "At least, where there is no question as to the rights of creditors, parol evidence may be introduced to show an additional consideration to

that expressed, and consistent with it, for the purpose of sustaining a deed."

7. Where a valuable consideration expressed in a deed from husband to wife was attacked, the wife would not "be precluded from showing that there was also a consideration of natural love and affection, although not expressed in the deed". —*Hannan v. Oxley*, 23 W. 519, 522.

8. "There was no error in receiving the evidence of the verbal agreement and understanding of the parties at the time of the making of the note. The object was to show a partial or total failure of the consideration for the note; and for that purpose the evidence was admissible."

—*Smith v. Carter*, 25 W. 283, 287.

9. On an account stated, or the giving of a new promise, "upon an original illegal contract," "the plaintiff must show that there was a demand on his side, which was acceded to by the defendant. The admission must have reference to past transactions, that is, to a subsisting debt, or to a moral obligation founded on an extinguished legal obligation, to pay a certain sum". *Greenleaf Ev.*

10. "It is a general rule, that a promise to pay for a past consideration, for which there is not and never has been any legal liability on the part of the party promising, does not make a contract binding in law. It is placed on the same footing with a promise which does not purport to be of any consideration whatever". (24 W. 204.) An exception to this rule is, a subsequent promise as to a contract made on Sunday. See also *SUNDAY*.

—*Melchoir v. McCarty*, 31 W. 252, 256.

11. "The words 'for value received', in a guaranty, sufficiently express the consideration". "The consideration of a guaranty need not pass between the parties to it." See also *GUARANTY*.

—*Dahlman v. Hammel*, 45 W. 466, 468.

12. "Here we have written instruments which set out particularly the consideration of the notes in suit, to-wit: the assignment of notes and mortgages, and of a contract to convey lands and to sell timber upon other lands.

13. The right to prove a failure of consideration would admit evidence of the failure of any consideration expressed in the writings, as that the title to any of the property thus sold or assigned had failed,

14. But does not go to the extent of allowing proof of an additional consideration not expressed in the writings, and a failure thereof. To hold otherwise would be to destroy the rule which prohibits parol evidence to contradict or vary written instruments". See also *PAROL*.

—*Hubbard v. Marshall*, 50 W. 322, 327.

15. The difference between \$1300 the value, and \$900 the contract price, was held not sufficient to defeat specific performance. See *SPECIFIC PERFORMANCE*.

—*Conrad v. Schwamb*, 53 W. 372, 378.

16. "Inadequacy of consideration may be a badge of fraud". See **MARRIED WOMAN**.
—*Fisher v. Shelver*, 53 W. 498, 504.

17. Parties may modify an agreement or rescind it without a new consideration, the original consideration applying. See **RESCISSION OF CONTRACT**.
—*Kelly v. Bliss*, 54 W. 187, 191.

18. "It is always competent to prove that an instrument which expresses a consideration was in fact made without consideration.

19. And it would seem equally competent to prove that an instrument silent on the subject was in fact executed upon sufficient consideration." So held.
—*Board of Trustees v. Saunders*, 84 W., 570, 573.

20. "It is clear that, in case the note was taken as payment of the antecedent indebtedness, it was as full and ample consideration as the antecedent indebtedness itself. The antecedent indebtedness was its consideration.

21. Besides, it gave an extension of time on the old debt, which alone was a sufficient consideration to support it."
—*Studebaker Bros. Mfg. Co. v. Langson*, 89 W., 200, 204.

22. "Want of consideration is" a defense between original parties, and may be proved by parol. See **PROMISSORY NOTES**.
—*Remington v. Detroit D. M. Co.*, 101 W. 307, 309.

23. A surrender of decedent's notes "constituted a sufficient consideration," for a new note by an heir. See **PROMISSORY NOTES**.
—*Union & P. Bank v. Jefferson*, 101 W., 452, 456.

24. "The general rule is that the consideration expressed in a deed is not conclusive; that parol evidence is admissible to show that the conveyance was based upon a different consideration than that expressed.

25. That rule has this limitation: parol evidence is not admissible to show a different consideration than that expressed in the writing if it be inconsistent therewith. *Powers v. Spaulding*, 96 W., 487."

26. In this case the "evidence rejected was directed to the establishment of the entire contract," and "it did not contradict the deed, because the writing did not purport to evidence the entire contract. It was clearly admissible. *Frey v. Vanderhoof*, 15 W., 397 (See **PAROL**); (other cases)".
—*Cuddy v. Foreman*, 107 W., 519, 526.

27. In a "part payment to release an indebtedness to take the transaction out of the common-law rule", "consideration, in addition to money paid, 'may consist of anything which might be a burden to the one party or benefit to the other.' (Cases)." See also **ACCORD AND SATISFACTION**.
—*Herman v. Schlesinger*, 114 W., 382, 401.

28. "The assumption by the claimant of a (mortgage) debt for which he was not before liable, and the procurement thereby of the release of the testatrix from liability, is entirely sufficient as a consideration for the promise of the testatrix to pay him interest on the sum during her life. The agreement was not" within the statute of frauds.

—*Roberts v. Lamberton*, 117 W., 635, 638.

29. A person may "prove by parol the consideration for a conveyance of realty and establish a legal obligation to pay the same." (Cases).

—*Halvorsen v. Halvorsen*, 120 W., 52.

30. As to recitals of payment of consideration in an ordinary deed, binding "no one as to its correctness", etc. See PAROL.

—*Jost v. Wolf*, 130 W. 37, 43.

31. "Generally speaking, a valuable consideration however small is sufficient to support any contract; that inadequacy of consideration alone is not a fatal defect. (Many cases)".

32. "Where the consideration to support a contract is so small as under all the circumstances to show fraud the agreement is void, but the defect consists in the element of fraud, not at all in the insignificance of the consideration. *Blake v. Blake*, 7 Ia., 46; *Wolford v. Powers*, 85 Ind., 294".

33. "The rule" "is that, in the absence of satisfactory proof of fraud, the smallness of the consideration to support a contract, so long as it is large enough to be measurable, is immaterial, except in case of a contract to pay a sum of money".

34. Here, an agreement, 'in consideration of one dollar', to pay one-fourth 'of the net proceeds derived from the sale of' 8000 acres of land, to be sold, resulting in many thousand dollars for such share, after some years,—was held valid as to consideration.

—*Rust v. Fitzhugh*, 132 W., 549, 557.

35. "Affectionate care and attention bestowed by" a wife upon her husband, "was simply the performance of her duty as a wife, for which she did not ask and could not have demanded compensation,

36. And the services thus rendered cannot be considered a valuable consideration for the purchase of the lands." (Cases).

—*Perkinson v. Clarke*, 135 W., 584, 591.

37. The owner of realty may as against the heir at law, convey it to another without consideration. See ESCROW.

—*Schumacher v. Draeger*, 137 W. 618, 622.

38. "There is no doubt but that the agreement to perform the services (teaching) was a sufficient consideration for the note. (Cases)".

—*Pierce v. Stolhand*, 141 W., 286, 288.

39. "The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise,

40. And that one discharged by operation of law will support one."

41. A promise to pay a debt after "a composition after bankruptcy proceedings are instituted" is held to sustain recovery.

—*Cohen v. Lachenmaier*, 147 W. 649, 652.

42. Recital of a large consideration in a deed as having been paid, but not paid, and the deed given as a gift on account of a threatened action against the grantor,—recovery of consideration named, denied. See CONSTRUCTION OF DEEDS.

—*Gross v. Arians*, 153 W. 435, 440.

43. In "an agreement to render personal services on the one side and to make payment for them in a certain way on the other", "there is no lack of consideration even though no money be paid at the time.

44. It is a case of a promise for a promise; each is the consideration for the other. *Olson v. Olson*, 149 W. 248 (See SERVICES)".

—*Huebner v. Huebner*, 163 W. 166, 170.

CONSTITUTION.

Dower of non-residents, 9.

Guardian appointment, 2.

Insanity, jury trial, 10.

Judicial power of state, 4.

Ordinance of 1787, 7.

Repeal of, 8.

Police power, 11, 12.

Powers of judges, 5.

Provisions, 6.

Unconstitutional, 1, 12.

Act not a law, 13.

Waive rights, 3.

1. "To justify a court in declaring a law of the legislature unconstitutional, the case must be clear and manifest." The compulsory reference law is constitutional.

—*Norton v. Rooker*, 1 Pin. 195, 204.

2. Appointments of guardians are not "cases at law" under the constitution as to jury trial. See GUARDIANS.

—*Gaston v. Babcock*, 6 W. 503.

3. Parties may waive constitutional rights. See REFERENCE.

—*Home Ins. Co. v. Security Ins. Co.*, 23 W. 171, 174.

4. "The constitution vests the judicial power of the state in courts which it establishes or authorizes to be established, to be held by judges whose offices it creates or authorizes to be created. This exhausts the judicial power. 3 W. 805; 27 W. 119."

5. "And the judges of these courts take, under the constitution creating their offices, the powers of judges of such courts at the common law,

including the powers commonly possessed by them at chambers, at the time of the adoption of the constitution. 5 W. 185; 7 W. 405; 643; 20 W. 686".

—*In re Kindling*, 39 W. 35, 58.

6. Sections 8 and 14 of Article VII of the constitution set forth the provisions as to circuit, probate, and county courts. See CIRCUIT COURTS. PROBATE COURT.

—*Lannon v. Hackett*, 49 W. 261, 267.

7. As to the Ordinance of 1787 it is said, by Dixon, C. J., "that the adoption of the constitution of this state by the free will and vote of the people with the assent of the government of the United States, and the subsequent admission of the state into the Union, in our judgment, abrogates entirely the provisions of the Ordinance wherever its provisions and those of the state constitution come in conflict.

8. Such adoption and ratification of the constitution was a repeal of the Ordinance 'by mutual consent', as provided for by the ordinance itself, and gave to the legislature of the state plenary powers of legislation, except as limited by the constitution of the United States and the constitution of this state".

—*Connecticut M. L. Ins. Co. v. Cross*, 18 W. 109, 115.

9. The statute, sec. 2160, discriminating as to dower against non-residents, is constitutional. See DOWER.

—*Bennett v. Harms*, 51 W. 251, 261.

10. As to right of trial of insanity issue by jury in criminal cases. See JURY. WRIT OF ERROR.

—*Crocker v. State*, 60 W. 553.

11. "The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous.

12. An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition".

—*State ex rel. Jones v. Froehlich*, 115 W., 32, 42.

13. "An unconstitutional act of the legislature is not a law". See also LAW.

—*State ex rel. Kleist v. Donald*, 164 W. 545, 552.

CONSTRUCTION OF CONTRACTS.

See also AMBIGUITY. CONSIDERATION. CONSTRUCTION OF DEEDS. CONTRACTS. PAROL. USAGE.

Ambiguity, 13, 14, 15, 34, 46.

Conversations, etc., 39, 40.

Surrounding circumstances, 39.

Breach: specific price, 16.

Personal service, 17.

Condition precedent, 6.

Conversations leading to, 34, 39.

Explain ambiguity, 40.

Decease of one party, 25, 29.

Lease binds devisee, 32.

Lease contract, 30.

Peculiar skill, 26.

Perform in person, 27, 31.

Due bill, specific, 8.

Effect to every part, 48.

Enumerations, 35, 36.

Express over implied, 36.

Forfeiture, 5.

Grammar or punctuation, 33.

Implied in express contract, 21.

Correlative obligation, 22.

Insurance division, 20.

Intent of parties, 2, 3, 33.

Law for the court, 7, 24.

Lawful and unlawful, 19.

Office of construction, 33.

Oral contract, vague, 23.

Jury when, and court, 24.

Parties' construction, 13, 38, 41, 42.

Ambiguity, 14, 15.

Personal representatives, 28, 31.

Devisees, realty lease, 32.

Whether named or not, 29.

Printed form filled, 43.

Written control, 44.

Reading nothing in or out, 48.

Surrounding circumstances, 12, 47.

Ambiguous contract, 39.

Evidence competent, 9.

Nature of the subject, 12.

Parol testimony, 10, 11.

Reasonable construction, 4.

Two papers as one, 18.

Several as one, 37.

Two reasonable meanings, 45, 47.

1. Evidence showing condition of parties and surrounding circumstances may be received. See CONTRACTS.

—*Sigerson v. Cushing*, 14 W. 527, 548.

2. To get at the intent, "the situation of the parties and the nature and object of the transactions, may be looked at, but it * is not the business of construction to look outside of the instrument to get at the intention of the parties, * whether the instrument contains language sufficient to express it or not."

—*Farmers' L. & T. Co. v. Com. Bank*, 15 W. 424, 438.

3. "The contract should be construed in accordance with the intention of the parties to it".

4. "The contract should have a reasonable construction, reference being had to the circumstances under which it was made".

5. "When the intent is doubtful, conditions providing for forfeitures, are to be construed strictly against those for whose benefit they were introduced".

6. "The party to a contract who seeks to destroy its obligation by reason of an alleged breach of a condition precedent by the other party, cannot establish the existence of such a condition by inference or conjecture."

—*Morse v. Buffalo F. & M. Ins. Co.*, 30 W. 534, 538.

7. "The construction and effect of" a written contract is a "matter of law for the court to pass upon".

—*Farnsworth v. Brunquest*, 36 W. 202, 206.

8. A due bill of railroad stock, where the company is named, is held to be specific. See LEGACY.

—*Wheeler v. Hartshorn*, 40 W. 83, 102.

9. That evidence showing the facts and circumstances "is competent, even where the whole contract is in writing, is well settled by the decisions of this court.

10. It was said by the late learned chief justice, in the case of *Lyman v. Babcock*, 40 W. 503-512, quoting from *Greenleaf* on evidence: "As it is a leading rule in regard to written instruments that they are to be interpreted according to their subject matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers.

11. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it.

12. Whatever, therefore, indicates the nature of the subject is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, differing from that which it would receive if considered in the abstract." (Citation)".

13. "Where there is any uncertainty or ambiguity in a written contract, the construction put upon it by the parties themselves is always received as evidence tending to aid in its construction.

14. In such cases it is the intention of the parties which the court seeks to arrive at, and this intention is best shown by the construction which the parties have placed upon it themselves.

15. It is true, the intention of the parties cannot avoid or change the meaning of a written contract when the language used is clear and certain, but only when the language is uncertain and doubtful. 2 Pars. on Con. 494, 499". (Approved in *Burton v. Douglass*, 141 W. post).

16. "The rule in case of a breach of contract for doing a specific work for a specified price is the profit the person would have realized had he been permitted to perform the work, and not the difference between the contract price and the sum the contractor actually received from other employments during the time he would have been employed in completing the work.

17. The rule applicable to contracts for personal services does not apply to a case of this kind. 3 Pars. on Con. 781; *Masterton v. Mayor of Brooklyn*, 7 Hill. 61; *P., W. & B. R. R. Co. v. Howard*, 13 How. (U. S.) 307, 344; 7 Cush. 516; 6 Barb. 419".

—*Nilson v. Morse*, 52 W. 240, 250.

18. Manifestly "two written instruments between the same parties, made at the same time, in pursuance of the same agreement, for the same common purpose, and in relation to the same subject-matter, must, upon well-settled principles, be construed together as constituting one paper in law. *Winner v. Hoyt*, 66 W. 234; *Herbst v. Lowe*, 65 W. 320".

—*Hagerly v. White*, 69 W. 317, 323.

19. "It is well settled that 'where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.' *Hobbs v. McLean*, 117 U. S. 576".

—*Watters v. McGuigan*, 72 W. 155, 157.

20. The clause "the sole use of M. P. and children of G. P.", being a widow and three children, beneficiaries in an insurance policy, is construed as entitling each to one fourth of the proceeds. See *INSURANCE*.

—*Taylor v. Hill*, 86 W., 99, 105.

21. "What is implied in an express contract is as much a part of it as what is expressed. It is a well-known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it (cases);

22. That, where a contract is so framed that it binds the party contracting to do an act, it will imply a correlative obligation on the party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract (*Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall., 288; other cases)."

—*Manistee Iron Works Co. v. Shores Lumber Co.*, 92 W., 21, 28.

23. "Where the terms of an oral contract are to be gathered from conduct and conversations, or where they are in dispute; or are ambiguous or vague, the question as to what the understanding or agreement in fact was is a question for the jury. *Becker v. Holm*, 89 W. 86.

24. But where an oral contract is detailed by the plaintiff, and no other testimony is given concerning it, and it is clear and unambiguous in terms, it is the duty of the court to construe it".

—*James v. Carson*, 94 W. 632, 636.

25. "The death of one contracting party does not operate as a release or discharge from the performance of his part of the agreement, where it is of such a character that it may be performed by his personal representatives. *Hawkins v. Ball's Admr.*, 18 B. Mon. 816, 68 Am. Dec. 755.

26. Where the agreement" involves "peculiar skill of an expert", and "distinctly personal considerations", "the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract.

27. If a party agrees to do that which does not necessarily require him to perform in person,—that which he may, by assignment of his contract or otherwise, employ others to do,—it may be fairly inferred, unless otherwise expressed, that a mere personal relation was not contemplated. *Billings' Appeal*, 106 Pa. St., 558.

28. It is a presumption of law that the parties to a contract bind, not only themselves, but their personal representatives;

29. And executors, therefore, whether named in the contract or not, are liable on the contracts of the testator which are broken in his life-

time, and, with the exception of contracts in which personal skill or taste is required, on all such as are broken after his death. *Chitty Cont.* (13 Ed.) 130; *Siboni v. Kirkman*, 1 *Mess. & W.* 418.

30. An ordinary contract of lease is not such a personal contract as is extinguished by the death of the lessor or lessee. *Lockart v. Forsythe*, 49 *Mo. App.* 654.

31. The executors or administrators are in truth contained in the person of the testator or intestate, except in the case of a personal contract,—that is, a contract depending on personal skill,—in which is always implied the condition that the person is not prevented by the act of God from completing the work”. *Wills v. Murray*, 4 *Exch.* 865; *Hyde v. Skinner*, 2 *P. Wms.* 196.

32. Held, that a contract “in the nature of a lease”, where the rents and profits are not required in the settlement of the estate, is binding on the devisees of the realty and that the administrator has no right of recovery of the realty.
—*Volk v. Stowell*, 98 *W.* 385, 390.

33. “The office of judicial construction is to determine what parties intended by their written language.” “The intention being determined, words, sentences, and clauses are brought into harmony with that so far as the meaning reasonably attributed to words will permit, regardless of mere rules of grammar or punctuation. *Wis. M. & F. Ins. Co. Bank v. Wilkin*, 95 *W.*, 111”. —*Hunt v. Stinson*, 101 *W.*, 556, 558.

34. As to ambiguity, and mere conversations leading up to the agreement. See **AMBIGUITY**. —*Johnson v. Pugh*, 110 *W.*, 167, 170.

35. “It is well settled ‘that general words in any instrument’ are ‘weakened by enumerations’. *Sharpless v. Mayor, etc.*, 21 *Pa. St.* 161; *Webster v. Morris*, 66 *W.*, 395 (see **CONSTRUCTION OF WILLS.**); *McAlpine v. Foley*, 34 *Minn.*, 252.

36. As stated by the late Chief Justice Gilfillan, ‘the definite and precise must prevail over the indefinite, the particular over the general, and the express over what might otherwise be implied’. *Quimby v. Shearer*, 56 *Minn.*, 538”. —*Spencer v. Holman*, 113 *W.*, 340, 343.

37. “The writings (note, mortgage, agency contracts) were all delivered at the same time; they related to the same subject matter between the same parties; and upon well-established principles so far as they can stand together they must be considered as one instrument. (Many cases)”. —*Security T. & L. Ins. Co. v. Ellsworth*, 129 *W.* 349, 358.

38. “Practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise a great and sometimes a controlling influence in determining the construction to be placed thereon by the courts. (Many cases)”.

39. “While evidence of surrounding circumstances and facts” “is receivable to aid in the construction of an ambiguous contract, many

cases hold that the rule does not go to the extent of permitting a party to testify to antecedent or contemporaneous oral agreements or conversations. (Many cases).

40. On the contrary, there are a number of cases holding that such evidence is competent to explain ambiguity in the writing. *Ganson v. Madigan*, 15 W. 144, unqualifiedly so holds, and there are many cases" subsequently approving "the rule laid down in this case". (Cases).

41. "The parties here substantially agreed on the definition of an ambiguous term", and "parol evidence to establish that fact does not alter their written contract, and neither does it add to it.

42. It simply goes to show what the parties meant when they used the term 'vicinity' and what the contract now in fact means".

—*Burton v. Douglass*, 141 W. 110, 114.

43. "It is a well recognized rule of construction that where a contract 'is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts.

44. Accordingly, if the written provisions cannot be reconciled with the printed, the written provisions control. *Hicks P. Co. v. Wis. Central R. Co.*, 138 W., 584; (citations)".

—*Atlantic T. C. Co. v. Goetzler*, 150 W., 19, 24.

45. As to when choice is to be made between "two or more reasonable meanings",

46. And as to specific ambiguity cleared up by "looking at the writing in all its parts". See MARRIAGE CONTRACTS. AMBIGUITY.

—*Oesau v. Est. of Oesau*, 157 W. 255, 261.

47. "Where an instrument is capable of different construction, each of which does no violence to the language used, recourse must be had to the facts and circumstances surrounding the parties at the time of the execution thereof, for the purpose of determining its true construction, and the intention of the parties, if at all consonant with the language used, must govern its construction.

48. The court, if possible, must give force and effect to every part of the instrument, reading nothing into it and nothing out of it. (Citation)".

—*Polebitzke v. John Week L. Co.*, 163 W., 322, 324.

CONSTRUCTION OF DEEDS.

See also AMBIGUITY. BOND FOR MAINTENANCE. CONSTRUCTION OF CONTRACTS. DEEDS. SALE OF REALTY.

Actual state of lands, 17, 35.

Ambiguity, absent, 27, 62.

Ascertained beginning, 2.

Charge upon land, 23.

Conditions: place, 9.

Precedent, defined, 10.

Conditions—continued

- Precedent, none, 44.
- Precedent, subsequent, 42.
- Relief by court, 43.
- Subsequent: found, 11.
- Subsequent not absolute, 12, 41.
- Subsequent not favored, 13, 23, 24, 25.
- Consideration recital, 52, 54.
- Creditors' equities, 56.
- Evidence to explain, 53.
- Future payments, 55.
- Parties left statu quo, 58.
- Recovery of consideration, 57.
- Controlling influences, 3.
- Corporations nonexistent, 22.
- Court to construe, 20.
- Exception in deed, 38, 39.
- Not reservation, 46.
- Father to minor son, 47.
- Fee or use, uncertain, 36.
- Fixed landmarks, 6.
- Forfeiture not favored, 24.
- Future effect, valid, 48.
- Possession in future, 39, 50.
- Government surveys, 5.
- Highway or river, 1.
- Identity of persons, 4.
- Intent of parties, 26, 33.
- Meaning of language, 28, 29.
- Jury, as to description, 20.
- Omission of grantee's name, 8.
- Parol evidence, 18, 21, 35.
- Consideration, 56.
- Intent testamentary, 51.
- Interpret description, 60.
- Not vary warranty deed, 63.
- Section omitted, 21.
- Surrounding circumstances, 59.
- Plat referred to, 6.
- Quit-claim deed, 7.
- Reservation in deed, 37, 39, 45.
- Distinction; exception, 46.
- Something in futuro, 40.
- Right of way, 15.
- Implied grant, 15.
- Obstruction thereof, 16.
- Subsequent control resumed, 14.
- Surrounding circumstances, 18.
- Interpret description, 60.
- Make deed definite, 19.
- Not to vary, 59.
- Two conflicting clauses, 30, 34.
- Against the grantor, 31.
- Former shall stand, 32.
- Warranty deed, effect, 62.
- Excluding parol, 63.
- Free of incumbrances, 61.

1. "Where the boundary is a highway or a river, unless there be some express words in the grant limiting the boundary to the bank of the river, or to the side of the highway, the center of the river or highway is to be taken as the boundary."

2. "Where there is a known and well ascertained place of beginning, in the description in a deed, that must govern, and the grant be confined within the boundaries given."

3. "What is most material and most certain in the description of the property granted, has a controlling influence. A river, a known stream, a spring, or a marked tree, will control as to courses, distances and quantities."

—*Gove v. White*, 20 W. 425, 431.

4. Where two persons answer a description, evidence may be received; not so in case of one only. See CONSTRUCTION OF WILLS.

—*Barton v. Babcock*, 28 W. 192, 198.

5. Government surveys and monuments "are to be regarded, rather than the number of acres". See REAL ESTATE.

—*McEvoy v. Loyd*, 31 W. 142, 145.

6. It is "well settled in the law", "that when a plat is referred to in a deed as a part of the description of the lands conveyed, such plat becomes

an essential part of the description itself, and that courses, distances, quantities and measurements must yield to, and are controlled by, natural or fixed landmarks". —*Shufeldt v. Spaulding*, 37 W., 662, 668.

7. In a quit-claim deed, "its language naturally and properly relates only to the interest which the grantor owned in the land," and not to a power. —*Towle v. Ewing*, 23 W. 336, 338.

8. "The omission of the grantee's name immediately after the operative words of grant in the respondent's conveyance is cured by the habendum to the grantee, his heirs and assigns".

9. "Conditions regularly follow the habendum, but are good in law in any other place". *Horner v. Railway Co.*, 38 W. 174. This was always the rule. (Case)." —*Lowe v. Hyde*, 39 W. 345, 355.

10. "It is familiar law that a condition precedent is defined to be one which must take place before the estate can vest".

11. A conveyance from parents to a daughter for one dollar "and the reservations and rents hereby reserved to be paid to us", with a condition that "this conveyance is not to become absolute until the decease" of the grantors, "and then only on this condition to-wit", that the grantee "shall deliver" to the grantors annually "one-third of the product", as specified, and work the land "in a good and farmlike manner", is held to be "a grant upon conditions subsequent".

12. The language "not to become absolute, etc.," "implies that an estate was intended to pass by the conveyance; if this were not so, it would seem inconsistent to state that the conveyance should not be absolute until those conditions were performed".

13. "It is a general principle, that conditions subsequent are not favored in law, and are construed strictly because they tend to destroy estates. (Cases).

14. The grantor having subsequently assumed control of the land deeded, to the time of his decease, it is held that the presumption of "a mutual understanding" that he had "become seized as of his first estate", "would be destroyed by proof that the deceased acknowledged the rights of the defendants in the land, and did not claim it in his own right", and that such proof should have been admitted.

—*Drew, Admr. v. Baldwin*, 48 W. 529, 532.

15. As showing "that the defendant had a right of necessity, from his house to the public highway, over the lands of the plaintiff", "we are content to cite and follow", "*Dillman v. Hoffman*, 38 W. 559, where it was held that 'in every deed of a part of the grantor's land, without express provision on the subject, there is an implied grant or reservation of easements of necessity for the enjoyment of the part conveyed, or of the part retained'."

16. "It is well established that if the owner of land which is subject

to a right of way obstructs the way, a person entitled to use the same may enter upon and go over adjoining land of the same owner, doing no unnecessary damage. *Smiles v. Hastings*, 24 Barb. 44; S. C. affirmed 22 N. Y. 217; *Leonard v. Leonard*, 2 Allen, 543; *Kent v. Judkins*, 53 Me. 160". —*Jarstadt v. Smith*, 51 W. 96, 98.

17. "Deeds are to be construed with reference to the actual rightful state of the property at the time of their execution. *Dunklee v. Railroad Company*, 24 N. H. 489; 51 Me. 575; 12 Cal. 148; 14 N. Y. 589; 22 Wend. 148; *Morgan v. Burrows*, 45 W. 211; et al.,

18. For this purpose extrinsic evidence is often admitted in order to place the court in the position of the parties at the time of making the deed, and thus enable the court to intelligently interpret the language used.

19. The law will not declare a deed void for uncertainty when the light which contemporaneous facts and circumstances furnish renders the description definite and certain.

20. It is for the court to construe a deed, but when so construed it is the duty of the jury to ascertain from the evidence whether the premises in question are within the description."

—*Messer v. Oestreich*, 52 W. 684, 689.

21. Oral evidence was admitted to explain a deed (long-time lease) where the section number was omitted, the grantees being in possession, and having fenced the premises with the acquiescence of the grantor, and the deed was upheld on the authority of *Messer v. Oestreich*, 52 W. supra.

22. The grantor or his successors, "is in no position to deny that any estate passed by the lease, on the ground that there were no such corporations in existence as therein named" as grantees.

—*Whitney v. Robinson*, 53 W. 309, 314.

23. "Whether a provision in a deed or will, which, as a part of the consideration, requires the payment of money to third persons by the grantee or devisee therein, within a fixed time after the title and right of possession vest in him, will be construed to be a charge upon the land, or whether it will be construed to be a condition subsequent, depends upon the intent of the parties to the conveyance, or of the testator in case of a devise, and it will always be construed to make a charge upon the premises, unless a different intent is clearly apparent, or in the case of a deed the language is so clear as to leave no room for construction or doubt."

24. "The rule is well settled that conditions subsequent which work a forfeiture of the estate are not favored in the law, and no language will be construed into such a condition contrary to the intent of the parties when such intent can be derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof;

25. Nor will the language used be construed into such a condition subsequent, when any other reasonable construction can be given to it. (Cases).”—*Wier v. Simmons*, 55 W. 637, 641.

26. The rule “that deeds and contracts should be construed in accordance with the intention of the parties to them”, “is subject to this other rule,

27. That if the instrument is free of ambiguity, such intention must be ascertained from the language of the instrument itself.

28. In such cases, as was tersely said by Lord Denman in *Rickman v. Carstairs*, 5 B. & Ad. 651, ‘the question is, not what was the intention of the parties, but what is the meaning of the words they have used’.

29. Or, as was said with equal terseness by the late Justice Paine, in *Farmers L. & T. Co., v. Commercial Bank*, 15 W. 438, ‘the sole duty of construction is to find out what was meant by the language of the instrument’. See also *Hubbard v. Marshall*, 50 W. 322 (cited under PAROL).”—

30. Where there are “two conflicting clauses in the deed”, the question as to which should prevail must be determined by other rules of law.

31. “One of these rules is, that a deed is always construed most strongly against the grantor”.

32. “Another is, that where there are two clauses in a deed, and the latter is contradictory to the former, the former shall stand. This is an application of the ancient rule or maxim that ‘the first deed and the last will shall operate’”.

33. “If from the whole instrument the true intention of the parties can be gathered, that intention should prevail;

34. But where, as in this case, two conflicting intentions are plainly and unequivocally expressed, there is no alternative but to construe it by these rules, even though they may be arbitrary rules”.

—*Green Bay & M. C. Co. v. Hewett*, 55 W. 96, 103.

35. “It has often been held that a deed with a description otherwise uncertain should be construed with reference to the actual rightful state of the property at the time of its execution, and extrinsic evidence of that state is admitted to aid in the construction. *Whitney v. Robinson*, 53 W. supra; *Messer v. Oestrieche*, 52 W. supra”.

—*McMillan v. Wehle*, 55 W. 685, 695.

36. “Where, by the terms of the grant, it is uncertain which is intended,”—“the temporary use of the buildings or in fee”—“and the point is left doubtful, it should be construed most favorably to the grantee. 3 Washb. 628.

37. If there is a reservation in the deed, it being in effect a grant by the grantee, it should be construed most favorably to the original grantor, by the same rule”.

38. An exception—“a part of the thing included in the grant, to be

taken out of it, and the part so taken out is in esse", "if of doubtful construction in respect to whether any part of the land in fee is excepted with the buildings, must, by the same rule, be construed in favor of the grantee, and against the grantor, who has granted the whole estate and sets up the exception against it.

39. An exception is none the less an exception because in the form and terms of a reservation.

40. A reservation is something in futuro in respect to the use of the land, as an easement or the like. These are familiar principles. 3 Washb. Real Prop. 640".

—*Green Bay & M. C. Co. v. Hewitt*, 66 W. 461, 465.

41. A condition in a deed providing that upon the decease of the grantors, "the absolute title" "shall vest in" the grantee, "provided she has fulfilled" the "conditions of the deed", but on failure, "then the said deed shall be null and void, and all rights conveyed herein shall revert to the first parties", is held to be a condition subsequent;

42. The question being, "Was the condition in the deed a condition precedent, such as must happen before title would vest in the grantee, or was it a condition subsequent, a breach of which might be taken advantage of, or operate, under its terms, to defeat the title already vested?

43. If the latter, a court of equity had ample power to relieve the defendant, upon equitable principles of compensation, from a forfeiture; if the former, the court had no such power.

44. Failure to perform a condition precedent is an effectual bar to any remedy at law, and, in a case like this, to any remedy in equity as well. (Cases)". Title held vested absolutely, subject to payment of compensation "for failure to perform the conditions of the deed."

—*Donnelly v. Eastes*, 94 W., 390, 393.

45. A deed which "excepts and reserves" "the two rods in width off the north side thereof, to be used as a right of way", "quite plainly imports that a fee was intended to be reserved. (Case)".

46. "A marked distinction exists between the terms 'exception' and 'reservation' as used in deeds; the distinction being that a reservation is something taken back from the thing granted, while an exception is some part of the estate not granted at all. (Cases)".

—*Pritchard v. Lewis*, 125 W. 604, 610.

47. "When a father executes and causes to be recorded" "a deed of his land to his infant child, brings this to the knowledge of the child, and the grant is beneficial to the infant, and the latter thereafter makes claim to the land under the deed, its acceptance is presumed and the delivery is complete. (Many cases).

48. A conveyance of land in fee to take effect at a future time is valid in this state. *Ferguson v. Mason*, 60 W. 377 (See DEEDS)."

49. A warranty deed containing after the description,—“This deed is given upon the express condition that the title and possession of the property conveyed is not to pass during the life of the party of the first part, but is to be absolute at his death”,—

50. Is “construed as a deed carrying a grant in fee simple to the grantee, to commence in possession and enjoyment after the death of the grantor. (Cases).”

51. “Such being the legal effect of the instrument, the oral evidence of the grantor to the effect that he intended a testamentary disposition was incompetent and unavailing. (Cases)”.

—*Jones v. Caird*, 153 W. 384, 386.

52. “The mere recital of consideration in a deed, coupled with an acknowledgment of its payment, is some evidence of the amount of the consideration paid, or to be paid, where the obligation to pay is admitted or otherwise proven.

53. But it may not be evidence at all that the grantee promised to pay that sum. That would depend upon other facts in evidence.

54. Such recital presents nothing of a promise or contract, merely a declaration of the fact that this was the amount of the consideration, and the declaration is made by the grantor. *Jost v. Wolf*, 130 W. supra.

55. The assent of the grantee may be presumed from his acceptance of the deed, but” he surely did not assent “that there was a promise on his part to make future payment.” (Cases)”.

56. Where “no equities of creditors are involved”, and nothing is in the deed as to creditors, but a recital of a large consideration as having been paid, none in fact having been paid, and parol testimony showing an intention to give the land as a gift, and that the deed was made in fear of a present action against the grantor, which was afterwards brought and dismissed,—

57. In an action, to recover the consideration named, by the administrator of the grantor, judgment of recovery is reversed.

58. “In such case the law leaves the parties just where they put themselves, and there is no promise implied to pay any other consideration than that agreed upon by and between the parties to the deed”.

—*Gross v. Arians*, 153 W. 435, 440.

59. “Parol evidence of the facts and circumstances surrounding the execution of the deed, if they do not contradict, vary, or modify it, may be received to aid in determining what the writing was intended to express. (Cases)”.

60. It is held that “the trial court properly received (parol) evidence to explain the subject matter of the grant and to interpret the descriptive part of the deed and ascertain the intent of the parties in relation to it”.

—*Radtke v. Rothschild, W. P. Co.*, 158 W. 271, 276.

61. "A contract to convey by 'a good and sufficient warranty deed' entitled the vendee to a warranty deed of the land 'free from all encumbrances'. *Davidson v. Van Pelt*, 15 W. 341". (Other cases).

62. "The term 'warranty deed' in the contract", "being in its legal meaning free from ambiguity, calls upon defendant to convey the title to the lots by deed containing the usual covenants of warranty".

63. He "cannot complain of the court's ruling excluding parol evidence to show that the contract called for a conveyance of the lots by a deed with restrictive covenants and reversionary provisions", such as the kind of buildings, the purpose for which used, etc. See also *SALE OF REALTY*.
—*Neff v. Rubin*, 161 W. 511, 515.

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1. "It is a well settled rule for construing statutes that particular words ought not to be permitted to control the evident meaning of the context."
—*Williams v. McDonal*, 3 Pin. 331, 334.

2. In "statutes of limitation, * general words are to have a general operation," with no exceptions unless "expressly mentioned."

—*Woodbury v. Shackelford*, 19 W. 55, 60.

3. "The purpose, and the only purpose, of judicial investigation in regard to the construction of doubtful provisions of statute law, is to ascertain the intention of the legislature which enacted the statute; and

when that is done, the intention is not to be defeated either by a too narrow or too liberal application of the words employed. Words susceptible of different applications are to be limited or extended so as to subserve the object which the legislature had in view." Dixon, C. J.

4. A statute which "might, at first blush, seem to include every action in which an administrator or legal representative sues or defends" as such, in excluding the administrator from testifying, held, "the object of the legislature" was only "to prohibit a living party from testifying in behalf of himself, when, by reason of death the other party" could not confront him.
—*Lawrence v. Vilas*, 20 W. 381, 386.

5. "It is a settled rule in the construction of statutes, that where a statute has received a judicial construction in another state, and is then adopted, it is taken with the construction which has been so given to it. Such is the presumed intention of the legislature".

—*Draper v. Emerson*, 22 W. 147, 150.

6. "Special provisions of a statute in regard to a particular subject, will prevail over general provisions in the same or other statutes, so far as there is a conflict".

—*State ex rel. Lutfring v. Goetze*, 22 W. 363, 365.

7. "Directory statutes are such as are not of the substance of the thing provided for".

8. "That which a public officer is directed by law to do for others, and which is intended for their benefit, and is beneficial to them, the law holds must be done. *Mason v. Fearson*, 9 How. U. S. 249."

9. "Statutes imposing a duty, and giving the means of performing such duty, are to be regarded as mandatory."

—*Wendel v. Durbin*, 26 W. 390, 392.

10. Where "the language of the statute is elliptical", the rule per Dixon, C. J., is applied: "If in any law we find the omission of something essential to it, or which is a necessary result of its provisions, and requisite to give the law its full effect, we may supply what is wanting but not expressed, and extend the law to what it was manifestly intended to embrace, but in its terms does not include".

—*Nichols v. Halliday*, 27 W. 406, 409.

11. "The true rule for the construction of statutes is, to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject matter, to the effects and consequences, and to the reason and spirit of the law; and thus, to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words. *Ryegate v. Wardsboro*, 30 Vt. 746".

12. "This principle in the construction of a statute, that every part

of it must be viewed in connection with the whole, and, in addition, that it must be construed so as to make all the parts harmonize if practicable, and give a sensible and intelligent effect to each, and not to place one portion in antagonism to another, has been recognized and enforced in a great variety of cases, and is, in fact, elementary. (Many cases cited)."

13. "It is a well established rule of interpretation, that the general system of legislation upon the subject matter may be taken into view, in order to aid the construction of one statute relating to the subject, and that it is proper to consider other statutes in *pari materia*, whether they are repealed or unrepealed. (Many citations)".

14. "This rule of construction extends to the statutes of other states or countries; which were the source or fountain from which the statute in question was drawn."

15. "One rule is, that a statute ought, upon the whole, to be so construed that, if possible, no clause, sentence or word, shall be superfluous, void or insignificant."

16. "Another and kindred rule is, that every clause and word of a statute shall be presumed to have been intended to have some force and effect."

17. "Another rule of construction is, that where a known statute has been reenacted in terms, its interpretation will be presumed to have been also adopted by the legislature".

18. "Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction, and such practical construction will be adhered to, even though, were it *res integra*, it might be difficult to maintain it. (Many cases.)

—*Harrington v. Smith*, 28 W. 43, 59.

19. "The rule now universally recognized and acted upon is, that whatever else may be done with the words of a statute, they may never, in the language of Lord Bacon, 'be taken to a repugnant intent.' "

20. The words "every mortgage of real estate" are held to include those of insane persons or others under disability.

—*Encking v. Simmons*, 28 W. 272, 276.

21. "It is our duty to give effect to the intent rather than to the letter of a statute, where the intent is manifest."

22. "Words of a statute ought not to be interpreted to destroy natural justice. *Rawson v. Bague*, Style's R. 81."

23. "Where words per se are repugnant and very absurd, what is necessary may be supplied by reasonable intendment and good construction. *Dwarris on Stat.* 726".

—*Haentze v. Howe*, 28 W. 293, 295.

24. "A statute to abrogate or change" the common law "must be clearly expressed". See COMMON LAW.

—*Orton v. Noonan*, 29 W. 541, 545.

25. "Courts cannot correct supposed errors, omissions or defects in legislation."

26. "The office of interpretation is to bring out the sense where the words used are in some manner doubtful, and where these are plain and unambiguous the court cannot depart from the language of the statute".

27. "It is only where the intention of the legislature is ambiguously expressed, so as to be fairly capable of two or more meanings, that interpretation or any latitude of construction is allowable.

28. It is only in such cases that the courts are at liberty to accept or act upon what is termed the doctrine of equitable construction".

29. "We are to look to the mischiefs to be remedied and the motives which led to the enactment, and to consider the whole and every part of the statute, and the apparent intention derived from the whole; to consider the subject matter, the effects and consequences, and the reason, spirit, and policy of the law, and thus to arrive at the meaning of the legislature".

30. "It being a remedial statute and its construction in doubt, we think we are at liberty to construe it liberally for the advancement of the remedy and suppression of the mischief aimed at by the legislature".

31. "In cases of doubtful construction the title of the act may also be referred to for the purpose of aiding in the interpretation. The act here was entitled an act further to protect laborers on railroads."

32. In cases of revision or substitution of a new law for an old statute, "a change of language does not always indicate an intent to change the rule, but to express the same rule in shorter and more comprehensive words". Shaw, C. J., in *Harwood v. Lowell*, 4 Cush. 312.

—*Mundt v. Sheboygan & F. Ry.*, 31 W. 451, 457.

33. "The general understanding of a law and constant practice under it for so long a period (twenty years) by all the officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle the construction in the courts, ought to be very strong, if not conclusive, evidence of its true meaning and application, and that they are such as it has thus received".

—*Scanlan v. Childs*, 33 W. 663, 666.

34. "Other circumstances being equal, or not preventing, that construction is always best which will best subserve the great primary object of the law-giver".

35. "Where the words of a statute are plain and unambiguous and such as are ordinarily incapable of different applications, or are commonly used in one general sense, we are bound to adhere to the ordinary meaning of them and to their grammatical construction, regardless of any equity which may be raised upon the statute, or of any public or private inconvenience or injustice which may follow".

—*State ex rel. S. B., etc., v. Com'rs*, 34 W. 162, 165.

36. "This familiar rule (*Draper v. Emerson*, 22 W. supra) in the construction of statutes is one which has been frequently recognized and acted upon by this court. (Cases)".

—*Westcott v. Miller*, 42 W. 454, 461.

37. "If there be any inconsistency or conflict between the first paragraph of the section above referred to (sec. 3935) and the provisions of the subsequent paragraphs and sections thereof in the same chapter, then under subd. 15, sec. 4972, 'the section which is last in numerical order shall prevail, unless such construction be inconsistent with the meaning of the chapter'." —*Baker v. Baker, Extr.*, 57 W. 382, 394.

38. In amending a criminal statute, in a restatement of the law as amended the omission of the words 'or more' after 'years', "and inserting the words 'or under', is a mere clerical mistake in engrossing or rewriting the whole section as amended, and does not affect the act, which merely struck out 'ten' and inserted 'twelve'", there being no repealing clause.

39. "The rewriting and reenactment of the whole action with the amendment or amendments engrossed, is a mere rule of the legislature to secure a clearer and readier understanding of the place and effect of the amendment. It is no part of the legislative act".

—*State v. Stillman*, 81 W. 124, 126.

40. Where the particular language of a statute adopted from another state has not "received judicial construction" there prior to such adoption, "this court is not bound to follow any subsequent interpretation there given, but may adopt such interpretation as seems to be most in harmony with the legislative intent. *Rowan v. State*, 30 W., 129; *Hogan v. State*, 36 W., 226.

41. Nevertheless" such subsequent determination, long adhered to, "should be followed, unless it clearly appears that some other interpretation of the statute is more consistent with reason and will better effectuate the intent".

—*Paine v. Jones*, 93 W., 70, 74.

42. "Punctuation or the lack of it cannot be allowed to override plain rules of construction.

43. The rule is that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction. (Citations)".

—*Jorgenson v. City of Superior*, 111 W., 561, 566.

44. "It is a universal rule of construction, founded in the clearest reason", said Black, C. J., 'that general words in an instrument or statute are strengthened by exceptions and weakened by enumerations.' (Cases)".

—*Glascott v. Bragg*, 111 W., 605, 609.

45. "Titles of acts may be resorted to in cases of doubtful construction. (Cases, *supra*)".

46. "It is" "a cardinal principal of statutory construction that conflicts, by implication or otherwise, between different statutes are not favored and will not be held to exist if they may otherwise be reasonably construed. (Cases)".

—*State ex rel. McManman v. Thomas*, 150 W., 190, 194.

47. The words of a statute may be and are construed not to "have their exact and precise meaning", but "given their colloquial and inexact meaning", where "the exact meaning would lead to unjust if not absurd results",—the general purpose of the law being also considered. See also PROMISSORY NOTES, ETC.

—*State Bank of L. v. Michel*, 152 W. 88, 91.

48. Failure to insert in title the abolishing of a county court, held to invalidate the act. See PROBATE COURTS.

—*State ex rel. Richter v. Chadbourne*, 162 W. 410.

49. "Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together. (Cases.)"

—*State ex rel. Boddenhagen v. C. M. & St. P. R. Co.*, 164 W. 304, 307.

CONSTRUCTION OF WILLS.

See also ADVANCEMENTS. AFTER-BORN CHILD. AMBIGUITY. CHARITABLE TRUSTS. CODICILS. EQUITABLE CONVERSION. LEGACIES. LIFE ESTATES. PERPETUITIES. PRECATORY TRUSTS. REVOCATION. TRUSTS. VESTING OF ESTATES, ETC. WIDOW. WILLS. WORDS AND PHRASES.

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1. "The rule is that the intent of the testator is to govern, and that to get at that intent, the instrument may be construed in the light of evidence, as to extrinsic circumstances and facts, which may enable the court to determine the true meaning of the words used." See also **AMBIGUITY**.

—*Hopkins v. Holt*, 9 W. 228, 230.

2. It is "the familiar rule that the intention of the testator is the thing to be sought, and that, when found satisfactorily evinced by the instrument as a whole, it is to govern, notwithstanding any technical or literal meaning of particular clauses to the contrary."

3. Held that the testator "used the phrase 'if that contract is consummated' as precisely equivalent to the phrase 'if there is a surplus of my estate after payment of the debts and legacies already given'."

—*Yearnshaw's Appeal*, 25 W. 21, 23.

4. If there are "two persons each fully and accurately answering the whole description, evidence might be received, or arguments from the language of the will and from circumstances might be adduced, to show to which of these persons the will applied".

5. "Where one person, and one only, fully and accurately answers the whole description, the court is bound to apply the will to that person".

—*Barton v. Babcock*, 28 W. 192, 198.

6. "The intent of the testator", "being consistent with the rules of law, must prevail. *Smith v. Bell*, 6 Peters 68."

7. "The general rule" is,—where there is a bequest of the personal estate, or residue thereof, "to one person for life, with a remainder to others after the termination of the life estate, the whole property must be converted into money, and invested in permanent securities, by the executor, and the income only paid to the legatee for life".

8. "But if it can be gathered from the will that the testator intended that such legatee for life should enjoy the property in its then condition, the bequest is specific, and the legatee is entitled to the possession and enjoyment of the property thus specifically bequeathed, although the bequest be made in general terms, and without any particular designation of the property".

9. The bequest for life is general, but as the property was to be 'sold

after her death,' it is held that as to "the property which was of the character to be possessed, used, enjoyed and sold, that is, the personal chattels as distinguished from the choses in action, the legacy is specific", and that such legatee "was entitled to the possession, use and enjoyment of such chattels in specie, during her life". See also *LIFE ESTATE*.

—*Golder v. Littlejohn*, 30 W. 344, 350.

10. The word legatee in its broader sense is held to include a devisee. See also *LEGACY*.

11. All "questions arising upon the proper construction of a will, must be determined by the intention of the testator, to be gathered from the terms of the will itself, as applied to the subject matter, and the surrounding circumstances. 1 Redfield on Wills, 443".

12. "The testator intended that the proceeds of the sale of his real estate should be treated as money for all purposes, and hence", the disposition thereof "is not a devise of real estate, but a bequest of money".

—*Chandler's Appeal, Est. of McCoy*, 34 W. 505, 511.

13. The clause 'My good wife is to have a home and a good support as long as she lives on the home premises, board and clothing, money for reasonable expenses, or at her option \$200.00 per year while she remains my widow, etc.', was held "to charge her support upon the home farm" in the first instance, notwithstanding a subsequent trust provision for her "if all else should fail". —*Estate of Goodrich*, 38 W. 492, 496.

14. A suit for construction by a disinterested executor, is in the nature of a bill of interpleader. See *INTERPLEADER*.

15. Distinction between general and specific legacy of bonds given. See *LEGACIES*.

—*Wheeler v. Hartshorn*, 40 W. 83, 95.

16. "That the county court has jurisdiction to give construction to wills when that is necessary to the due administration of the estates of deceased persons, and may exercise the same as fully as can a court of equity, is settled in *Brook v. Chappell*, 34 W. 419" (See *JURISDICTION*).

17. There being no statute prescribing notice, and, "although in *Ruth v. Oberbrunner*, 40 W. 238, we held (following *Bresee v. Stiles*, 22 W. 120), that only those parties in interest who have notice of the proceedings are bound by the order of the court in a case like this," yet, under the general statute (Sec. 4044) for notice in matters not specifically prescribed, under which the county court gave three weeks general notice by publication by its order, it is held, "this gave the court jurisdiction of all persons interested in the proceedings, and binds them by the order, if such order is otherwise sufficient". (Notice now by statute, sec. 3791a).

—*Appeal of Edw. Schaeffner*, 41 W. 260, 264.

18. As to the north line of real estate devised to Mrs. B., there is no ambiguity in the will, "but when we look for her line, we find two lines

corresponding with the description in the will. Here we have an ambiguity, not in the will, but produced by extraneous circumstances. This is a latent ambiguity."

19. "That such an ambiguity may be removed by proof of extraneous facts, is too well settled to be questioned or doubted."

20. Sir James Wigram states: "'Where the object of a testator's bounty, or the subject of disposition (i. e. person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.' (O'Hara's 2 Am. Ed. 188, Wigram Ev.). The principle of this rule has frequently been asserted and applied by this court. (Cases)''.

21. "In *Ganson v. Madigan*, 15 W. 144, Dixon, C. J., discussing this question, says: 'If the evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time, of their understanding of them, ought not to be excluded. (Cases).'

22. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial'. (p. 154).

23. We are satisfied that the rule as here stated is supported not only by the great weight of authority, but by the stronger and better reasons. We therefore adopt it as the correct rule, and hold that the evidence of the declarations of the testator made when he executed the will, was properly received".
—*Morgan v. Burrows*, 45 W. 211, 217.

24. On the question "whether the will admits of the construction that the testator therein devised lot 10", when in fact the will says "lot 9", which the testator did not own, and there is no other mention of lot 10, it is held that "there is nothing in the will upon which to predicate" such construction, and that extrinsic evidence is inadmissible, under the rules of construction, following:

25. "One of the rules by which this question must be determined is, that evidence of the intention of the testator, extrinsic to the will itself, is not admissible for the purpose of explaining, construing or adding to the terms of a will;

26. But such intention must be spelled out from the words of the will itself, read in the light of the circumstances surrounding the testator when he made it.

27. In cases where there are inconsistent provisions in the will, evidence of such circumstances is always admissible". (But, see also *Will of Boeck*, 160 W. post).

28. "It might be otherwise had" there been other identification of the lot in the will, as: "For instance, had he devised to her 'lot 9 in block 20, occupied by A.;' or, 'which I purchased of B.;', or even 'my lot 9 in

block 20', and had it appeared that lot 10 alone was occupied by A, or that the testator purchased lot 10 alone of B, or that lot 10 was the only lot owned by the testator in block 20, in either case extrinsic evidence would be admissible to show the fact; and if established, the court would be justified in construing the will as a devise to the plaintiff of lot 10'.

29. "This does not contravene the rule which rejects extrinsic evidence of the intention of the testator when offered to vary or add to a will; for in either of the cases above supposed, the will itself contains two inconsistent descriptions of the lot devised, the one true and the other false; and the court would merely resort to extrinsic evidence to ascertain which was the true description, and would construe the will accordingly". See also REFORMATION.

—*Sherwood v. Sherwood*, 45 W. 357, 363.

30. "As a general rule, we suppose, whenever the provisions of the will are such as to render it proper for the executor to take the opinion of the court as to its construction and the rights of the parties under it, the executor is entitled to the aid of the court".

31. "In *Heiss, Extr. v. Murphey*, 43 W. 45, the chief justice observes that it was not the mere right, it was almost the duty, of the executor to take the opinion of the court upon the construction of the will and the validity of the disposition which it purported to make of the testator's property.

32. The remark is as pertinent and true in this case as it was in the case in which it was made. The executor had certainly the right to ask the direction of the court as to who took the residue of the estate under the will, in order that he might discharge his duty as trustee.

33. The question as to the meaning of the will came up on the final settlement of his account in the county court. That court had then necessarily to construe the will in settling its order of distribution".

—*Est. of Carl Schaeffner*, 45 W. 614, 616.

34. The will contains a general power of sale, and uses the terms 'pay over and deliver', as to definite sums and as to the residue, as to charitable bequests, and it is held "the manifest construction of the will is, that it was the intention of the testator that his executors should convert all his realty, and execute his bequests in personalty only". See also CHARITABLE TRUSTS.

—*Dodge v. Williams*, 46 W. 70, 97.

35. "Where all the persons interested in getting a different construction from that given by the court having original jurisdiction are parties to the action and have had their day in court", it is not the duty of the executor to appeal, except in case of parties who "are infants, insane, out of the jurisdiction of the court, or perhaps where, on account of poverty, they may be unable to carry on the litigation in their own behalf".

36. Where "the testator had no estate except money and goods and chattels at the time the will was made, and at the time of his death," and a bequest is made to S. of '\$100 in money, and all other personal property', it is held that, "the words 'personal property' in that clause were clearly intended to be limited to goods and chattels of ordinary kinds", the testator clearly indicating a distinction between money and personal property.

37. "Second. We think this clause was not intended to give to S. all the personal estate of the testator, because there is another residuary clause in the will", which follows the specific bequests, and which would become "void and of no effect if the bequest to S. carries all the personal estate".

38. "Upon this subject Redfield says: 'One of the most common grounds of inferring the limited signification of general terms, which might, in their more enlarged sense, include the general residue of the estate, or of the personal property, is, that in some other portion of the instrument a clearly defined residuary clause is found, which, as no testator would designedly create two residuary legatees, must very clearly show that one or the other was not so intended'. 2 Redf. on Wills, 113, and cases cited". —*Wolf, Extr. v. Schaeffner*, 51 W. 53, 59.

39. In a will devising a farm to each of two sons, including to one 'all the stock, grain and farming utensils' thereon, and to the other 'all the stock and farming utensils' on his farm, with a residuary clause giving all the remaining real and personal property to the second son, it is held, that "the word 'stock' is used in a popular sense, as including the domestic animals, cattle, etc., raised and used upon a farm", and that it did not include "the clip of wool" from the previous year, stored upon the farm of the first son, but "that the wool in question" passed to the second son "under the residuary clause".

—*Baker v. Baker, Extr.*, 51 W. 538, 546.

40. Where the testator had original capital of \$20,000 invested in a business, and some \$23,000 additional therein as accumulated profits, all having been used in the business,—in a clause in a codicil, 'my present capital in said business to remain for a period of two years', and the executor collecting annually 'the net profits arising from said business' for the benefit of the estate, 'capital' is construed to include only the original investment, and not the accumulated profits used in the business.

—*Dean, Extr., v. Dean*, 54 W. 23, 30.

41. Where the widow fails to elect, she is not entitled to a share in intestate residue. See WIDOW. —*Hardy v. Scales*, 54 W. 452, 457.

42. A provision in a will should be construed as "a charge upon the land", preferably to a "condition subsequent", unless the contrary is "clearly apparent". See CONSTRUCTION OF DEEDS.

—*Weir v. Simmons*, 55 W. 637, 641.

43. An 'annuity to be taken from the proceeds of my said farm each and every year', is held to mean "that the annuity shall be taken from the proceeds of the testator's farm 'each and every year'," and that he "did not intend that surplus rents should be accumulated with which to meet any possible future deficiency in the rents to pay the annuity".

44. When, after provision as to the wife's annuity, the will gives to certain heirs "all the rest, residue and remainder" "of my real estate at the time of the decease of my said wife", no trustee being named, it is held that the estate vests in such heirs immediately, and that they have the right of immediate possession charged with the payment of the annuity, "the functions of the executor" having ceased because of the statutory six-year limitation. —*Est. of Pierce*, 56 W. 560, 562.

45. As to words of entreaty, request, etc., construed. See PRECATORY TRUSTS. —*Knox, Extr. v. Knox*, 59 W. 172.

46. Extrinsic evidence in general is not admissible. It may be to place the court in the position of the testator. Where there is no latent ambiguity, it cannot be resorted to to control the meaning. See WILLS. —*Brunn, Extr. v. Schuett*, 59 W. 260, 261.

47. The court elects for an insane widow and construes a "provision" for her, etc., in Gov. Washburn's will. See WIDOW.

48. Without determining the effect of such election on real estate in other states, "this observation, however, may be made:

49. It is generally agreed by writers on the subject, and the rule has frequently been acted on by the courts, that the interpretation and construction of the will belongs to the tribunal of the domicile of the testator". —*Van Steenwyck v. Washburn*, 59 W. 483, 510.

50. "The rules of construction are never strained to defeat a devise; and when the instrument admits of a construction which will sustain it, it must be adopted".

51. "Another rule", "is that the construction is not to be varied by subsequent events, but that the will speaks from the death of the testator, and its different clauses must be considered with reference to that time.

52. These rules for the construction of wills are found in the elementary works on the subject, and are doubtless correct. (Citations)". —*De Wolf, Extr. v. Lawson*, 61 W. 469, 476.

53. Where a "clause was evidently copied by mistake from a former will", referring to a daughter as unmarried, who was then in fact married and had children, it is held: this "did not indicate the purpose to exclude her two children then living", and that the obvious intention "is not to be frustrated by a false assumption". "Like a false description, otherwise perfect, it may be rejected. *Thompson v. Jones*, 4 W. 106; *Mann v. Pearson*, 2 Johns. 37".

54. This is in accordance with the universal rule "that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense,

55. Or unless the rule, if acted on, would lead to some manifest absurdity or incongruity". *Thellusson v. Rendlesham*, 7 H. L. Cas. 494". See also VESTING OF ESTATES.

—*Scott, Extr. v. West*, 63 W. 529, 551.

56. "In giving a construction to the words of the will", the court "was not at liberty to give any weight to the expressed intention of the testatrix at the time the will was executed,

57. Nor to the intention of the writer in drawing the will".

58. "Under the common-law rule the presumption was that only a life estate was intended to be conveyed, unless words of inheritance were used, or other words showing an intent to devise a greater estate".

59. This rule was changed, in England in 1837, and by our statute, sec. 2278, but "this act was not intended" to limit courts "to the words of the will alone in determining the extent of the estate devised,

60. Unaffected by the surrounding circumstances which may properly have force and be considered in construing the language used by the testator and thus determining the real intent of the testator by the use of such language".

61. "In the construction of the language used by a testator in his will, his manifest intention should be carried out, when it can be done without doing violence to the meaning of the language used. (Cases supra)".

—*Dew, Extr. v. Kuehn*, 64 W. 293, 297.

62. "It was said by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 68, that 'the first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in the will shall prevail, provided it be consistent with the rules of law'.

63. This rule has been asserted in a variety of forms, and enforced in all courts of this country and England whose decisions are authoritative, and it has never been shaken by adverse rulings". See also LIFE ESTATES.

—*Jones, Extr. v. Jones*, 66 W. 310, 315.

64. As to condition as to "good moral character", and learning a trade, etc., see POLICY OF THE LAW.

65. "Manifestly the bequest to H." on such condition, "is not to be held void on the ground of probability or improbability of the contingency on which it is limited to take effect. Sec. 2050; *Scott v. West*, 63 W. supra. The condition must therefore be held legal and binding".

66. "It is a universal rule of construction, founded in the clearest reason", said Black C. J., 'that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration'. *Sharpless v. Mayor*, 21 Pa. St. 161. That rule has been applied by this court. *Wis. Cen. R. Co. v. Taylor Co.*, 52 W. 90, 91".

67. "It is now universally admitted that in construing a will the rule is to read it in the ordinary and grammatical sense of the words employed,

68. Unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the testator, to be extracted from the whole instrument, should follow from so reading it.

69. 'Then the sense may be modified, extended, or abridged so as to avoid those consequences, but no further'. *Abbott v. Middleton*, 7 H. L. Cas. 115, and cases there cited.

70. 'Quite consistently with this rule, words and limitations may be supplied or rejected, when warranted by the immediate context or the general scheme of the will,

71. But not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the instrument.' *Ibid*;" and other cases, including *Scott v. West*, 63 W. *supra*.

"The foregoing principles" were applied in this case. See also CHARITABLE TRUSTS. —*Webster v. Morris*, 66 W. 366, 389.

72. As to the law of the domicile governing in construction. See DOMICIL.

73. The three papers, the will proper and two "schedules A and B therein mentioned and thereunto attached", are to be construed together "as one instrument in law, and together constituting the will of the testator. (Cases)". —*Ford v. Ford*, 70 W. 19, 45.

74. "Where the whole will indicates nothing to the contrary, a devise by words of general description is not to be cut down or limited by a subsequent attempt at a particular description. (Citations)."

75. And "no presumption of an intent to die intestate as to any part of the estate is to be indulged, when the words of the will, fairly construed, are such as to carry the whole (citations)",—

76. And where the testator by a general clause disposed of 'all of my (his) real estate', and subsequently states 'the land so devised consists of one hundred and sixty acres', and undertakes to make a specific devise of one hundred and sixty acres, when in fact he owned two hundred and sixty acres,—it is held that all was devised, and that the additional one hundred acres were devised in common, in harmony with the foregoing rules of construction.

—*Will of Abram Ehle*, 73 W. 445, 451.

77. A bequest, 'provided that the trustees have changed the name before my decease to Downer College, in memory of my husband,' is construed not effective where the name was not so legally changed before the testatrix deceased, being a condition precedent.

—*Merrill v. Wis. Female Col.*, 74 W. 415, 416.

78. "Extrinsic evidence of the facts and circumstances which will explain the language and show in what sense it was used by the testatrix, is admissible, though, of course, not to change the plain meaning of the words.

79. The words 'debt' and 'indebtedness' are not always used in the same sense; that is, they do not always import a legal obligation on the part of one to pay another something due him. They often imply a mere moral or equitable obligation, as well as a strictly legal one".

80. And it is held that parol evidence was properly admitted to show that by the words 'individual indebtedness', the intention of the testatrix was to have satisfied an obligation which she may have been under no legal obligation to pay. (Cited approvingly as to latent ambiguity in *Hanley v. Krafcezyk*, 119 W. post).

—*Scott v. Neeves*, 77 W. 305, 310.

81. A devise of realty to a son 'conditioned said son shall support and maintain my daughter A. out of said property' is held a charge on the property that may be complied with "by delivering to her specific articles necessary to her maintenance, having due regard to the condition in life of the testator and his family when he died".

—*Dickson v. Field*, 77 W. 439, 443.

82. A will granting a life estate to the widow with power to sell and use proceeds for support if necessary, construed. See LIFE ESTATES.

—*Larsen v. Johnson*, 78 W. 300.

83. Condition subsequent rather than condition precedent is favored and the words "without issue" are practically supplied to vest a trust estate in a child who was to receive the estate at the age of twenty-one, and she having previously died with issue, the issue takes. See VESTING OF ESTATES.

—*Baker v. Est. of McLeod*, 79 W. 534.

84. "In construing the will we are to consider the original and the codicil as one instrument in law; and together as constituting the last will and testament of the testator. *Ford v. Ford*, 70 W. supra, In other words, every provision of the original will remains in force, except in so far as it was changed or modified by the codicil".

85. As to vesting and divesting of an equitable estate, where conditions subsequent and precedent become impossible of performance, and

86. The rule of construction of wills, as to the leaning of the law, in various doubtful cases. See VESTING OF ESTATES.

—*Burnham v. Burnham*, 79 W. 557, 564.

87. A holographic will of an illiterate old lady, stating, 'When I have done with my property, I want C. and his wife to pay' debts and make certain definite dispositions of personalty; 'and the remainder to keep

and dispose of as they think best',—is held to dispose of to C. and wife, all "the residue or remainder, absolutely, as their own property".

—*Cheney v. Plumb*, 79 W. 602, 605.

88. In a suit in equity for construction, it is held that plaintiff has an adequate remedy at law in ejectment.

89. "So far as a will of real property bequeaths purely legal estates, and the devisees therein obtain purely legal titles to the land given, the enforcement thereof belongs to the courts of law by means of the action of ejectment. The courts of law have full power to construe and interpret the instrument, and to determine the rights of the devisee. There is no necessity, and therefore no power, of resorting to a court of equity in order to obtain a construction of such wills." 3 Pom. Eq. Jur. sec. 1155". See also EQUITY.

—*Kelley v. Kelley*, 80 W. 486, 489.

90. Whether by descent or purchase with a devise equal to what the law would give? See DEVISES.

91. As to charge of legacies on both real and personal residuary estates, and as to sale of remainder or reversion to pay legacies. See LEGACIES.

—*Will of Root*, 81 W. 263, 266.

92. It is held that as to the intent of the testator, the will "is unambiguous in its terms, and hence that no testimony of extrinsic facts is admissible to aid in the construction thereof".

93. While the will of the testatrix' husband, made at the same time, is referred to in hers, and indicated as being "substantially incorporated" therein "as expressing a mutual agreement between them", and therefore not an extrinsic fact under the above rule, yet the court construed her will "by its own terms alone, without regard to the will executed by her husband (living) or any agreement with him".

94. A testatrix bequeathed to her husband 'my entire estate, both real and personal, of every name and nature,' and 'further bequeath out of my and my husband's property such sum as may be necessary for the support, etc.' of certain minors until majority, 'according to the mutual agreement between me and my husband, as is expressed in his will,' and further 'after my death all the property that shall be left that was mine or my husband's shall be divided between his and my legal heirs, one-half to his heirs and one-half to mine'.

95. The husband at the same time executed a similar will to his wife and such minors. She died first.

96. "On the authority of the cases of *Jones v. Jones*, 66 W. 310 (See LIFE ESTATES); and *Knox v. Knox*, 59 W. 172 (See PREGATORY TRUSTS), it cannot be doubted that" the husband "A. took only a life estate in the property."

97. "The will in terms disposes of the property of A., and gives him property belonging to the testatrix. The law is well settled that this put A. to his election whether he would take under the will, or reject

the provision made for him therein and stand upon his rights as they existed irrespective of the will”.

98. Having propounded the will, qualified as executor, administered the estate, and claimed the residue, in the three courts, “we are of the opinion that these acts on his part are an election to take under the will. He must be held, therefore, to all the equitable consequences which result from such election”. “An election by him to take under the will binds him by all its provisions which affect him or his property”.

99. The husband’s estate must share in support of the minors, and at his death the two estates go to the distributees according to her will, “and the court has ample power to declare, and should declare, a trust for their benefit in his estate, and has the power also to restrain him from squandering or otherwise disposing of his estate to the injury of such heirs”.

—*Allen v. Boomer*, 82 W. 364, 370.

100. Where, subject to a widow’s life estate, a testator, gives all his real estate in “six several devises” in undivided sixth parts, and some of such devises are void in whole or in part, by reason of conditions thereto annexed, the trial court’s decision that all are therefore void because “they altogether constituted ‘a single scheme for the disposition’ of the testator’s” estate, is reversed;

101. And it is held, that as to three, that “they each took a vested fee of such devises, respectively, immediately upon the death of the testator, subject only to the extinguishment of such life estate so vested in the widow. *Dana v. Murray*, 122 N. Y. 614; *Scott v. West*, 63 W. *supra*, and cases there cited.”

102. The common-law change by statute as to “joint tenancy (sec. 2068), does not apply to devises made in trust (sec. 2069), but this exception only seems to be applicable where the devises so made in trust are of the same estates so devised to two or more persons in solido or in common”.

103. The devise, subject to the wife’s life estate, “to his ‘said daughter H., her heirs and assigns forever’, the lands therein described, followed by this clause: ‘But in case of her decease without issue, then in that case all the real estate so devised to her is to descend to my heirs at law living at the time of her decease, unless her husband shall survive her, in which case he shall be entitled to the same for and during the term of his natural life, in case he shall not marry again, and upon his decease or marriage the same shall descend to my heirs at law living at the time of his decease or marriage’ ”, it is held,—

104. “Immediately became vested in the said H. (sec. 2037), as a future estate limited to commencing possession on the determination, by lapse of time, of the precedent estate, created at the same time in the widow. Sec. 2034.

105. The mere fact that H. might have died prior to her mother did not prevent such estate from vesting in her immediately upon the death of her father. *Scott v. West*, 63 W.; *Webster v. Morris*, 66 W.; *Baker*

v. McLeod's Est., 79 W. supra. Such an estate is not only a freehold, but 'may be termed a remainder'. Secs. 2029, 2035."

106. "Here the testator attempted by the conditions annexed to the devise (to H.) to suspend the 'absolute power of alienation' for a longer period than during the continuance of the lives of his wife and daughter, and hence such conditions are necessarily void and of no effect".

107. And having reference to the statute (sec. 2041), "borrowed from New York", as construed in *Purdy v. Hayt*, 92 N. Y. 446, and other cases cited, as to a devise with a void condition vesting absolutely in the first taker, it is said: "This court has, in effect, held the same thing. *Scott v. West*, 63 W. supra. We must hold that the devise to the daughter (H.), 'her heirs and assigns forever', vested the title in her, and that the unlawful conditions annexed thereto did not and cannot operate as a defeasance".
—*Saxton v. Webber*, 83 W. 617, 624.

108. If a bequest "be void the money bequeathed thereby passes under the residuary clause of the will, and becomes a part of the residuum of the state". *Hawk. Wills*, p. 40.

109. A legatee is held not "a proper party to bring an action for construction of the clause of the will in question, not being in any way interested in any possible construction thereof, either as executor, trustee, or cestui que trust. *Chipman v. Montgomery*, 63 N. Y. 221; *Bailey v. Briggs*, 56 N. Y. 407.

110. The executor A., however, could rightfully bring the action, and he having answered to the merits and praying" judgment, jurisdiction as a court of equity is retained, construction being necessary.

111. However, J., one of two executors named, having declined to act as such, but not specifically as trustee, and the executors as such being also "nominated trustees of a trust which was entirely distinct from the office of executor", it is held that J., is an essential party to the construction (cases), especially, as his declination as trustee may "render the execution of the trust impossible, because of the personal confidence reposed by the testator in the trustees whom he has named. *2 Perry, Trusts*, 4th ed., 721, 729." —*Sawtelle v. Ripley*, 85 W., 72, 74.

112. A precatory clause of a will construed as merely advisory. See PRECATORY TRUSTS.
—*Tabor v. Tabor* 85 W., 313, 317.

113. The mandatory effect of a trust to pay principal "as it shall seem to him proper, for her comfort and support." See POWER.

—*Osborne v. Gordon*, 86 W., 92, 95.

114. Where a testator provided a \$6000 trustee bond and mortgage for his wife, the income thereof payable from his decease, 'as a suitable allowance', and, without referring thereto, afterward in his will provided the income for her from a like amount, and some household furniture, etc., in addition, 'in lieu of all other allowance',—and she elected

to take under the will by not electing under the statute, it is held, "that the bequest last made was substitutional", and not cumulative.

—*Graves v. Mitchell*, 90 W., 306, 315.

115. A will gives the wife a life estate in the whole property, and then states: "I will and bequeath to my son, J., the sum of \$200 to be paid to him by my daughter B. within one year after the death of my wife, if she survive me," the last four words being interlined, there being several such bequests; the wife died some years before the testator; held,—

116. That the bequests "were not intended to be dependent on" the wife's surviving him. "The bequest in each case is, in the first instance, absolute and unqualified; but it is to be paid by the residuary legatee within one year after the death of the life tenant, if she survive the testator". The conditions do not affect "the gift itself, but simply affecting the time of payment."

117. And after giving her the residue, the will states: "It is my further will that in case my said daughter, B., shall die without issue of her body lawfully begotten, then and in that case the whole of my estate hereinbefore devised to her shall be equally divided between my children," etc.; held,—that this vested "an absolute estate" in her.

118. "The rule is well settled that where there is a devise to one person in fee, and, in case of his death without issue, to another, the death referred to is death during the lifetime of the testator, unless there is language in the will which gives fair, clear, and reasonable ground for saying that the testator had a different intention. *Washbon v. Cope*, 144 N. Y. 287; *Benson v. Corbin*, 145 N. Y., 351." (Approvingly quoted and distinguished in *Littlewood's will*, 96 W., post.)

—*Lovass v. Olson*, 92 W., 616, 618.

119. In a devise in fee "by apt and technical words, with a condition annexed to the effect that the devisees should not convey the same", "for a fixed period," the condition is held "void, because absolutely repugnant to the estate granted," and the devisees "took a fee-simple estate". (Many cases); *Van Osdell v. Champion*, 89 W., 661; (See DEVISE).

—*Zillmer v. Landguth*, 94 W., 607, 609.

120. Two wills construed as a will and codicil, and an apparent and named widow given dower right as the will directed. See PROBATE OF WILLS.

—*Dicke v. Wagner*, 95 W., 260, 263.

121. A will gives the wife all the estate and appoints her guardian of the son, and just before the signature is added the words, "but if one or the other dies, the one that survives the other, take it all".

122. Held, under the rule of *Lovass v. Olson*, 92 W. supra, "that the language of the entire will clearly shows that the testator contemplated that both his wife and his son would survive him, and that the death which he referred to was a death after his (the testator's) death".

123. The will, therefore, is construed "as giving the widow a life estate, which will be merged in a fee in case of the death of the son during her life, and, in the event of the widow's death prior to that of her son, as vesting the remainder in fee simple in the son".

—*Littlewood's Will*, 96 W. 608, 610.

124. As to the effect and meaning of a "provision" under the statute. See AFTER-BORN CHILD.

—*Verrinder v. Winter*, 98 W. 287, 290.

125. Courts of equity construe wills "by reason of the jurisdiction of the court of chancery over trusts". See EQUITY.

—*Miller v. Drane*, 100 W. 1, 5.

126. A legacy with a condition precedent determining before the testator's decease. See VESTING OF ESTATES.

—*Stark Extr. v. Conde*, 100 W. 633, 640.

127. A testatrix bequeaths "one twelfth to the children of each of my deceased brothers and sisters"; and 'in case of the decease of either, * I bequeath his or her share to be equally divided among his or her children'. Subsequently she directs "that the money which, by the foregoing distribution, would go to F., grandson of D.," a deceased brother, be placed in trust for him. "W. was an illegitimate son of a deceased grandchild of" a deceased sister;

128. Words in the ordinary will yield to "some peculiar sense", "when it is clear from the instrument that the latter meaning was intended", "the purpose of construction being not to get meaning into the language of the testator, but to get the testator's meaning out of it;

129. That such meaning when ascertained is to govern, if not contrary to law or good morals, however strange it may be, or however much the rules of punctuation and the literal meaning of words, or even their arrangement in the writing, may be violated to reach it".

130. "The word 'children', when not rendered obscure by the manner of its use, has a plain and well-understood ordinary signification. It means the descendants of human parents in the first degree. That is its lexicographical as well as its ordinary legal meaning".

131. "Where there are no immediate children to whom the term can apply, or where it is manifest from other words in the will that it was used in the broad sense of issue or descendants, it may be construed to include grandchildren, step-children, illegitimate children, or descendants, however remote. (Citations)". (Approvingly quoted in *Est. of Sander*, 126 W. 660, 666; See LEGITIMACY).

132. "The description 'child', 'son', 'issue', and words of that nature, includes legitimates only. *Cartwright v. Vawdry*, 5 Ves. 530, is often quoted as a leading authority on that point", but "that is authority only to the point that a general bequest to children, without something to clearly give to the term an extended meaning, includes legitimates only".

133. The same rule as to intention as to 'children' including other descendants, applies to "illegitimates, adopted children, step-children, or any other class to whom the term may reasonably apply", but "there must be some evidence to supplement the policy of the statute (sec. 2274) in order to warrant us in saying that the testatrix intended by the term 'children' to include the illegitimate son of" the deceased grandchild, and there being none he is excluded.

134. Held, that the testatrix intended the "shares bequeathed to the children of deceased brothers and sisters to go in the line of descent till it all reached a resting place, however remote, on a basis of absolute equality between the members of each class, the children of a deceased member of one class forming a new class to take per stirpes the share of such deceased member". —*Will of Scholl*, 100 W. 650, 655-662.

135. As to supplying an omission to express the testator's intention, and that a remainder so supplied is a 'provision'. See AFTER-BORN CHILD.

136. "The comprehensive and all-dominating rule in construing wills is that the intention of the testator must be ascertained from the words thereof, in the light of all surrounding circumstances, and that intention be given effect".

137. And among the "multitudinous minor rules", relevant, are these: "first, that in case of doubt such construction will be adopted as to support and give effect to the will, rather than to defeat it;

138. Second, that a testator is presumed to have intended a complete disposition of his estate, and a construction tending to that end will be preferred to one which results in intestacy as to any part. *Mann v. Hyde*, 71 Mich. 278; *Given v. Hilton*, 95 U. S. 591, 594". (But see *Lawrence v. Barber*, 116 W. post).

—*In re Donges's Est.*, 103 W. 497, 500.

139. An estate to trustees, with named children to have part of the income, and after the widow's decease, the corpus,—construed as vesting at once in the children, the share of a subsequently deceased child without issue going to his widow.

140. And the share of a deceased child to be by representation, is held to mean in case of decease before the testator. See VESTING OF ESTATES.

—*Patton v. Ludington*, 103 W. 629, 650.

141. An ambiguous will provides, in the first clause, for the payment of debts and expenses 'out of my real estate not given to my wife;' the 3rd clause gives specific personalty to the wife; the 4th, and last, clause, gives a legacy to A. 'from the residue of my estate after my said wife has received her portion as above expressed,' and the 'balance of my said estate', to be divided among the children of deceased daughters. The 2nd clause reads: "I give and bequeath to my wife E., the undivided real estate of which I die seized. I also desire that my said wife

shall control and have all the proceeds of said real estate until the same is divided either by the mutual consent of the parties interested or by the judgment of a proper court." The only reality was a homestead.

142. Held, that the 2nd clause "was void for uncertainty, but that the other portions of the will were valid," "leaving the homestead to pass as intestate property."

143. "The conclusion that there is a patent ambiguity in the will", requiring rejection of a portion, "cannot be avoided."

144. No rules known to the law can be successfully resorted to for the purpose of determining what was intended by the language of the second clause."

145. "If that intention cannot be intelligently read out of the language used by the testator, such language must be rejected. *Woerner Admn.*, 414".
—*Willey v. Clark*, 105 W., 22, 23.

146. Where a will gave a life estate to the widow, one-third of the residue to each of two children, and the remaining one-third to a trustee for him 'to pay and deliver, deed or convey,' to a son C., if he shall 'for seven years from and after my death, or at any one continuous period of time, lead a moral and sober life in the opinion of' the trustee,—and the son having so lived such a period,—it is held that "the trust is closed, and it becomes the duty of the trustee to turn over the trust estate as directed in the will", notwithstanding the life beneficiary is still living.
—*Ordway v. Gardner*, 107 W. 74, 80.

147. As to a devise (subject to the wife's life estate) to trustees to manage, etc. 'for and during' the life of a son H. J., 'and to pay' him the income, 'and upon his decease to convey the same to his issue then living in fee, or, in case he shall die without issue, then in that case the same to descend to' the testator's heirs then living, in fee,—the son dying after the widow without issue, a child having predeceased him, it is held:.

148. As decided in *Saxton v. Webber*, 83 W. supra, p. 631, the trust is valid under sec. 2081.

149. It "'only ties up said estate so devised in trust during the life of said H. J., and hence is not repugnant' to" the perpetuity statute, sec. 2039.

150. "'Issue then living' manifestly means living when H. J. shall die" and "'die without issue', clearly means such issue as had just been mentioned as 'then living'".

151. "That H. J. was never seized of the fractional share of the lands so devised in trust, and hence that such lands could not pass from him to his widow, the appellant". —*Webber v. Webber*, 108 W. 626, 629.

152. A will in effect apparently gives the whole estate to the wife "in trust" for an only infant son, and "there are no appropriate words in the will which give a beneficial estate in the property to the wife";

153. "The words 'in trust for' are technical words, and, if to be construed in a technical sense, would convey no beneficial estate to the wife";

154. But the intent and surrounding circumstances, indicate that the testator, a university professor who drew his own will, used "the word 'trust' in its popular sense", as "his belief or trust that the devisee would carry out his wishes", and it is upheld that he "bequeathed to his widow both the legal estate and the beneficial interest in and to all of his property, subject only to the trust or burden imposed thereon for the benefit of the" son.

155. "In construing a will, 'the intention etc.'," as stated in *Yearnshaw's appeal*, 25 W. supra, "is to govern".

156. "A construction which gives effect to the will, and prevents either total or partial intestacy, is to be preferred. *Lovass v. Olson*, 92 W. supra.

157. The circumstances surrounding the testator at the time of execution—such as the condition of his family, and his relations to his relatives, and the amount and character of his property—should be taken into consideration, so that the interpreter may be placed as nearly as possible in the position occupied by the testator. *Blake v. Hawkins*, 98 U. S. 315".
—*Davies v. Davies*, 109 W. 129, 132.

158. "In construing wills, courts are not required to find apt and technical words defining or creating the titles or rights conferred."

159. They are to find the intention of the testator from the will itself, and, that intent having been ascertained, are to adjudge such rights and title in the beneficiaries as give effect to it. (*Cases, supra*).

160. The testator may not know, and need not in terms declare, whether the estate to be taken by any shall be a fee, a life estate, or a trust;

161. But, if he makes apparent the quality and characteristics of the estate he intends to confer, the courts will give it a name and vitality, if not contrary to law".

162. Where a will devised the residuary estate after the death of the wife to the children "to have and to hold the same to them, and their heirs and assigns, forever," but none of the realty "shall be in any manner conveyed or sold until the expiration of twenty-one years from the date of this instrument", the executor to collect and divide the income, until such expiration, between the children,—the widow dying before such time,—it is held,

That the will, "without saying so explicitly," provides that after "the death of the widow the real estate is vested in the executors named, as trustees to manage the same," and,

163. "That the remainder in fee devised to his children is postponed till the expiration of twenty-one years from the date of the will;"

164. And that under the statute as then (and now) existing, sec. 2039, the provision is not "an unlawful suspension of alienation," and "no term not exceeding twenty-one years is prohibited."

165. "A will is ambulatory during the life of its maker", "and is governed by the law existing at the time when it takes effect, upon the testator's death. *Dodge v. Williams*, 46 W., supra; *De Peyster v. Clendining*, 8 Paige, 295".
—*Will of Kopmeier*, 113 W., 233, 237.

166. On petition to construe a will, "the county court did not have before it any question as to what were her (the widow's) rights in intestate property,

167. And, indeed, the county court is by statute restrained from adjudging as to the existence of the right to dower and homestead." See also *Widow*.
—*Willey v. Lewis*, 113 W., 618, 622.

168. Where "the parties claim title from a common ancestor", the construction of such ancestor's will being necessary to determine "the size of the interest of each", it is held that such construction may be properly had in an "action for partition".

169. Where, after a life estate to the wife, a will gives one-half of the estate to one of three children, the other two children not being named and no disposition being made of the other half of the estate, such situation "is not sufficient to justify the presumption that he intended that property otherwise undisposed of should go to other heirs in equal shares, in absence of anything in the will to indicate such intention".

170. Such remaining half goes to all the children as intestate property, and words to a different effect cannot be added to the will.

171. *Baker v. McLeod's Est.*, 79 W. supra, and *In re Donges's Est.* 103 W. supra (See also *AFTER-BORN CHILD*), distinguished, as "in both cases the court construed the will according to the language used, and the intent of the testator as gathered therefrom, in the light of surrounding circumstances".
—*O'Hearn v. O'Hearn*, 114 W. 428, 431.

172. "The word 'all'", "is too significant, definite, and unambiguous to warrant us in entering upon the field of interpretation and holding that, instead of all, only part was intended".

173. There is "a presumption that one who makes a will intends to dispose of all his property", "but this is inconclusive.

174. Intestacy and the rights of heirs depend not on whether the testator intended such a situation should exist, or supposed it would exist, under his will, but whether he has, by the will, disposed of all his property".

175 "If as to any portion of the estate we are unable to say that it is given by the will and the codicils, then intestacy results, no matter how averse the testator may have been thereto". (*Cases*).

176. "On the other hand, it is not absolutely imperative that the express and unambiguous words of gift and designation of beneficiaries should be physically written in the will, in order that the court may be able to find that the testator has thereby made donation".

177. "The duty of courts in raising devises by implication", "was not so carefully stated as it should have been in the opinion in *In re Donges's Est.*, 103 W. supra", but "was accurately expressed in *O'Hearn v. O'Hearn*, 114 W. supra, thus:

178. 'It is only admitted as a means of carrying out what the testator appeared on the whole to have really meant, but failed somehow to express as distinctly as he should have done.

179. In other words, a gift by implication must be founded upon some expressions in the will from which such intention can be inferred.

180. It cannot be inferred from an absolute silence on the subject. * The court cannot reform the will by changing its language, or add provisions not written therein. It can only construe the instrument as written'."

181. "The mere revocation of a bequest to H. (by codicil), even accompanied by a confirmation of all of the rest of the will, probably would not, under the authorities, suffice to justify an implication of gift of that share to any or all the other beneficiaries, (cases)", though there was a residuary clause which includes him with the other children.

182. "As this court has declared, however, precedents are of very slight utility in construing wills. (Cases)". See also POWER.

—*Lawrence v. Barber*, 116 W. 294, 304.

183. Extrinsic evidence admitted to construe sec. 21 as sec. 22, in the description of land in a will. See MISTAKE.

—*Hanley v. Kraftczyk*, 119 W., 352, 358.

184. Where a will gives a life estate first to the widow and then to a daughter M., and 'such portion of my estate as may remain, shall be equally divided between my lawful heirs', and there were eight children at the decease of the testator, several of whom died, leaving children, before the decease of M. who also left children, it is held,—

185. That by "my lawful heirs", "the testator meant those persons who at his death were by law entitled to inherit his intestate real estate, to-wit, his eight children", and not those who would be such heirs had he "died at the time of the termination of the two life estates".

186. The circuit court, without controversy, in effect held that the remainder vested absolutely in the eight children at the death of the testator, the descendants of deceased children subsequently taking by representation; however, it is indicated that such holding was erroneous and that the remainder should have gone "only to such members of that class as survived the period fixed for distribution and enjoyment", (Cassody, C. J., dissenting from this proposition only),

187. But "since those prejudicially affected rest content, and do not appeal, we could not reverse the judgment for such an error. (Cases)".

—*In Re Cowley's Will*, 120 W. 263, 265.

188. It is held that the partnership interest was not to go to the widow "in specie", and that "the phrase 'all of my property of whatsoever description; real, personal, or mixed, including my interest in the firm of K. H. & S. etc.', did not dispose of that interest differently from any of the other property", in which she was given a limited estate, it being so "mentioned merely for greater certainty".

—*Stehn v. Hayssen*, 124 W. 583, 587.

189. Where a will, after specifically disposing of the realty, and giving specific legacies, in its last clause bequeathed 'all the household furniture and effects', and there being no further residuary clause, but a considerable remainder of personal estate, it is held,—

190. That under "the rule ejusdem generis", the words 'and effects' "are limited to household effects", and such remainder of personalty therefor is intestate property.

191. As to a residuary bequest, "the intention to pass the whole estate must be expressed in some form", and "the presumption against intestacy" does not prevail "when the language of the will, fairly constructed, is insufficient to carry the whole estate".

—*Gallagher v. McKeague*, 125 W. 116, 119.

192. "A will is not to be read in the light of rules for judicial construction merely because its meaning is challenged, and the challenge supported by reasoning on the assumption that such meaning is obscure".

193. "The first duty in examining a will for its purpose is to proceed as if it was unambiguously expressed. If, taking the will as a whole in the light of the subjects dealt with, its meaning is plain, there is no legitimate room for judicial construction, and none should be attempted". (Approvingly quoted in *Benner v. Mauer*, 133 W. post).

—*Mitchell v. Mitchell*, 126 W. 47, 49.

194. A bequest to a son to be paid 'in fifteen annual payments', 'made conditional that' he 'attend the regular meetings of worship of the E. church', and if he 'does not try in good faith to comply with' 'the above condition', 'I give and bequeath' the sum 'to the N. Lutheran H. & F. M. Assn.',—is held valid, and does not infringe art. 1, sec. 18, const., being the religious clause, and is not "void for uncertainty and indefiniteness".

195. There being no society as named, but, "a society known as 'The H. & F. M. of the U. N. Lutheran C. of A.'", "connected with the E. church"; at which testatrix attended,—“extrinsic evidence was admissible to explain the ambiguity. (Cases, supra)”.

196. The "intention" is that the son "should continue to perform the conditions of the will during the period of fifteen years while the bequest was being paid to him, and that, if during said time he should fail to do so, the remaining portion of the \$1500 should be paid over to the society",—the will giving to the son a conditional and not an "absolute title".

197. "It is true that legacies payable at a future time certain and not subject to condition precedent are vested,

198. While, on the other hand, legacies made payable on conditions which may never happen and placed in the possession and under the control of a trustee and subject to condition precedent are contingent. *Scott v. West*, 63 W. 529 (See VESTING OF ESTATES).

199. And, when a future time for the payment of a legacy is defined by the will, the legacy may be vested or contingent as may appear to have been the intention of the testator upon a proper construction of the will. *Stark v. Conde*, 100 W. *supra*.

200. But in all cases the intention of the testator as expressed in the will must govern. And it is clear in the case before us that the testatrix intended the conditions should attach to the gift and defeat it upon failure upon the part of the legatee to perform", and that control "should remain in the executrix during the period necessary".

—*In re Paulson's Will*, 127 W. 612, 615.

201. Notwithstanding the estate is pending, and "the questions involved will eventually arise for consideration in the county court", it is held that under its "plenary jurisdiction" in "chancery, over actions for the construction of wills, especially where trust powers are involved", the circuit court properly entertained an action for construction of the will. (*Cases, supra*).

202. Nor in such cases is it necessary that there should be an actual litigation begun or contest pending to justify the court in entertaining the action.

203. A trustee is entitled to the protection of the court in the execution of his trusts, and, when real and serious doubts confront him as to his duty, is entitled to the advice of the court to guide him.

204. This court has said that in such a case 'it is not the mere right, it is almost the duty, of the executor to take the opinion of the court upon the construction of the will and the validity of the disposition which it purports to make of the testator's property'. *Heiss v. Murphey*, 43 W. 45."

205. "Ch. 163, L. 1905 (Sec. 3791a), passed after the present suit had been begun, gave formal and express recognition to the power of the county court to construe wills in a proceeding brought solely for that purpose; but it did not purport to abridge the already existing power of the circuit court to do that same thing".

206. The clauses 'giving to each of said descendants such portion thereof as my said trustees shall deem best', are construed as "entirely distinct from the discretion to withhold for unfitness or unworthiness under" a subsequent item of the will,

207. "And that this discretion (under the prior clauses) authorizes them to apportion equally or unequally, or to cut off one or more entirely and give the whole to the others". Sec. 2126.

208. "It must be a sound legal discretion", and "there must be real

and substantial differences of situation germane to the subject and calling for difference in treatment in order to justify discrimination in amount". It must not be "arbitrary and capricious".

209. Obligations of indebtedness to the testator, provided in the will to be reckoned as part of the estate and charged to the beneficiaries owing, though barred by the statute, are held properly so chargeable, though a beneficiary "obtained a discharge in bankruptcy" prior to the testator's death. See also COMPENSATION OF ADMR., ETC.

—*Stephenson v. Norris*, 128 W. 242, 253.

210. As to a devise vesting in fee, defeasible, on death without issue, and chargeable with legacy payment. See VESTING OF ESTATES, ETC.

—*Korn v. Friz*, 128 W. 428, 431.

211. Though administration is pending, the circuit court has jurisdiction to construe, even on the question of distribution. See CONCURRENT JURISDICTION.

212. There being possible conflict in two paragraphs of a will, "the words in each paragraph" are "given such force and effect as to harmonize the whole instrument and permit all parts to stand together", (many cases) and so "carry out the intention of the testator."

213. It is the duty of the court in construing wills to ascertain the intention of the testator, if that can be determined from the instrument itself. And in seeking out the intention words are to be given their plain and ordinary meaning. (Cases)."

214. In view of such possible harmonizing "upon its face," resort to "the rules of law that where two provisions are in conflict, the latter prevails,

215. And the rule that the law prefers a construction in favor of the early vesting of estates, and a vested rather than a contingent estate", is rendered unnecessary.

216. On the grounds of "intention", and the facts, "the shares of stock purchased by the corporation", and held uncanceled as 'treasury stock', and 'not purchased with earnings or income', "must be regarded as outstanding and corpus of the estate and not income". (Cases)

217. "A corporation clearly has the right to purchase its stock, keep it alive, and treat it as assets". (Cases) See also TRUST FUNDS.

—*Pabst v. Goodrich*, 133 W., 43, 65.

218. In the will of Col. Gabriel Bouck, "an eminent lawyer", the residuary clause,—'to be divided into three parts; one thereof to R. & my niece M., such one part to be divided as follows; R. two thirds of said part & M. one third of said part'; 'one of said three parts to M. M.; 'one part to D' for life with remainder disposed of; 'to my nephew B. one part' etc. as to payment,—is, in harmony with the county and contrary to the circuit court, construed as,

219. "An intention that the plan of division was by thirds", and to "dispose of one-third of the residue" to R. and M. together, R. to have two-ninths and M. one-ninth of the whole residue; M. M. to have "one-third of the residue of his estate"; and as, "so far there is not much room for doubt" as to the meaning "expressed by unmistakable words with reference to the disposition of the first two-thirds of the residue",

220. There "being the manifest intention" "to dispose of the whole residue by this 8th paragraph, the quantity represented by the 'one part' to D. etc., and the 'one part' to B. must be determined by the number of persons between whom division is made and the fraction remaining undisposed of. This gives one-sixth of the residue to D. for life, remainder as stated, and one sixth thereof to B".

221. "'Part' all through this paragraph is construed to mean a fraction, although in two instances, by apt words of reference the testator designated the value of this fraction, and in two instances he did not. (Citation)".

222. This construction "rejects no words as repugnant or meaningless" (citation), and "also finds the intention of the testator from the will itself (Will of Kopmeier, 113 W. supra; other cases)", and "reconciles all parts of the will, and it does not cut down the clear gift of the first two thirds. (N. Y. cases)".

223. An "indebtedness" made a 'charge' 'upon the bequest of B', "is to be considered part of the residue", and B's share of "the residue thus ascertained" "is then to be diminished by subtracting therefrom" such liability.

224. A clause that 'my executor can pay him the whole or part of the net income if satisfied that he needs it for his own use', "fairly construed, leaves the whole income of his portion to him, because it leaves him to determine what he shall need for his use,

225. The kind of use not having been specified, and no person being appointed to determine the needs of B. (Cases)".

—*Will of Bouck*, 133 W. 161, 163.

226. "Judicial construction cannot properly commence except in the face of uncertainty of sense; some fair doubt as to which of two or more reasonable meanings, if there be such, was intended". "We may well repeat what was said in *Mitchell v. Mitchell*, 126 W. supra". See also EQUITABLE CONVERSION. VESTING OF ESTATES, ETC.

—*Benner v. Mauer*, 133 W. 325, 329.

227. None of the rules of construction are "inflexible", the intention and circumstances governing.

228. A sum to be paid to the widow 'as it becomes necessary for her needs', without "words of bequest", held, absolute and vested. See also VESTING OF ESTATES, ETC.

—*Ohse v. Miller*, 137 W. 474, 476.

229. "It is given to every person of mature years and of sound mind to make a will, and he having made one, legally, the law cannot unmake it

or change it by injecting into it something the testator did not intend to put there. In *re Moran's Will*, 118 W., 177 (See VESTING OF ESTATES, ETC.) See also ADOPTION. —*Lichter v. Thiers*, 139 W., 481, 486.

230. A bequest provides for the support of an insane son, and that after his death the residue 'be divided, share and share alike, to my nieces who may be unmarried at that date'. At the date of the will, and of the decease of the testatrix and son, there were four nieces who had never married, and two who were married. Held,—

231. "The gift is, in plain language, to such of testatrix's nieces as at the death of the son shall be unmarried",—the four;

232. That the question as to whether the bequest "was contrary to public policy", is undetermined, because the married nieces, appellants "are not shown to have been the next of kin" or "beneficially interested"; and,

233. That "it is obvious that the appellants were never members of any" class, as "they could not at any time" "have received" the bounty of the testator, "if this future estate was vested in a class".

—*McMichael v. Peterman*, 140 W. 589, 590.

234. "A court of equity will not entertain a suit for construction of a will where there is no trust or other independent ground of equity jurisdiction. (Citation)".

235. Adverse claims clouding the title (*quia timet*) "gives that court jurisdiction to proceed to construe the will so as to enable plaintiff (infant) to avail herself of her rights to the real property."

236. She has no remedy at law against these claimants who are not in possession".

237. As "the doubt as to title arose" after assignment of the estate, the county "court did not have" "the adversary parties before it", nor could it "bring in such adversary parties upon such an application". See also INFANTS' SALE OF REALTY.

—*Rowley v. Rowley*, 143 W. 325, 327.

238. "While the word 'securities', construed strictly, does not cover corporate stock, but rather bonds or evidences of debt, it has undoubtedly acquired a much broader meaning by general usage", and it is held here to cover stock certificate, and that by "the term 'par value' he meant 'face value'".

239. As to "residuary estate" and future vesting thereof, and disposition of rents and profits not specifically provided for. See VESTING OF ESTATES, ETC.

—*Will of Stark*, 149 W., 631, 657.

240. "In construing a will the vital thing is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surround him when it was made. (Many cases, *supra*).

241. But construction of a will does not begin 'until uncertainty of sense is pretty clearly apparent'. *Holmes v. Walter*, 118 W., 409 (See TRUSTS.) 'We must have ambiguity before we can enter upon the field of interpretation or construction'. In *re Moran's Will*, 118 W., 177. (See VESTING OF ESTATES, ETC.).

242. While adjudicated cases may be and some times are helpful in aiding in the construction to be placed on wills,

243. It is seldom that the language used and the surrounding circumstances are so much alike in the case of two wills that the decision in reference to one establishes a precedent which controls the decision as to the other. (Cases)."

244. As to the word 'heirs' of a person living, referring to the persons who were the heirs at such person's decease. See HEIRS.

—*Flint v. Wis. Trust Co.*, 151 W., 231, 234.

245. Where a will gives to four stepchildren, named as 'my children', 'to each an undivided one-fifth part of my estate and to' five named grandchildren, 'each an undivided one-tenth part of my estate',—it is held the testatrix intended to give "one-fifth of her estate to each of the four members of the first class" and the remaining "one-fifth to be divided between the five members of the second class, or one-twenty-fifth to each, instead of one-tenth".

246. "In choosing between reasonable meanings of substantial equal dignity", the "paramount" consideration "is the rule that the intention of the testator should prevail so far as it can be read out of the language used to express it".

247. "The court has very great power" "to prevent failure of a testator's purpose, all in harmony with the rule that the legal intention of the testator is the one expressed in his language, though it may not be exactly the real intention he had in mind".

248. "Words may be given a very broad or very restrictive meaning, going to the very limit of the boundaries of reason,

249. Or may be transposed or rejected, or words not seen, may be read in place which are there by reasonable or necessary inference, or may be transposed or supplied,

250. And thus the language be moulded to express, so far as can reasonably be done, the testator's intention".

251. "The heir at law is to be favored" "in making a choice between reasonable meanings".

252. "Ordinarily, the last clause of two which conflict, is supreme, but it has no application where the effect would be to defeat the real intent".

253. "One of the most weighty rules for judicial construction is that of two reasonable meanings, one which will under a will void, in whole or in part, for uncertainty and one which will not, the latter is to prevail."

254. "That she" "used the word 'one tenth' by mistake, seems quite

plain. The improper definition of the fraction may be rejected", "and the will read as" indicated. In *re Donges's Est.*, 103 W. supra.

—*Will of Ehlers*, 155 W. 46, 48.

255. Where "all the property, by specific mention, was distributed" except that one forty of the two that the testator owned, being "the southwest quarter of the northwest quarter",—and he gave to a son, otherwise left out, "the northeast quarter of the northwest quarter" which he did not own, it is held, in harmony with the county and against the circuit court's decision, that "the testator intended" such son to have such forty "not otherwise disposed of by his will".

256. "Uncertainty of meaning may arise as well by application of the words of a will to the subject with which it deals as from the words of the will themselves".

257. "While extrinsic evidence cannot be resorted to for the purpose of changing or explaining a will,

258. It may be for the purpose of showing the circumstances characterizing its making and,

259. For the purpose of determining the meaning, in fact, and intended to be expressed therein, it may be read in the light of such circumstances". And the quotation in *Sherwood v. Sherwood*, 45 W. supra, "is in perfect harmony with what we have said".

260. "Where the intention of the testator is plain, the court may and should go to the uttermost limits of construction authority to discover it expressed in the language used to that end".

261. "In the field for judicial construction", "rules are just as broad in respect to wills as other instruments".

—*Will of Boeck*, 160 W. 577, 579.

262. Legacies 'payable to the legal heir', "in case of the death of" the legatee, is held, "under the peculiar circumstances" to "include legatees who had died prior to the making of the will". See also LEGACIES.

—*Flemming v. Griem*, 161 W. 608, 611.

263. Though "some of the provisions in the will evince a purpose to keep the property in the family of the testator, to prevent it from going to strangers to his blood", yet "the testator having made no limitation over to grandchildren we can make none". (Cases)

264. "The gift to the daughters" "is defeasible on condition subsequent and in no event vests in the grandchildren. If a daughter had a child who attained majority living the daughter, the gift vests in the daughter absolutely. There is no express gift over to grandchildren on the termination of the estate in a daughter.

265. A gift to a grandchild cannot be implied from a gift to a daughter, defeasible if the daughter dies without children surviving. (Many cases)."

—*Will of Allis*, 163 W. 452, 462.

266. Where a will with various specific bequests directs the residue 'shall be divided into five equal shares', one "assigned to each of the five legatees or groups of legatees therein named", one being to a sister who "predeceased the testatrix, leaving no issue",—it is held, with the county court and against the circuit, that such share goes as testate estate to the remaining residuary legatees. *Kerwin and Vinje, JJ.*, dissent.

267. "Rules of construction are not to be applied in ascertaining the true meaning of a will if that meaning can be ascertained clearly from the will itself and the surrounding circumstances. *Donges's Est.*, 103 W. supra". *Will of Ehlers*, 155 W. supra.

268. "The fact that" "the residuary estate is divided into five equal parts, one of those parts assigned to each of the legatees or groups of persons therein named, is not inconsistent with the intention of the testatrix to confine the distribution of the residue of her estate to the persons or groups of persons named in such clause, and that is true irrespective of whether or not they constitute a class. *Will of Reynolds*, 151 W. 375 (See DESCENT AND DISTRIBUTION); *Ives's Est.*, 182 Mich. 699".

—*Will of Waterbury*, 163 W. 510, 514.

269. The general rule as to "death" of a child named in a will referring to "death occurring during the lifetime of the testator",—is found not applicable,

270. On applying the primary construction rule of intent, and the rule favoring early vesting. See VESTING OF ESTATES, ETC.

—*Will of Owens*, 164 W. 260, 263.

CONSTRUCTIVE TRUSTS.

See IMPLIED TRUSTS. TRUSTS.

CONTEMPT.

Appeal: none in general, 1.
 Willful disregard of order, 12.
 Erroneous order violated, 9.
 Court may punish, 9.
 Party cannot recover, 10.
 Party's right to hearing, 11.
 While in contempt, 11.
 Refusal to answer, 3.
 Costs of proceeding, 8.

Refusal to answer—continued
 Disobedience of order, 7.
 Equity proceedings, 8.
 Failure to admit, 4.
 Proceedings, 3, 4.
 Punish for criminal contempt, 7.
 Refusal established, 5.
 Requiring him to answer, 6.
 Service defective, 2.

1. "The general rule in relation to convictions for contempt is, that there is no appeal," especially where the proceedings are "aimed at

conduct which tends to interrupt the proceedings and impair the authority of the court.”

—*State ex rel. Chappell v. Giles*, 10 W. 101.

2. An injunction being defectively served on defendant, held, “it is enough for us to know that he has knowledge that the injunction was granted. He was then bound to obey it. Advice of counsel cannot save him from the penalties of contempt.”

—*Mead v. Norris*, 21 W. 310, 316.

3. “When the officer taking the deposition of a witness to be used in an action pending in a court of record of this state, reports to the court in which such action is pending, that the witness has refused to answer certain interrogatories propounded to him, the court should, on application of the aggrieved party, grant an order that the witness show cause why he should not be required to answer such interrogatories.

4. On the return of the order, if the witness does not admit his refusal to answer, proper interrogatories in that behalf should be served upon him.

5. If it appear by his admission, or by his answer to the interrogatories, or by proof, that he has so refused, the court will decide whether he ought to answer the questions which he has refused to answer;

6. And if it is held that he ought, the court will make an order requiring him to go before the officer and make answer thereto; and in such case the court in its discretion may impose upon him the costs of the proceeding.

7. For disobedience to such order the court should, on proper proceedings, punish the witness as for a criminal contempt.

8. The practice here indicated prevails in courts of equity, and does not seem to contravene the provisions of any statute.”

—*State ex rel. Lanning v. Lonsdale*, 48 W. 348, 370.

9. “That the court has the right, in vindication of its order, to punish the defendant for a wilful violation thereof, notwithstanding that the same ought not to have been granted, is unquestioned”.

10. But a party not entitled to such injunctive order, can have no legal damages for a violation thereof, “not having shown to the court that she had any right which the court ought to protect by such order.”

11. While “the courts will not grant him any favors” while in contempt, “a party against whom an injunction is issued upon an ex parte application, has the legal right to demand a hearing upon the question of the regularity and propriety of issuing the same (sec. 2781); and the fact that he may have violated such ex parte injunction does not deprive him of that right.”

—*Kaehler v. Dobberpuhl*, 56 W. 497, 501.

12. As to “an appeal from an order adjudging the appellant in contempt for the violation of an injunction”, being “a wilful disregard of the order of the court, and is consequently a criminal contempt”, it is

held, following *In re Murphey* 39 W. 286, "not appealable" and "that this question of practice must be deemed settled".

—*T. of Williamstown v. Darge*, 71 W. 643.

CONTINGENT CLAIM.

Accrues: unfailing test, 33.
 After become absolute, 12.
 Assets remaining only, 12.
 Balance from heirs, 13.
 Four years after time expired, 14.
 Within one year, 14.
 After estate settled, 9.
 Allowed in county court, 22.
 Not in county court, 9.
 Remedy against heirs, 10.
 Agency contract bond; 21.
 After estate settled, 22.
 Before settlement of estate, 6.
 After estate settled, 22.
 Liability established, 5.
 Must become absolute, 7.
 Not after estate settled, 9.
 Which did not accrue, 8.
 Contingent: definition, 18, 35.
 Absolute, contingent, 27.
 Essential element of, 26.
 May ripen into absolute, 24.
 Uncertain as to absolute, 25.
 Contribution: action, 1.

Contribution—continued
 As a contingent claim, 3.
 Filed after time expired, 36.
 One year after absolute, 4.
 Sureties right to, 2.
 Covenants in deed, 29.
 Accrued when paid, 30.
 Action, nominal damages, 31.
 Action, substantial damages, 32.
 Failure to present, 24.
 Fixed amount, definite time, 37.
 Joint notes not due, 17.
 Not contingent, 18.
 Provable as claim, 17.
 Partnership accounting, 34.
 Permissive statute, 19.
 Possible deficiency, 38.
 Present as contingent claim, 11.
 Or after absolute, 11.
 Subscription contract, 23.
 Debt payable in future, 28.
 Surety's claim, 4, 15.
 Payment, absolute, 16.
 Trust funds not barred, 20.

1. Where an executor "was adjudged in default" Jan. 22, 1881, and died insolvent shortly thereafter without paying, and N. a surety, died thereafter, and the time for filing claims against N.'s estate expired June 6, 1882, and his co-sureties paid the defaulted amount Dec. 7, 1882,—it was held, that an action brought by the co-sureties Apr. 15, 1882, in the name of the county judge, against N.'s executor, in circuit court for contribution; could not be maintained. See also ACTIONS AGAINST EXTRS. & ADMRS.

2. The co-sureties' right to contribution from N.'s estate, was a contingency, which became absolute when they paid the whole amount, and they "had two opportunities for proving their claim against N.'s estate for contribution.

3. First. They could have proved it within the time limited, as a contingent claim under secs. 3858, 3842, and 3859", and "insured the collection". "That can be done, as held by this court in *Davis v. McCurdy*, 50 W. 569, where the claim against a surety on a guardian's bond was defeated by the discharge in bankruptcy, on the ground that it was provable against the estate of the bankrupt.

4. Second. The plaintiffs had one year in which to prove their claim after it became absolute, but under that section (3860) they would have been obliged to take their chances as to getting the amount out of the estate".

—*Ernst v. Nau, Extrx.*, 63 W. 134, 139.

5. The statutes as to contingent claims, secs. 3858-61, "refer to a contingent claim or liability which can be established by proof, and the amount ascertained.

6. Where a contingent liability exists, and the contingency happens so that the contingent liability becomes an absolute debt which may be proven by the creditor before the settlement of the estate has been closed and the property distributed, there the statute bars the claim if not presented", "within the time allowed".

7. The statutes refer to a contingent claim "which accrues and becomes absolute before the administration upon the estate is closed".

8. "We do not think they were intended to or do apply to a contingent claim like the present, which did not accrue and which was incapable of being established by proof until years after the estate of E. had been fully administered".

9. In this case where the deceased was surety on an administrator's bond, for license to sell the realty, and the liability was not manifest until long after his estate was settled, it was held, "there was no remedy in" the county court: and,

10. An action on the defaulted bond against the heirs, under secs. 3274, et al, was proper, and the heirs held liable for the amount of the default, and the costs of prosecution in both courts, but not counsel fees.

—*Mann, Judge v. Everts*, 64 W. 372, 377.

11. The claim of a surviving partner being "a contingent claim against the estate of the deceased partner, the plaintiffs had an option either to present the claim against the estate as a contingent claim, under secs. 3858, 3859, or to delay until the claim became absolute by the settlement of the affairs of the firm, and then present the claim under sec. 3860, within one year after it shall become absolute.

12. When a creditor presents a claim under sec. 3860, he can only be paid out of the assets of the deceased still remaining in the hands of the executor or administrator not then lawfully distributed or applied to the payment of other debts theretofore presented and allowed against the estate;"

13. "And sec. 3861 provides that when, at the time such claim is presented under the provisions of sec. 3860, the executor or administrator shall not have sufficient assets to pay the whole of such claim, the creditor shall have the right to recover" the balance from the heirs or distributees who have received property liable for debts. See also SURVIVING PARTNER.

—*Logan v. Dixon*, 73 W. 533, 538.

14. The claimant W. "stood in the relation of surety for the" decedent L, "the liability of L. to W. was a contingent liability, and remained so

until W. actually paid money on account of his obligation." "The claim of W. then became absolute, and the statute gave him one year from that date to present it to the county court. Sec. 3860." And though filed nearly four years after time limited for filing claims had expired, but within such year, the claim was held duly filed as a contingent claim.

15. "It was settled by this court in *Ernst v. Nau*, 63 W., supra, that the claim of a surety against a principal debtor remains contingent until the surety pays the debt;

16. And that, if the debtor has deceased, sec. 3860 gives the surety the right to present his claim, which by such payment became absolute, to the county court for allowance within one year thereafter."

—*Webster v. Est. of Lawson*, 73 W. 561, 571.

17. Notes "not due until some years after the time" limited, severally and jointly payable, the claimant "not liable thereon as security", were held "provable as a claim against the estate within the time limited in the order", under sec. 3843, and held not "a contingent claim within the meaning of sec. 3858, and hence provable within the time prescribed by sec. 3860 as construed by this court. (Cases supra)."

18. "A contingent claim, within the meaning of the statutes, is one where the absolute liability depends upon some future event, which may never happen, and which therefore renders such liability uncertain and indeterminable. *Sargent's Admr. v. Kimball's Admr.*, 37 Vt. 320; *Edwards v. Roepke*, 74 W. 575; *Foster v. Singer*, 69 W. 392".

—*Austin v. Saveland's Est.*, 77 W. 108, 113.

19. In a suit against a trustee as to proceeds of the sale of lands in fraud of heirs, where the "claim did not exist until the period for presenting claims against the estate of S. had expired", S. being the testate of the trustee, and the estate not having then been closed, it is held as to sec. 3860, concerning such subsequently accruing claims to be proven in the county court within one year after accrual, that "the language of the statute is permissive; and it may be doubtful if the intention was to bar all actions on such a claim unless the remedy in this section was resorted to;"

20. But, without deciding this question, it was indicated that this "claim for the proceeds of the sale was not one strictly or solely against the estate of S", but that the proceeds in general "are trust funds, and he (the testamentary trustee) holds them as trustee" for the plaintiffs; "hence that the failure to present the claim for allowance against the estate of S. was not a bar to this action", and it was so held.

—*Biron v. Scott, Trustee*, 80 W. 206, 210.

21. In a bond "for the faithful performance of" an agency contract to termination, the amount due at such termination is "one indivisible claim", and "did not accrue" "before the termination of the agency, nor until after the time limited for the presentation of claims against the estate of W. (surety thereon) had expired.

22. It was then a claim proper to be audited, under section 3860, after the expiration of that time." So filed and allowed after "his estate had been settled".

—*C. & J. Michel B. Co. v. Est. of Wightman*, 97 W. 657, 660.

23. Secs. 3269 et al., "contemplate an action for money only", and it is held, that an action thereunder is properly brought against the legatees, to recover on a "call for a payment upon the subscription contract" for stock held by the testator, being a claim that "was contingent till after the administration of the estate" was completed, and had not become absolute for filing in the county court.

24. "All claims not proper to be allowed, but which may be exhibited to the county court and may ripen into absolute liabilities, are contingent, and a failure to present them while the contingent character exists does not affect the right of action under sec. 3269. *Ernst v. Nau*, 63 W. supra; *Mann v. Everts*, 64 W. supra".

25. "If a liability exists but it is uncertain whether it will ever be absolute in the sense of being enforceable, it is contingent within the meaning of the statute.

26. The terms 'debt', 'absolute debt', 'liability', and 'absolute liability', are used" in connection with the fact "that the essential element of a contingent claim is uncertainty as to whether it will ever be enforceable.

27. True, so long as a debt is absolute it is not contingent, but it is not absolute if its enforceability is dependent upon a contingency that may never happen". (Quoted and approved in *Davis v. Davis*, 137 W. post).

28. A stock "subscription liability" "is a debt", "but not an absolute debt", being "payable in the future".

—*South Milwaukee Co. v. Murphy*, 112 W. 614, 620.

29. Where claimant received title to realty "by deed with full covenants" through another party who had title "with full covenants" from the deceased, and, after much litigation and foreclosure, he paid the incumbrance thereon, and filed his claim against the estate, ten days after payment, but four years after expiration of the time for filing general claims, it is held:

30. That as against the deceased, his "cause of action did not accrue till he paid off the incumbrance", and that "his claim was seasonably filed", under sec. 3860.

31. While "an action for nominal damages accrues in the circumstances of this case as soon as the deed is given",

32. "But until eviction in such a case, there is no opportunity to recover substantial damages such as in this instance, the amount paid to remove the incumbrance, till payment occurs". (Cases).

33. As to when "the cause of action accrues", "the unfailing test is, in the absence of some statute to the contrary, whether the party asserting the claim can successfully maintain an action to enforce it". (Citation). Recovery sustained.

—*In re Est. of Hanlin*, 133 W., 140, 144.

34. "The mere fact that an accounting (of a partnership) is necessary to determine the amount due does not make a claim a contingent claim.

35. A contingent claim is one which may never accrue. 9 Cyc. 73. A contingent claim is one where the liability depends on some future event which may or may not happen and therefore makes it uncertain whether there ever will be a liability. (Many cases).

What constitutes a contingent claim is very clearly stated in the case of *South Milwaukee Co. v. Murphy*, 112 W. supra, (quoting as above)." See also CLAIMS. —*Davis v. Davis*, 137 W. 640, 648.

36. A claim for contribution accruing after payment, held properly filed after time expired, under sec. 3860. See also CONTRIBUTION.

—*Est. of Ryan*, 157 W. 576, 579.

37. "A fixed amount due at a definite time in the future is not a contingent claim within the meaning of sec. 3858".

38. The "contingency" of a possible "deficiency after sale" on foreclosure, whether the note is due or not, does not make "the claim a contingent one". See also MORTGAGES.

—*Schmidt v. Grenzow*, 162 W. 301, 302.

CONTINGENT INTERESTS.

See FUTURE CONTINGENT ESTATES. TRUST VARIATION. VESTING OF ESTATES, ETC.

CONTRACTS.

See also AGREEMENTS. BOND FOR MAINTENANCE. COMMISSIONS OF BROKERS, ETC. CONSIDERATION. CONSTRUCTION OF CONTRACTS. COVENANTS. DEEDS. ENTIRE CONTRACTS. FRAUDS, STATUTE OF. JOINT OBLIGATIONS. LAND CONTRACTS. MARRIAGE CONTRACTS. MARRIED WOMAN. NOVATION. OPTIONS. PAROL. RESCISSION OF CONTRACT. SERVICES. UNLAWFUL CONTRACTS. WRITINGS.

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1. "A party to a written contract, cannot vary or control it by a parol agreement, made before the written contract was entered into, or simultaneously with it".
—*Cooper v. Tappan*, 4 W. 362, 369.

2. Creditor uninstructed by the debtor may apply payments as he likes on admitted or provable contracts. See PAYMENTS.
—*Stones v. Talbot*, 4 W. 442, 449.

3. Contract for services is not essential to recovery, where the ordinary relations of parent and child did not exist, and there was an under-
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standing that the services were not to be performed gratuitously, in the case of a child working after he becomes of age.

—*Fisher v. Fisher*, 5 W. 472, 474.

4. "Part performance of a parol contract for the purchase of lands, accompanied by the delivery of possession, is sufficient to take the case out of the statute of frauds," but "mere payment of a portion of the purchase money", even by tenant in possession as tenant, will not.

—*Blanchard v. McDougal*, 6 W. 167.

5. "Courts of equity" will reform and decree specific performance in the same suit. See REFORMATION.

Waterman v. Dutton, 6 W. 265, 273.

6. Where the contract is not complied with, but the work is accepted and used, compensation of reasonable value of the benefit can be recovered. See QUANTUM MERUIT.

—*Taylor v. Williams*, 6 W. 363.

7. Fraud or mistake may allow prior parol agreement to vary a written contract. See PAROL.

—*Reed v. Jones*, 8 W. 392, 413.

8. Contracts of infants are voidable on their part. See INFANTS.

—*Davies v. Turton*, 13 W. 185.

9. A written contract "must be assumed to express conclusively the final intentions of the parties, and no evidence of their previous statements or negotiations is admissible for the purpose of contradicting or varying it in any degree."

—*Sigerson v. Cushing*, 14 W. 527, 547.

10. Intent must be obtained from the language of the contract, and not outside. See CONSTRUCTION OF CONTRACTS.

—*Farmers L. & T. Co., v. Bank*, 15 W. 424, 438.

11. When rescinded for fraud it must be in toto. See CONSTRUCTION OF CONTRACTS.

—*Hendricks v. Goodrich*, 15 W. 679, 682.

12. "It is only where the (unlawful) contract is executory, that a rescission and a recovery are allowed". See UNLAWFUL CONTRACT.

—*Miller v. Larson*, 19 W., 463, 467.

13. Contracts cannot be changed from executory to executive by parol evidence. See PAROL.

—*Godfrey v. Germain*, 24 W. 410, 416.

14. The omission without fraud of a revenue stamp does not invalidate a written agreement, "although the law provides that it must be stamped."

—*Smith v. Scott*, 31 W. 437, 439.

15. "It is well settled in this state, that when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. (Cases cited)".

16. It is here held that "this principle extends beyond mere simple contracts", and "is applicable to contracts under seal."

—*McDowell v. Laev*, 35 W. 171, 175.

17. "An offer, unaccepted, is not a contract, because it is *ex parte*. When accepted, it ceases to be an offer and becomes a contract.

18. If the offer be in writing signed only by the party making it, and is merely accepted, not signed, by the other party, it becomes what civilians call a unilateral contract, binding both parties".

—*Hutchinson v. C. & N. W. Ry.*, 37 W. 582, 601.

19. A contract may be completed by a letter mailed but never delivered. See WRITINGS.

—*Washburn v. Fletcher*, 42 W. 152, 166.

20. "In the present case, the defendant, for a valuable consideration, engaged with his father to pay the debt which the latter owed the plaintiffs, and, within the above rule, (*McDowell v. Laev*, 35 W. *supra*, approved) the plaintiffs may maintain this action to recover the unpaid balance of such debt."

21. "It is quite immaterial, if the defendant's covenant to pay his father's debt was afterward rescinded by mutual agreement between the parties to it. Before that was done, the plaintiffs had been informed of the covenant, and made no objection thereto; indeed, the fair inference from the testimony is, that the plaintiffs fully assented thereto".

22. "Certainly, after such notice and assent, the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent."

—*Bassett v. Hughes*, 43 W. 319, 321.

23. "No principle of law is better settled than that a written contract cannot be varied or controlled by parol agreements or understandings between the parties made previously to or simultaneously with the execution of the written contract.

24. "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing;

25. And all oral testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon,

to the prejudice, possibly, of one of the parties, is rejected.' 1 Greenl. Ev. Sec. 275." —*Cooper v. Cleghorn*, 50 W. 113, 120.

26. "The writings purport to state the whole contract, and in the absence of any claim of fraud or mistake they must be held to contain the whole contract", and evidence of additional consideration cannot be received. See PAROL. CONSIDERATION.

—*Hubbard v. Marshall*, 50 W. 322, 327.

27. May be modified or rescinded without a new consideration. See RESCISSION.

—*Kelly v. Bliss*, 54 W. 187, 191.

28. "Circumstantial evidence, and evidence by which a contract might be implied in the absence of direct and positive evidence of an express contract, if sufficiently clear and satisfactory, may establish an express contract".

—*Pritchard v. Pritchard*, 69 W. 373, 377.

29. "The original contract is void, it being for the sale of goods of over \$50, and no payment or delivery, and it not being in writing," and the subsequent "delivery of the organ on Sunday was also void." But it is held that there was a subsequent admission of delivery and acceptance, by the plaintiff afterward saying "that 'he liked it first rate,' and asked about the book and stool".

—*Schmidt v. Thomas*, 75 W. 529, 531.

30. The law is "firmly settled in this state, to the effect 'that, in the absence of fraud or mistake, proof of antecedent or contemporaneous verbal agreements between contracting parties cannot be received to alter or control their written agreement'. *Herbst v. Lowe*, 65 W. 320; (other cases).

31. 'This is on the theory that all such prior negotiations are either merged in or excluded by the contract finally made. The same is true in respect to any prior preliminary agreement, in so far as it is covered by, or in conflict with, the final contract'. *Ibid*,"

—*Ball v. McGeoch*, 81 W. 160, 171.

32. "In the language of a Massachusetts case cited: 'Though the writing signed by the defendant was but an offer which might be revoked, yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance;

33. And during the whole of that time it was an offer, every instant; but, as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract.' *Boston & M. R. Co. v. Bartlett*, 3 Cush. 227. (As to this quotation, it is said *Abroahams v. Revillon*, 129 W., 235, 244,— "that language has received the express sanction of this court").

34. 'Willingness to contract once manifested is presumed to continue for the time limited by the offer, or, if not so limited, until expressly

revoked, or overcome by a contrary presumption'. *Mactier's Admrs. v. Frith*, 6 Wend., 103, 115.

35. In the opinion of the court in that case by Mr. Justice Marcy, it is in effect said that assent to a proposition may sometimes be presumed from a party's silence.

36. In a very recent English case it is said by Lord Herschell 'that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn', and he cites several cases in support of the proposition. *Henthorn v. Fraser*, (1892) 2 Ch. 31. See also, *Stevenson v. McLean*, 5 Q. B. Div. 351.

37. These decisions are in line with our own adjudications. *Matteson v. Scofield*, 27 W., 671; *Washburn v. Fletcher*, 42 W., supra; *Hawkinson v. Harmon*, 69 W., 551. We must hold that the defendant's offer by telegram remained open until it was accepted."

38. So held, though there was a business failure after the offer changing the commercial situation, both parties being cognizant of the failure six days before the acceptance, during which time the offer might have been withdrawn.

—*Sherley v. Peehl*, 84 W., 46, 52.

39. "The mere fact that the contract in question (an option) was only signed by the vendor does not prevent its enforcement against him and the land. *Docter v. Hellberg*, 65 W., 415."

40. "The contention is that the writing was a mere option, without mutuality, and gave the company (the proposed vendee) no interest in the land. But one having an option in writing for the purchase of land has an interest therein, within the meaning of the section of the statute cited (sec. 2304), as well as sec. 2302. *Telford v. Frost*, 76 W., 172.

41. Where the option is exercised by electing to purchase within the time prescribed, and entering into the possession of the land and expending money thereon, there would seem to be no good reason why such contract should not be enforceable. *Kerr v. Day*, 14 Pa. St., 112, 53 Am. Dec. 526."

42. So held in this case, though there was also an oral modification of the contract,—the fact of possession and expending money in "performance or pursuance of such contract so modified" obviating, the otherwise not permissible parol modification.

—*Wall v. M. St. P. S. S. R. Co.*, 86 W., 48, 56.

43. Definition of, and evidence establishing, an express contract, making a note payment thereunder. See PROMISSORY NOTES, ETC.

—*McDonald v. Provident S. L. A. Soc.*, 108 W., 213, 218.

44. A contract void in part, being indivisible, is wholly void, but may rebut the presumption of gratuitous services. See SERVICES.

—*Martin v. Est. of Martin*, 108 W., 284, 289.

45. It is a "well-established rule that neither a simple deed of conveyance nor a promissory note purports to express the whole contract between the parties. *Nauman v. Ullman*, 102 W. 92; *Cuddy v. Foreman*, 107 W. 519 (See CONSIDERATION).

46. The deed but purports to convey property in execution, partially or wholly, of some agreement;

47. The promissory note merely serves as convenient evidence of a promise to "pay money".

48. As there usually are other elements involved, "therefore no presumption arises that the parties have attempted to embody their whole contract in either instrument".

49. "Of course, the additional elements of contract which may thus be proved (by parol) must be consistent with, and not in contradiction of, the effective part of the writing".

50. And it is held that evidence as to a settlement and release, and the giving of promissory notes, as a part of the agreement in connection with "a simple deed of conveyance" and the execution of the promissory notes covering the consideration named therein, should have been admitted,—the case of *Hei v. Heller*, 53 W. 415 (See PAROL) being "wholly distinguished from *Cuddy v. Foreman*, 107 W. 519 (See CONSIDERATION)", as not involving "a mere deed of conveyance" but containing a bi-lateral agreement covering the whole contract.

—*Brader v. Brader*, 110 W. 423, 431.

51. An option contract is enforceable against the administrator and heirs of the seller. See OPTIONS.

—*Mueller v. Nortmann*, 116 W., 468, 470.

52. "When a contract is made in one state or country, to be performed in another state or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation, and effect" (1 *Daniel Neg. Inst.* 865),

53. Unless it clearly appears that the parties intended the contract should be governed by the law of the place where it was made".

54. As to notes executed and delivered at New York City, on Sunday, payable at Boston, Mass., at B's office, resulting from a negotiation between G. of Wisconsin and B. as to the sale of the latter's lands in Florida, to P.,—

55. "Since the place of performance or payment is expressed in the notes, the presumption, therefore, is that the parties contracted with reference to the law of that place",

56. And the "notes made in violation of the law (of Mass.) which prohibits the making of such contracts on Sunday", were void.

—*Brown v. Gates*, 120 W. 349, 356.

57. "Slight circumstances excusing" "failure to examine" a contract is sufficient to enable consideration of redress. See DEEDS.

—*Loyd, v. Phillips*, 123 W. 627, 630.

58. "It seems to be firmly established" "that 'the manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect.

59. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced'. *Wilson v. Powers*, 131 Mass. 539, 540." (Many cases).

60. So held, and that parol evidence was admissible to so show, though the "written instrument enumerates (other) conditions precedent to its validity".

—*Golden v. Meier*, 129 W. 14, 19.

61. As to parol evidence of a subsequent new contract re-adopting a plan discussed preceding a prior written contract,

62. And as to recitals and consideration in a deed, varied by parol. See PAROL.

—*Jost v. Wolf*, 130 W. 37, 40.

63. "There must be a direct conflict as to the contract price of the thing", "to render" evidence of reasonable value admissible, and,

64. "The difference must be so great that the reasonable value thereof from the standpoint of the parties when the contract was made may reasonably discredit the evidence of the one side and corroborate that on the other, affording some reasonable ground for believing that the contract was at the price most in harmony with such evidence".

—*Anderson v. Arpin H. L. Co.*, 131 W. 34, 48.

65. Agreement to bequeath property, for "privilege of naming a child". See LEGACIES.

—*Freeman v. Morris*, 131 W. 216, 218.

66. "Aside from the statute of frauds, no express formal stipulation is essential to create a contract. Proposal and assent may take any form.

67. The question always is whether the parties understood and intended a contract based upon sufficient consideration, as in *Gauger v. Pautz*, 45 W., 449".

—*Kaley v. Van Ostrand*, 134 W., 443, 446.

68. While "the general rule is that a contract is governed by the law of the place thereof", which "doctrine" "rests in comity",

69. Yet, where "a contract which is so contrary to the public policy of this state as to be void if made here", both by the decisions and by the statute, it will not be "judicially enforced here if valid in the state where it was made or breached".

—*Fox v. Postal Tel. Co.*, 138 W., 648, 651.

70. "A married woman's contract as accommodation maker of a promissory note, which is valid in the place where made", is held

“enforceable in the courts of this state, such a contract not being valid if made here”.

71. “Being so valid, appellant (plaintiff) is entitled, as matter of right, by the universal comity,” to enforce the contract here, it being “not contrary to any public policy of this state heretofore, in the code of unwritten law, established by our court”, and “not to be regarded as inherently harmful”. p. 125.

72. “The proposition, in the main, is governed by a few quite elementary principles:”

73. “As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; the *lex loci contractus*, unless the parties thereto intended” otherwise;

74. “Matters respecting the remedies depend upon the law of the forum”;

75. “A contract which is valid in the place thereof is valid everywhere”;

76. “The enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose,

77. Unless the agreement is contrary to the public policy of the forum”;

78. “The law of the place of the contract” “applies to the capacity of parties, including that of married women”. (Citations).

79. A contract “is not necessarily contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely” for such reason.

—*International H. Co. v. McAdam*, 142 W. 114, 117.

80. “The fact that a contract in the plural form is signed by only one person at the time of its manual tradition is not conclusive that it is an incomplete instrument.

81. Contracts of such form may be and often are treated by the parties thereto as complete, effective, and binding on the subscriber. 1 Randolph, Com. Paper, § 87”. Held, a question on the evidence.

—*First Natl. Bank v. Wunderlich*, 145 W. 193, 197.

82. Notes given for a loan “were dated and payable at Minneapolis”. “The negotiations were begun, conducted, and concluded there”. “The only act done outside of the state was the placing of the signatures of the defendants on the back of the note” at Eau Claire. “They were Minnesota contracts and governed by the laws of that state”, where such endorser is held as a maker.

—*E. L. Welch Co. v. Gillett*, 146 W. 61, 63.

83. “A valid contract made with one person for the benefit of another may be at once enforced by that other regardless of any formal assent

thereto prior to the commencement of the action". *Tweeddale v. Tweeddale*, 116 W. 517.

84. "The law regards such a transaction as at once vesting in the third person a right to have the promise made for his benefit executed, which right cannot be changed by the immediate parties to the transaction".
—*Zwietusch v. Becker*, 153 W. 213, 216.

85. "The law is quite well settled that where a contract informal, but complete in its terms, appears to have been made, it will take effect and be binding,

86. Notwithstanding the fact that the parties anticipate that a more formal contract will be afterwards made embodying the terms of the formal contract. *Cohn v. Plumer*, 88 W., 622.

87. It is equally well settled, however, that letters or telegraphic communications between the parties will not be construed as a contract when it is plain that they were intended only as preliminary negotiations,

88. To be followed by a formal contract containing material provisions not contained in or to be inferred from the preliminary letters or communications. (Cases)".

—*Francis H. Leggett & Co. v. West Salem C. Co.*, 155 W., 462, 469.

89. An oral contract involving more than \$50, made in Tennessee, "there being nothing inherently bad about" it, and being "valid by the place of the agreement, it should be so treated here, regardless of our statute of frauds. *International H. Co. v. McAdam*, 142 W., *supra*."

90. While "in case of a contract being physically made in one place and mutually intended to be performed in another, the presumption is" "that the place of performance is that of the contract",

91. Yet, "the place of a contract is a matter of mutual intention", and, it is held, that such presumption is "one of fact", and may be overcome by evidence, circumstantial as well as direct.

—*D. Canale & Co. v. Pauly & P. C. Co.*, 155 W., 541, 543.

92. "In matters of contract one must observe what he has reasonable means of knowing. The law for the protection of persons even against fraud will not be extended to those who 'having the means in their own hands neglect to protect themselves'." *Mamlock v. Fairbanks*, 46 W. 415."
—*Ross v. Northrup, K. & Co.*, 156 W. 327, 335.

93. "When the validity of a written instrument is in issue it is always competent, in an action at law as well as in a suit in equity, to show that the instrument never was executed; -

94. That its signature was procured either by fraud or duress, and therefore that it never had any legal existence as a valid instrument. *Keller v. Ruppold*, 115 W. 636; *Aukland v. Arnold*, 131 W. 64".

—*Heineman v. Old Nat. Bank*, 157 W. 289, 291.

95. An oral agreement to give a legacy, and a written agreement to devise realty, there being valid consideration, are valid and enforceable. See LEGACIES. —*Dilger v. Est. of McQuade*, 158 W. 328, 330.

96. A contract as to realty and support between two persons for the benefit of a third, having gone into effect and then mutually rescinded by the two, does not take away the rights of the third person for enforcement as to him. See BOND OF MAINTENANCE.

—*Wetutzke v. Wetutzke*, 158 W. 305, 308.

97. Where M. and B.,—the latter “indebted to plaintiff G.,”—entered into a conditional contract, and the papers placed in escrow until the conditions were performed; and such performance failing, and B. released M. “from paying plaintiff’s claim”, which payment was part of the contract,—it is held that G. could not recover from M. “since the contemplated one” “never ripened into an agreement”,—

98. And that the case is not “within the rule of *Tweeddale v. Tweeddale*, 116 W. 517, and *Wetutzke v. Wetutzke*, 158 W. supra, where it was held that a valid agreement entered into between two persons for the benefit of a third cannot be rescinded or altered without the consent of such third person”. —*Gimbel Bros. v. McConnell*, 159 W. 325, 329.

99. “A contract is not to be condemned merely because it is ingenious. (Case).

100. Nor unless it contravenes some rule of positive law or conflicts with public policy. (Case).

101. All stock corporations, when not expressly or by implication forbidden to do so, have general power to make contracts furthering the objects of their creation”. (Cases).

—*Jacobs v. Wis. Natl. L. Ins. Co.*, 162 W. 318, 321.

102. The sureties on the bond of the principal contractors are held “liable to a materialman who furnished material to the principal contractor, which material was used in the construction of the building in question”, “upon the promise contained in the bond to pay claims incurred in the construction of the building.

103. The rule is well settled in this court that ‘when a person for a consideration paid to him by another agrees to pay, or cause to be paid, a sum of money to a third person, a stranger to the transaction,

104. The latter thereby immediately becomes possessed of the absolute right to the benefit of the promise,

105. And a right of action thereby accrues to him against the promisor’. *Tweeddale v. Tweeddale*, 116 W. 517; *Wetutzke v. Wetutzke*, 158 W. supra”.

106. “If the contract be to pay a debt due to a third person, presumably it is for his benefit unless it appears that the contract was not so intended”. —*Concrete S. Co. v. Ill. Surety Co.*, 163 W. 41, 43.

107. Where a valid contract was made by two persons for the benefit, in part, of "a stranger thereto", and after performance for several years they "sought to change it without the consent of" such party, a "right of action" accrued to such third party thereon regardless of such change. (Cases, *supra*).

108. "The fact that the payment was to be in land and not in money does not affect the rule", and "since the promisor is dead", and the other party has "title to the land, secured through breach of the original contract", they may "be compelled to convey to" such party.

—*Sedgwick v. Blanchard*, 164 W. 421, 423.

109. A contract as to inheritance must be "clearly established" to be enforced. See ADOPTION. —*Wink v. Olson*, 164 W. 427, 431.

110. As to a contract of conveyance between two persons involving payments to a third "contingent upon a condition precedent". See BOND FOR MAINTENANCE. —*Krahn v. Goodrich*, 164 W. 600.

CONTRIBUTION.

See also JOINT OBLIGATIONS. SURETIES.

Accrues when paid, 15.

Between partners, 13.

Illegal act, 13.

Mistaken conception, 14.

Between wrong-doers, 12.

Co-guarantors, 6.

Breach by deceased, 6.

Co-surety, quasi-trustee, 9.

Legal and equity right, 7.

Principles stated, 11.

Right forfeited, 8.

Special advantage, 9.

Support: several parties, 1.

Against one or more, 3.

Agency of wife, 5.

Household details, 4.

Largely by one, 2.

Wrong by co-surety, 10.

1. Where two husbands and their wives contracted to support the latter's mother during her life, she having "the right to live at the home of either the plaintiff or the defendants at such times and for such periods as she might desire",

2. And she having resided largely with the plaintiff, it is held, "the right to contribution under similar circumstances is well established and its enforcement in legal actions has been sustained in the decisions of this court" and "in other jurisdictions". (Many cases).

3. "It clearly follows that plaintiff is entitled to enforce his alleged claim for contribution, and that he may do this by proceeding against one or more of the persons liable to him for their proportionate share without proceeding against all persons so liable to him".

4. Because plaintiff's wife "attended to the details" of such support "in the usual course in the management of the household" "in the customary way",

5. "It in no way tends to show that the relationship of principal and agent existed as to these matters between the husband and wife", and objection by plaintiff to her testifying on the ground of agency transactions, was sustained.
—*Payne v. Payne*, 129 W. 450, 454.

6. To a claim filed on notes, the estate submitted an offset for contribution for money paid by deceased on an obligation in which the claimant and deceased were co-guarantors, and such set-off was disallowed because of "prejudicial breach of duty" of the deceased in the management of the corporate property the payment of whose debts had been personally guaranteed by such guarantors as major owners of the corporate stock, such corporation having become insolvent during the three years preceding his death that decedent had been in control after having purchased claimant's stock therein.

7. "While" "the right of contribution" "is an equity the right to the equity is legal as well as equitable, because the parties are presumed to have agreed that the right shall exist, and so legal as well as equitable remedies are available to redress its violation. (Many cases)".

8. "The right of contribution may be parted with to co-sureties by contract, or lost to the extent that prejudicial breach of duty to the co-sureties would otherwise proximately cause loss to them, and may be forfeited in some other ways definitely established in law."

9. "Both in law and equity, a co-surety is a quasi-trustee for his associates of all special advantages he acquires from the principal debtor,—either in adversary proceedings or otherwise,—for the benefit of the bearers of the common burden, with all the duties incident to such relation".

10. "There is no rule better established in the law of suretyship than that, the co-surety whose wrongful conduct causes default, rendering resort to the guaranty necessary, and producing loss to the sureties, cannot have contribution, so far as loss was thus produced".

11. (Principles of contribution stated, and cases of illustration given.)
"There is dearth of such in the history of our own jurisprudence".

—*Est. of Koch*, 148 W. 548, 557.

12. "The principle that there can be no contribution between wrongdoers is very familiar and is very frequently applied".

13. But "as between partners" "a claim for contribution will not be rejected unless the partnership is" illegal, "or unless the act relied on" "was not only illegal, but the illegality such that it must or ought to have been known to the partner seeking contribution to have been illegal when it was committed. (Citations)".

14. Here the partners, attorneys, "were acting honestly and in good faith, but under a mistaken conception of the law, and hence the right of contribution exists".

15. It is held that the claim for contribution did not accrue until the judgment was paid, and hence a contingent claim proper to be filed under

sec. 3860, after expiration of the time fixed and "within one year after it accrues or becomes absolute". See also SETTLEMENT.

—*Est. of Ryan*, 157 W. 576, 578.

CONVERSION.

See ACTIONS BY EXTR. OR ADMR. DISCOVERY. PERSONAL ESTATE. SERVICES.

CONVEYANCE.

See CONSTRUCTION OF DEEDS. DEEDS. FRAUDULENT CONVEYANCES. MORTGAGES. SALE OF PERSONALTY. SALE OF REALTY.

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1. The discretion allowed the county and circuit courts as to costs "is applicable only to the question for and against whom costs shall be awarded at all, and whether to be paid by the parties personally or out of the estate".

2. "But the costs to be awarded are only such as are authorized by the statute relating to costs in other cases, so far as the same may be applicable to cases of this character".

3. The contestants succeeding in the circuit court but reversed on appeal, it is held that the statute as to the supreme court "does not deprive this court of all discretion in this matter", and the contest being in good faith, the costs of both parties including the contestants are allowed "to be paid out of the estate." p. 365.

—*In re Jackman Will*, 26 W. 143, 144.

4. The limitations of the statute of costs to twenty-five dollars, "relate to 'actions at law upon contract'. Equitable actions are subject to no

limitation, and the parties recovering costs therein may lawfully recover full costs, without reference to the amount of the judgment”.

—*Grace v. Newbre*, 31 W. 19, 26.

5. In an action by a surety for contribution against his co-surety, proportional attorney fees are held recoverable; but the right to contribution is not “extended to the costs incurred by the plaintiff, or paid by him, in the action brought in the circuit court” against such surety, presumably because “there is no special count in the complaint which would warrant any evidence to show that” the co-surety “was responsible for them”. (Not approved, except on the ground stated. *Boutin v. Etsell*, 110 W. 276. See SURETIES.)

—*Shepard v. Pebbles*, 38 W. 373, 380.

6. “We hold that a party is entitled to tax full fees for his witnesses in a court of record, though the same persons may have attended as witnesses for another party in another cause at the same term”.

—*McHugh v. C. & N. W. Ry. Co.*, 41 W. 79, 82.

7. The authorities “clearly establish the general rule of courts of equity that an executor may always, in a proper case, take the opinion of the court upon the will, at the expense of the estate”.

—*Heiss v. Murphey*, 43 W. 45, 48.

8. “The costs are the expenses incurred by a party in the prosecution or defense of an action or judicial proceedings”, and “consist of the fees of attorneys, solicitors, or other officers of the court, and such disbursements as are allowed by law”, according to all the authorities.

—*Emerick v. Krause*, 52 W. 358, 360.

9. “Whatever may have been the early rule in England and some of the states, in equity cases, yet the rule seems to have been settled in will cases in this state, for quite a number of years, that the amount of costs recoverable by a party is regulated wholly by the statute,

10. And that the only discretion given to the court is as to the party by or to whom the same shall be paid, and whether out of the fund or estate which is the subject of the controversy, or by the individual. *In re Jackman's Will*, 26 W. supra”.

11. As to equity cases, the statute (subd. 7, sec. 2918), contains “this general provision; ‘But in all equitable actions (and special proceedings) costs may be allowed or not to any party, (in whole or in part) in the discretion of the court’.

12. “This discretion seems to be limited to allowing or disallowing to a party such costs as the other provisions of the statute prescribe, and not to be a discretion to fix an arbitrary amount according to the trial judge’s notion of justice and equity in the particular case.”

—*In re Carroll's Will*, 53 W. 228, 233.

13. In former cases, (not cited, *supra*) while "there may be some discrepancy, if not contradiction," yet "the principle is sanctioned that in all cases where the administrator or trustee sues strictly in his representative right and in good faith, the judgment against him for costs as a party in form should be paid out of the estate.

14. To now settle the question beyond further dispute, we reaffirm the first decision on this question (*Lightfoot v. Cole*, 1 W. 36), and we hold also that the present statute (sec. 2932) should be so construed as to require the judgment in form, in a proper case, to be against the party as administrator, trustee, etc., to be chargeable upon and collected out of the estate, fund, or party represented, and that such direction should be inserted in the judgment itself."

—*Hei, Admr. v. Heller*, 53 W., 415, 420.

15. The presumption is that the administrator, personally is not chargeable with costs. *Hei v. Heller*, 53 W. *supra*, approved. See JUDGMENTS.

—*Ladd, Admr. v. Anderson*, 58 W. 591, 593.

16. Expenses of both contestants in an incompetent guardianship, to be paid by the guardian. See INCOMPETENTS.

—*Barbo v. Rider, Gdn.*, 67 W. 598, 607.

17. "A probate fee is manifestly a reward or compensation to a county judge or judge or register of probate for services rendered or to be rendered". —*State ex rel. Sanderson v. Mann, judge*, 76 W., 469, 473.

18. "The judgment for costs is in form against" executors personally, and "is unauthorized, unless the court therein expressly directs the same to be paid by such executors personally for mismanagement or bad faith in such action. Sec. 2932; *Ladd v. Anderson*, 58 W. *supra*."

19. The judgment should have contained a formal direction for the payment of the costs out of the estate. *Hei v. Heller*, 53 W. *supra*". Reversed, incidentally, solely for such reason.

—*Wiesmann v. T. of Brighton*, 83 W. 550, 552.

20. Attorneys are "liable for such costs, not as sureties merely, but as principal debtors", under secs. 2948, 2943, where they fail to protect themselves, and claims therefor are assignable.

—*Knowles v. Frawley*, 84 W., 119, 122.

21. Recovery of attorneys fees from administrator, when not employed by him. See LIABILITY.

—*Miller v. Tracy*, 86 W. 330, 336.

22. "The established rule is, where the contestant of a will has acted in good faith in taking an appeal to this court, and the questions of law or fact involved are worthy of consideration, to order the costs taxed against such contestant paid out of the estate. (Cases). (Quoted and

reaffirmed in *In re Donges's Est.*, 103 W. post. Followed in *Davis v. Davis*, and *Will of Bierke*, 132 W. post. Limited to "will contest or construction cases", in *Becker v. Chester*, 115 W. post.)

23. "Sec. 4041a, relating to costs of contestants, refers solely to county and circuit courts. It does not affect the rule which has always prevailed in this court". (Sec. 4041a, exists the same now (1916) as then. See Ch. 663, s. 447, L. 1911). — *Jones v. Roberts*, 96 W. 427, 433.

24. Costs held properly adjudged "against the executor personally", where the appeal was found to be "taken in bad faith". Likewise so adjudged in the supreme court.

— *Est. of Robinson v. Hodgkin*, 99 W. 327, 332.

25. "Taxable costs, strictly so called, in a case like this (a controversy in a trust estate), is wholly regulated by statute."

26. The court below may "allow or withhold costs"; and "if allowed against the trustees they are payable out of the trust fund unless the court otherwise directs because of bad faith on the part of such trustees. Sec. 2932. That applies to all courts and to the reasonable counsel fees of the trustees as well as taxable costs, the latter meaning costs taxed according to the statutory fee bill."

27. As to granting counsel fees to a party, other than the trustee, out of the trust fund, "there is no statute authorizing such a proceeding." While the counsel fees to the trustees is proper, "it is considered that counsel fees to others that may be interested in the trust fund are not recoverable, either from the trustees personally or out of such fund. (Cases)". (Approvingly quoted in *In re Donges's Est.*, 103 W. post).

— *Mulberger v. Beurhaus*, 102 W. 1, 11.

28. Compensation and expenses of a guardian ad litem are to be paid out of the ward's property. See COMPENSATION OF ADMR., ETC.

— *Tyson v. Richardson*, 103 W. 397, 400.

29. (The question of costs and counsel fees in probate matters, in many cases prior to the instant case, has been treated in so variable and desultory a manner, and so many directions have here and hereafter been questioned and disapproved that many such past adjudications have been herein ignored, but it is believed that the foregoing isolated rulings noted, are still effective. In the instant construction case, the general principles seem to have been for the first time fully and authoritatively set forth, and further elucidated in subsequent decisions.)

30. The question of costs and counsel fees "resolves itself into two very distinct parts", and "as to the first of these, the right and liability of litigants to costs, and the amount thereof, is wholly statutory. In *re Carroll's Will*, 53 W. supra; *Mulberger v. Beurhaus*, 102 W. supra."

31. "As to costs in this court, the allowance of them, in cases for the probate or construction of wills, otherwise than in ordinary litigation,

finds inception in the Jackman Will Case, 26 W. supra", is governed by sec. 2949, as construed "to leave to this court a discretion", and is held as "an established rule of practice", as set forth in Jones v. Roberts, 96 W. supra. Here, the contest as to construction "was entirely justifiable", and "the taxable costs of both parties in this court should be paid out of the estate".

32. In "the circuit court, the costs must be governed by sec. 2918", vesting a discretion "as to who shall recover", and whether "the whole or only a part", limited by the fee bill, and as set forth in Carroll's Will, 53 W. supra, and "controlled in some measure by sec. 2932", as to an executor's liability.

33. "In the county court taxable costs are controlled by sec. 4041, in applying which the county court is in some measure restrained by sec. 2932, which applies to all courts. Mulberger v. Beurhaus, 102 W. supra.

34. The discretion thus vested in the circuit and county courts under the statutes above mentioned we shall not attempt to direct in advance, though it might be subject to review if abused".

35. After considering prior contrary decisions, it is held: "On mature consideration we are convinced that the habit of ordering payment of counsel fees, other than the executor's, is without authority of law, and should not longer be indulged in, but that the cases and extent in which one party or any fund shall be required to contribute to the expenses of another in litigation must be limited by the costs statutes.

36. It will, of course, be understood that what we have said with reference to allowance of counsel fees, etc., have no application whatever to those reasonably incurred by an executor or any other trustee in the good-faith performance of his duties.

37. No rule is better settled than that the trustee is entitled to pay those, as all other proper expenses which fall on him by reason of his trust, out of the trust funds in his hands", if "proper in character and reasonable in amount".

38. But "courts should be cautious in allowing for services ostensibly rendered to executors, but in spirit and effect rendered to one of opposing interests, which should bear its own expenses".

39. Here the services "have been rendered, not to the executors, but to the respective claimants", "who should each bear the expense". "Taxable costs of both parties in this court will be paid out of the estate".
—*In re Donges's Est.*, 103 W. 497, 513-518.

40. *In re Donges's Est.*, 103 W. supra, "the court has just condemned" payment of "counsel fees out of the estate" for parties other than executors. Order for such payment is reversed.

41. Taxable costs and disbursements are allowed, in a construction case, in favor of the defendant, "and against the plaintiffs both in this court and the trial court; the same to be payable out of the estate". See VESTING OF ESTATES. —*Patton v. Ludington*, 103 W. 629, 651.

42. In a will contest between heirs and the proposed executor-named, the will being allowed in county court, and the decree reversed in circuit court, which last decree was reversed in the supreme court, and the county court decree affirmed, 104 W. 581 (See *UNDUE INFLUENCE*), and the circuit court provided that "counsel fees to the proponent and to the contestants" under the previous judgment and agreement should stand, and that the proponent should have a further sum of three hundred dollars, for the previous appeal, it is held,—

43. That "no reason occurs to us why the same rule as to the making of allowances for counsel fees outside of the statutory costs should not logically apply to" this case, as in the construction case *In re Donges's Est.*, 103 W. *supra*, and it is so determined, and such fees here disallowed as to both proponent and contestants. (This ruling is now modified and changed by the subsequently enacted sec. 4041b):

44. "The proponent is the person named as executor in the will, but is not an executor, within the meaning of the law, because he has not qualified or received his appointment from the county court. *In re Will of Somervail*, 104 W. 72 (See (*EXTRS. & ADMRS.*)).

45. The allowance of the counsel fees, on the stipulation of all the parties to the contest, is reversed, it being said that, "it is difficult to see how parties who neither own nor control a fund or estate can stipulate away any part of that fund or estate", "that there are other legatees not parties to the stipulation, and there may be creditors", and "to give binding force to the stipulation under such circumstances would be a clear departure from correct principles", and against "public policy".
—*Fox v. Martin*, 108 W. 99, 100.

46. The matter of guardianship being a "special proceeding", costs in circuit court were held properly awarded against the unsuccessful petitioners there, under subd. 7, sec. 2918, and the question is held inapplicable to sec. 2932, as to being "payable out of the estate", applicable only to "actions". (By ch. 325, L. 1907, sec. 2932 is now amended to apply to "any action or proceeding prosecuted or defended in any court".) See also *INCOMPETENTS*.

—*In re Gdnsp. of Welch*, 108 W., 387, 393.

47. In a will contest, "as to statutory costs in this court, the rule is that 'if the contestant has acted in good faith, and the questions of law or fact are worthy of consideration, costs taxed against him should be paid out of the estate.' *In re Donges's Est.*, 103 W., *supra*." So allowed.

—*Will of Healy*, 108 W., 632, 633.

48. Following *In re Donges's Est.*, 103 W., *supra*, in an equity case involving a trust estate, "not, strictly speaking, for the construction of a will or contesting the validity of a will, though the meaning or even the validity may be the vital question involved",—"taxable costs in this

court to the losing parties payable out of the trust fund," are not allowed,

49. Though the prevailing parties, executors and trustees, stipulate such allowance. "A trustee has no better right to give away the property he is duty bound to conserve than a guardian ad litem", concerning whom it has been so decided. *Kingsbury v. Buckner*, 134 U. S. 650; (other cases). —*Becken v. Chester*, 115 W., 90, 147.

50. Attorneys' fees allowed by the circuit court on appeal from a final judgment of the county court, to all the attorneys in lieu of taxed costs, held error and "without authority of law", following cases, supra. —*McMahon v. Snyder*, 117 W., 468, 468.

51. Where a co-executor "appealed alone under the provisions of sec. 4039, as a legatee, and not as executor", "sec. 2932 has no application either in circuit court or in this court", and costs were held properly taxed against appellant personally. —*Roberts v. Lamberton*, 117 W., 635, 638.

52. Sec. 2931, making the guardian ad litem responsible for the costs against an infant plaintiff, and providing that "payment may be enforced by attachment", is held valid and constitutional (Sec. 2931, subsequently repealed by Ch. 325, L. 1907, and guardian ad litem placed on a par with executors, etc., in sec. 2932). —*Burbach v. Milwaukee E. R. & L. Co.*, 119 W., 384.

53. Costs in an action, adjudged against an administrator as such, have priority over debts. See ADMINISTRATION EXPENSES. —*Ferguson v. Woods*, 124 W. 544, 546.

54. Judgment of the circuit court allowing "attorneys' fees in addition to taxable costs" payable "out of the estate", to parties other than the executors, in an action for construction of a will, is reversed, because "the court below had no authority to make the allowance",—following *In re Donges's Est.*, 103 W. supra, and other cases,—

55. Notwithstanding Ch. 397, L. 1901, quoted (as now, 1916, existing as subd. 1, sec. 4041b, except that the word "arising", between "contests" and "therein", was eliminated by ch. 231, L. 1909,—renumbered as sec. 4041b by ch. 663, s. 447, L. 1911), which "applies only to contests arising upon application for the probate of a will",—*Kronshage v. Varrell*, 127 W. 597, 598.

56. Under ch. 397, L. 1901 (now sec. 4041b), "it is the court wherein the contest arises, the one of first instance—the county court—that is given authority to allow the attorney's fees and direct the payment thereof out of the estate",—and the circuit court has no such authority.

57. ("The amendment of what is now sec. 4041b, by ch. 231, L. 1909,

by dropping out the word 'arising', was evidently made to avoid the decision of this court in *Gertsen's Will*, 127 W."—*Estate of Bean*, 159 W. post. See also *Kronshage v. Varrell*, 127 W. supra).

—*In re Gertsen's Will*, 127 W. 602, 604.

58. "The concurring decisions of the two lower courts should have convinced the guardian ad litem of appellants that there was no such doubtful question of probability of a different result in this court as to make it his duty to appeal", in the will contest, and therefore "respondent should recover costs in this court", such decisions being sustained. See also PROBATE OF WILLS.

—*Will of Arneson*, 128 W. 112, 117.

59. Following *In re Donges's Est.*, 103 W. supra, it is said: "Nor does the change in the law made by Ch. 397, L. 1901 (subd. 1, sec. 4041b), with reference to allowances for counsel fees in applications for probate of wills, affect actions for construction of wills. *Kronshage v. Varrell*, 127 W. supra". As to guardian ad litem, see COMPENSATION OF ADMR., ETC.

—*Stephenson v. Norris*, 128 W. 242, 263.

60. Citing *Jones v. Roberts*, 96 W. supra, costs in the supreme court to the successful respondent in construction of will, were "directed to be paid out of the estate";

61. And costs awarded in circuit court to such respondent "against the appellant", held "correct".

—*Davis v. Davis*, 132 W. 54, 60.

62. Held, that costs in circuit court, against an heir personally, who appealed from a judgment of the county court, were properly awarded,

63. He having given the undertaking prescribed by sec. 4039. "That included 'all damages and costs that' might 'be awarded against him on such appeal'". His "liability" "necessarily follows".

—*Marx v. Marx*, 132 W. 113, 120.

64. Where the will, contested by "a sister of the testator", was sustained in county, circuit, and supreme courts, and the appeal was "in good faith, and questions involved are questions worthy of consideration by this court", "respondent's costs" were directed "to be taxed and paid out of the estate". *Jones v. Roberts*, 96 W. supra.

—*Will of Bierke*, 132 W. 165.

65. "We think it very clear under the repeated decisions of this court that an order denying costs is not appealable. (Cases).

66. A judgment having been rendered without costs, the question of whether the defendant was entitled to costs could only be raised by an appeal from the judgment".

—*Mash v. Bloom*, 133 W., 662, 663.

67. Not allowable "before the services have been rendered", as to guardian ad litem for prospective disbursements. See COMPENSATION OF ADMR., ETC.

—*Frame v. Plumb*, 135 W., 24, 30.

68. Where a will was disallowed in county and circuit courts, and the will sustained in supreme court, expert witness fees and associate counsel fees for services in the contests for the executor-named proponent, he being also a principal beneficiary, were disallowed by the county and circuit courts, and such disallowance, on the whole case, held "no abuse of discretion". (Many cases)

69. "Ch. 397, L. 1901, being sec. 4041a (now subd. 1, sec. 4041b)" "manifestly vests in the court having jurisdiction of the probate of the will discretion in making an allowance to the proponent in will contests".

70. "In the view we take of the case it is not necessary to consider the power on appeal to review the discretion of the county court", because "there was no abuse of discretion".

—*Est. of Muellenschlader*, 137 W. 32, 37.

71. "Ordinarily the proponent (executor named, here) of a will is entitled to recover his costs out of the estate whether he be successful or not, because it is his duty to present the will for probate."

72. But clearly a proponent who has been adjudged guilty of securing the execution of a will by fraud and undue influence should not be entitled to recover his costs from any source, but rather should be required to pay costs". So adjudged. See also TESTAMENTARY CAPACITY.

—*Deleghise v. Morrissey*, 142 W., 234, 237.

73. "There is no vested right in costs. The right to them does not accrue until judgment. Until that time they may be abolished or changed in amount by statute". —*Huebl v. Scollard*, 142 W. 589, 590.

74. On "the final order" where a guardian was appointed, the incompetent having been represented in the matter in a series of dealings with him as to property rights, by three attorneys, and all parties "consented that in and by this order" "the circuit court should ascertain and determine the amount of attorneys' fees, if any, to which" such attorneys "might be entitled,

75. But did not agree that the finding on this subject should be conclusive or waive their right of appeal",—the circuit court allowed such fees in the amount of \$5,000. Held, on the facts, "no allowance should have been made" "on the merits". Order reversed.

—*Grdshp. of Abel*, 147 W. 467, 476.

76. Since the amendment of "sec. 4041b by ch. 231, L. 1909, by dropping out the word 'arising' "—"it is at least proper for this court" "to fix the amount of attorney fees that shall be allowed for work done in this court.

77. The executor",—presumably merely named as such in the will, it having been disallowed in both county and circuit courts, and allowed in supreme court,—“is directed to pay his attorneys the sum of \$100

for such services besides actual disbursements for prosecuting the appeal. No costs are awarded the contestants." See also **TESTAMENTARY CAPACITY**.
—*Est. of Bean*, 159 W. 67, 82.

78. Judgment for "\$250 attorney's fees to the contestant," against the unsuccessful proponent, she being legatee and executrix named merely, in the circuit court, is reversed as not permitted either under sec. 2932 or sec. 4041b.
—*Will of Lynch*, 163 W. 466, 469.

COUNTERCLAIM.

See **PLEADINGS**. **SET-OFF**.

COUNTY COURTS.

See **PROBATE COURTS**.

COUNTY JUDGE.

See also **COURT COMMISSIONERS**. **CUSTODY AND COMMITMENT**.

Advice to litigants, 17.
Assist district attorney, 17.
Authority specific, 7.
Counsel previously, 10.
Court outside county, 27.
Disability, disqualification, 33.
Drafting papers, 17.
Fees for child permits, 26.
Fees to salary, 13.
Filing of oath, 8.
Guardian ad litem, 16.
Improper fees collected, 32.
Judge of a court, 15, 18.
 Appeal, statutory, 19.
 Jurisdictional limits, 22.
 Not common law, 18.
 Subject to review, 20.
 Writ of certiorari, 21.

Justice of peace, 23.
 Incompatible, 24, 25.
Liability of, 5.
Magistrate. See **Judge of**, etc.
Mandamus remedy, 2.
Office important, 4.
Office in court house, 14.
Pecuniarily interested, 28.
 Deprived of power, 29, 31.
 Minors not consent, 30.
 Orders absolutely void, 31.
Personalty, charge of, 7.
Powers of circuit judge, 3.
Refusal to qualify, 1.
Retaxation of costs, 9.
Salary during term, 11.
 Not from state treasury, 12.
Statutory; qualified, 6.

1. Resignation on the last day of the old term to take effect on the first day of the new term, held to be equivalent to a refusal to qualify, and that a new appointment could be made forthwith.

—*State ex rel. Finch v. Washburn*, 17 W. 658.

2. Mandamus is held not proper to compel the county judge to sign an order and fix an appeal bond, but the circuit court should be applied to. See also **BONDS**.
State ex rel. Tallmadge v. Flint, 19 W. 621, 623.

3. "The powers of a circuit judge at chambers" are constitutionally conferred on a county judge. —*In re Gill*, 20 W. 686.

4. "The office of judge of probate is one of the most important * and its duties should be strictly and faithfully performed". —*Humes v. Cox*, 1 Pin. 551, 556.

5. It is a well settled principle of law, "that no judicial officer, acting within the scope of his jurisdiction, can be made liable in an action against him for an erroneous decision".

—*Keeler v. Woodward*, 3 Pin. 306.

6. "Probate courts are only in a qualified sense, the mere creatures of the statute". They are "the offspring of the common law".

—*Brunson v. Burnett*, 2 Pin. 185, 189.

7. There being alleged to be no person in this country who had the right to take charge of the intestate's personal property, and the county judge having made an order authorizing one R. to take charge thereof temporarily, held of no force, there being "no statute authorizing the county judge to make an order like the one made in this case".

—*Lill's C. B. Co. v. Russell*, 22 W. 178, 182.

8. The statute requiring the filing of the county judge's oath with the clerk of the circuit court, not having been complied with, it having been filed with the treasurer, held that he "had not qualified as the law required", and that the office became vacant.

—*Ståte ex rel. Lutfiring v. Goetze*, 22 W. 363, 366.

9. As to retaxation of costs by the county judge in "view of the peculiar nature of the proceeding, it being a kind of appellate power exercised only by the court itself over its own taxing officer," it follows "that the county judge has no jurisdiction in the premises, and that his order was properly set aside for that reason".

—*Schauble v. Tietgen*, 31 W. 695, 698.

10. It is held, on the authority of *Morgan v. Hammett*, 23 W. 30, where it was decided, "that a county judge was not disqualified to grant a license to an administrator to sell real estate to pay debts of the intestate, because he had been counsel for some of the parties interested in such sale"; that such action "was not a mere ministerial, but a judicial act"; and that this case, where, "the county judge, before he was chosen such judge, had been of counsel for the" appellant, stands "on the same ground, and should be determined by the same principle".

—*Appeal of Schaeffner*, 41 W. 260, 264.

11. The constitutional provision, sec. 26, art. IV, 'nor shall the compensation of any public officer be increased or diminished during his

term of office', does not prevent the legislature from changing the salary of a county judge during his term of office.

12. "In the case of the Board of Suprs. v. Hackett, 21 W. 613, it was expressly held that 'the word compensation as used in sec. 26, art. IV. of the constitution, above quoted, signifies a return for the services of such officers as receive a fixed salary payable out of the public treasury of the state'".

13. By chapter 121, laws of 1868, "the policy of paying fees instead of fixed salaries to county judges" was changed, and the county boards authorized to fix the salaries.

—*State ex rel. Martin v. Kalb*, 50 W. 178, 184.

14. Where the county board "provides an office in the court house of the county for a county officer (in this case county judge), the duty of the county in that behalf is performed, and the officer can be compelled to occupy the office provided". If he rents elsewhere, he cannot fasten such "an additional burden on the county".

—*Waldo v. Manitowoc Co.*, 54 W. 71, 72.

15. "There can be no doubt but that a judge not presiding in court may do many and most things appertaining to mere judicial administration not requiring a trial according to the course of the common law, especially by legislative authority". See also CUSTODY AND COMMITMENT.

—*Wis. Ind. Sch. for Girls v. Clark Co.*, 103 W. 651, 663.

16. A county judge who prior to becoming judge had acted as guardian ad litem in a trust estate, is held not disqualified to act in subsequent proceedings in the estate. See also GUARDIAN AD LITEM.

—*Richter v. Est. Leiby*, 107 W., 404, 407.

17. County judges may be appointed to aid the district attorney in criminal cases; "they are simply prohibited from giving advice to litigants in any matter pending before them or which they have reason to believe will be brought before them for decision, or drafting papers in such proceeding, except as expressly authorized by law (sec. 2582)".

—*Bliss v. State*, 117 W., 596, 600.

18. A proceeding where a county judge acts as a "judge of a court of record", as under secs. 978, et al. relating to refusal to deliver over to a successor the books etc. of a public officer, "is not a special proceeding in court, but one before a special statutory tribunal not proceeding according to the course of the common law, nor as a court". (Case).

19. And where no "method of appeal or other direct review has been provided, the action of the special tribunal is final, provided, of course, that it acts within and according to its jurisdiction. *State ex rel. Cook v. Houser*, 132 W. 534, 595.

20. In all cases, however, the acts of such tribunals as above described

are subject to review to the extent of ascertaining whether they are within the jurisdiction so conferred. (Cases)".

21. "No doubt can be entertained of the authority of the circuit court to issue its writ of certiorari to bring before it the record of a proceeding under sec. 978 et seq.,

22. To the end that it may examine whether the magistrate has transgressed the jurisdictional limits imposed upon him."

—*State ex rel. Velie v. Morgan*, 130 W. 293, 295.

23. It is held that a county judge vacates his office by accepting the office of justice of the peace, the offices being incompatible.

24. At common law, "if one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. (Many cases)

25. The decision of this case is, however, based upon *State ex rel. Knox v. Hadley*, 7 W. 700, by which we consider ourselves bound under the rule *stare decisis*".

—*State v. Jones*, 130 W. 572, 575.

26. The county judge of Lincoln County is held entitled, under sec. 2454, to fees for issuing child labor permits.

—*Hoffman v. Lincoln Co.*, 137 W. 353.

27. Where, under secs. 3503, et seq., infant sale of land "proceedings were conducted before Judge C., county judge of V. County, entirely in S. County from beginning to end", such proceedings were held void because of lack of "authority" "for holding any county court outside of the county."

28. "And further", where such "judge was pecuniarily interested", "as a stockholder in a brick company" which received "the title to one tract of the lands sold", this "would be fatal", under sec. 2579,

29. Which deprives him of power "to hear and determine the action or proceeding, or make any order therein, except by consent of the parties.

30. There was no consent here, and could be none as to the interests of the minors.

31. This statute deprives the judge of power, and orders made in violation of, it are not only irregular but absolutely void, and hence subject to collateral attack. (Citations)".

—*McIntosh v. Bowers*, 143 W. 74, 76.

32. The surety of a county judge is held liable for improper fees collected under sec. 2454 by such judge from the county, and the county is the proper party plaintiff under sec. 984. "The breach of official duty and the breach of the bond went hand in hand".

—*Forest Co. v. United Surety Co.*, 149 W., 323, 329.

33. Under a statute authorizing a municipal judge, 'in case of sickness, temporary absence or disability of said judge', to call in the county judge, it is held that the word 'disability' includes disqualification by reason of an affidavit of prejudice filed.

—*Eccles v. Free H. S. D.*, 162 W. 162, 164.

COURT COMMISSIONERS.

Appeal from power, 13.
Common law writs, 11.
Habeas corpus, 7.
Remedies, as to, 8.
Restraining, 14.
Judge at chambers, 3.
County judge, 4.
Jurisdictional, 9.

Mere judicial error, 12.
Powers, circuit judge, 1.
Preventing acting, 10.
Punish for contempt, 1, 2.
Remedies as to, 8.
Restraining of, 14.
Words "a judge," 4, 5, 6.

1. Court commissioners have generally the powers of a circuit judge at chambers. They have no power to punish for contempt. County judge is distinguished as given more power in "discovery" than court commissioners.

2. (Court commissioners by subsequent statute "have power" * to punish as for contempt, disobedience of any lawful order made by himself etc.", subject to review in all cases by the circuit court. Sec. 2434).

—*In re Remington*, 7 W. 643, 653.

3. "A judge at chambers' is simply a judge acting out of court", and a county judge can so act, under the statute, sec. 2815, "in all actions or proceedings in courts of record".

4. "Under this section this court has held that the word 'judge', when used alone, may be construed to mean county judge or a court commissioner. See *Clark v. Bergenthal*, 52 W. 103.

5. See also *Woodruff v. Depere*, 60 W. 128, 132. In this last case it was held that the words 'a judge' should be construed to include a 'county judge or court commissioner'.

6. And so, in the case at bar, the words 'a judge at chambers' include a county judge or court commissioner of the same county", under the statute for deposition of the adverse party, sec. 4096.

—*Whereatt v. Ellis*, 65 W. 639, 644.

7. "A court commissioner has jurisdiction upon habeas corpus to hear and determine the questions that may be appropriately presented for adjudication."

8. As to remedies concerning acts of court commissioners, "in the opinion of the court, these are the proper rules to be observed:

9. In case of an application to test the act of a court commissioner upon jurisdictional grounds, a writ of certiorari, as an independent

proceeding, or a motion in the proceeding challenged for review, is proper. In *re Hammer*, 113 W., 96; *Longstaff v. State*, 120 W., 346.

10. In case of a proceeding to prevent a court commissioner from hearing any particular matter for want of jurisdiction, a writ of prohibition or other appropriate common-law writ, if any other there be to meet the case, is proper.

11. In case of a proceeding in the circuit court under its power of superintending control, some one of the appropriate writs according to the practice at common law for the exercise of such control should be used and should be regularly obtained. *State ex rel. Milwaukee Med. Coll. v. Chittenden*, 127 W., 468.

12. To review the action of a court commissioner for mere judicial error, an ordinary motion in the proceeding in the circuit court for that purpose is the proper method of invoking the superior judicial authority. In *re Hammer*, *supra*; *State ex rel. Gaster v. Whiteher*, 117 W., *supra*; *Longstaff v. State*, *supra*.

13. In case of an appeal to the general equity power of the circuit court to prevent or redress a wrong, or for other relief, the method of approach should be by action in the absence of any special statutory authorization."

14. "The application to the circuit court to restrain the court commissioner from proceeding with the hearing upon habeas corpus", is held improper and a procedure "unknown to the practice." See also *JURISDICTION*.
—*Potter v. Frohbach*, 133 W., 1, 5.

COURT RULES.

See RULES OF PRACTICE.

COVENANT.

See also CONSTRUCTION OF DEEDS. DEEDS. LANDLORD AND TENANT.

Benefit of third, 5.

Consideration, to, 9.

Under seal, 6.

Incumbrance; free, 1.

Extinguished, 2.

Married woman, 7.

Not implied, 12.

Not implied—continued

Common law, 12.

Partial title failure, 4.

Pay to third person, 8, 9.

Grantor's liability, 10.

Quiet enjoyment, 3.

Renewal privilege, 11.

1. "Covenant that the premises were free from incumbrances" is not "one running with the land", but is a personal covenant.

2. "The doctrine is well settled * if the plaintiff has extinguished the incumbrance, he is entitled to recover the amount paid for it; but if he has not bought it in he is only entitled to recover nominal damages."
—*Pillsbury v. Mitchell*, 5 W. 17, 21.

3. A covenant for quiet enjoyment is implied at common law; and by statute "in case the term did not exceed three years".

—*Eldred v. Leahy*, 31 W. 546, 551.

4. On a partial failure of title, a proportionate recovery may be had. See DEEDS. —*Messer v. Oestreich*, 52 W. 684, 696.

5. "The rule is thoroughly established in this state and elsewhere, that when one person, for a valuable consideration, engages with another to pay money to or do any other act for the benefit of a third person, the latter may maintain an action against such promisor for a breach of his engagement. (Many cases).

6. This rule applies as well to covenants under seal as to simple contracts. *McDowell v. Laev*, 35 W. 171; *Bassett v. Hughes*, 43 W. 319".

7. The action based on the covenant "may be maintained against" a married woman, as well as against her husband, "on their covenant to support her mother". —*Houghton v. Milburn*, 54 W. 554, 561.

8. "A covenant by a grantee of land to pay the consideration therefor to a third person",—in this case payment of a mortgage on the land as a part of the purchase price,—is upheld as binding.

9. "In this state the liability rests upon the doctrine that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the promisor for the breach of the agreement". (Cases)

10. "No question of subrogation or novation is involved", and "the fact of whether the grantor was liable for the debt or not is held immaterial. (Cases) —*Enos v. Sanger*, 96 W. 150, 152.

11. A general covenant in a ten year lease 'with the privilege of a renewal', calls for a new lease with the same terms, except as to this privilege. See LANDLORD AND TENANT.

—*Kollock v. Scribner*, 98 W. 104, 108.

12. Sec. 2204, reversed the rule of the common law, and provided that 'no covenant shall be implied in any conveyance of real estate', which is held, under sec. 2242, to include leases for more than three years, and "our declaration in *Shaft v. Carey*, 107 W. 273 to the contrary, is withdrawn. —*Koeber v. Somers*, 108 W. 497, 500.

CREDIBILITY OF WITNESSES.

See IMPEACHMENT OF WITNESSES. WITNESSES.

CREDITORS' ACTIONS.

See also ACTIONS BY EXTR. OR ADMR. HUSBAND AND WIFE.

- Action against executor, 35.
- County court control, 37.
- Executors exempt, 38.
- Garnishment rule, 36.
- Administrator discharged, 50.
- Administrator to bring, 1:
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- All property liable, 39.
- Alienation power, 42.
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- Conveyance: to third, 15, 23, 46.
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 - One void, one valid, 23.
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- Creditor may bring, 1.
 - Compel executor, 1.
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- Deficiency of assets, 2.
 - Adjudication, 3.
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- Not a judgment debtor, 45.
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- Purchase; from insolvent, 9.
 - At sheriff's sale, 54.
 - Satisfaction effect, 54.
- Other creditors, 11.
- Realty first exhausted, 34.
- Receiver appointed, 49.
- Stay of proceedings, 18.
- Surviving partner; heirs, 17.
- Transfer between parties, 44.
- Trust: conveyance, 5.
 - Resulting from, 15.
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- Widow in active fraud, 51.
 - Not for support, 52.
 - No right to proceeds, 51.
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1. In insolvent estates, and conveyances in fraud of creditors by the deceased, "the creditor may now, in a proper case, compel the executor or administrator to bring the action (under sec. 3832), or bring it himself (under sec. 3835)," to recover such real or personal property, or property not included in the inventory.

2. "On just apprehension of a deficiency of assets to pay the debts of the deceased, before the fact is definitely ascertained", the creditor may bring such action under sec. 3835, and have "the benefit of his lis pendens", to secure "the fruits of the litigation if he prevails",

3. "But he can go no further until it is ascertained whether such deficiency exists", and as "the administration of the estate is peculiarly within the cognizance and under the control of the county court,—we

think the conclusion is inevitable that the fact of insufficiency of assets must be ascertained by the adjudication of that court".

4. In such an action, the debts having been judicially determined in the county court, and "there was an outstanding equity of redemption in lands", "available to the administrator", "the county court should have required" the sale thereof, and an accounting by the administrator, "and the order or judgment of the county court thereon would be an adjudication", from which to determine whether the action should be tried in the circuit court. —*German Bank v. Leyser*, 50 W. 258, 264.

5. On a suit under sec. 3832, a conveyance by an intestate for his own use, and to benefit heirs, was held a trust, void under sec. 2306, as against creditors, there being deficiency of assets. See BOND FOR MAINTENANCE. —*Severin, Admr. v. Rueckerick*, 62 W. 1, 6.

6. An administrator has power under sec. 3832, to bring an action "to cancel and remove from the records certain conveyances", "executed in fraud of the creditors of the plaintiff's intestate", and "to restore an altered or mutilated deed, and the record thereof," "the gravamen of both being alleged frauds, and to remove clouds upon title to land". —*Wheeler, Admr. v. Single*, 62 W. 380, 383.

7. Under section 3832, in an action by an administrator to recover property fraudulently conveyed, "the administrator can readily ascertain, by the inventory of the property and the claims presented, whether there will probably be a deficiency of assets in his hands or not", and he should "proceed with reasonable diligence to recover" and "it is not necessary that the deficiency of assets should be ascertained by claims against the deceased allowed by the county court."

—*Andrew v. Hinderman*, 71 W. 148, 150.

8. Creditors, having claims allowed in the county court, may, under secs. 3274, et al., pursue the real estate for payment thereof after three years, the limitation of sec. 3873a applying only to the county court. See also CLAIMS. LIEN. REAL ESTATE.

—*Fisk v. Jenewein*, 75 W. 254, 257.

9. "An actual purchase from an insolvent debtor for a valuable consideration may be found to have been made with an intent to hinder, delay, and defraud creditors, but in such cases there is generally an inadequacy of price, or an intent to put the consideration paid beyond the reach of the vendor's creditors; but nothing of the kind here appears.

10. This court has repeatedly held, in effect, that an insolvent debtor is at perfect liberty to pay in good faith some of his creditors in full or in part, and others not at all, and that this can be done without any intent to hinder, delay, or defraud creditors, within the meaning of the

statutes. Secs. 2320, 2323; *Hoey v. Pierron*, 67 W. 262; *Landauer v. Victor*, 69 W. 434; *Ingram v. Osborn*, 70 W. 184; *Greene & Button Co. v. Remington*, 72 W. 654." And so held here where an insolvent debtor paid debts to a brother by a conveyance of land to him.

11. The mere fact of the brother's knowledge of the other creditors, or even of the insolvency, while "competent evidence on the subject of such intent, it cannot itself be regarded as sufficient evidence to establish such intent"; *Erdall v. Atwood*, 79 W. 1, 7.

12. "The right of a creditor to take a mortgage or other security upon the property of his debtor, which, by reason of his superior diligence, will amount to a preference over all his other creditors, although the debtor may be pecuniarily embarrassed or in failing circumstances, or judgments are about to be taken against him, where no assignment for the benefit of creditors is made or contemplated and there is no fraudulent intent, cannot be denied; *Mehlhop v. Pettibone*, 54 W. 656; *Stevens v. Breen*, 75 W. 595; *Anstedt v. Bentley*, 61 W. 629.

13. The fact that the parties are relatives does not render the mortgage or other security presumptively fraudulent, but justly subjects the transaction to close scrutiny."

14. Held accordingly and the circuit reversed on the facts, where the mortgage was given two days after verdict, but before entry of judgment (for another creditor); that it was thought necessary to record it at once; where the debtor refused to pay the claim sued on "because she did not think it was an honest debt;" and where the property, including a homestead, mortgaged was worth several times the amount of the claim secured, and it was a debt of long standing. — *Bannister v. Phelps*, 81 W. 256, 259.

15. When a decedent, A., for three years prior to his decease and while insolvent, paid the consideration, but caused the conveyance of the realty to be made to a third person in whom "the title to the land vested"; "by sec. 2078, such conveyance is presumptively fraudulent as against the creditors of A.," and "a trust results in favor of such creditors," for whose benefit one in behalf of himself and others may proceed by action under sec. 3835. *Miner v. Lane*, 87 W., 348, (involving this same estate; other cases). — *Allen v. McRae*, 91 W., 226, 230.

16. A conveyance by an insolvent father to his children, of his farm including a homestead, for adequate consideration including also an agreement to support the father, there being a small equity besides the homestead for the support consideration, is held not fraudulent as to creditors. — *Torrey Cedar Co. v. Eul*, 95 W. 615.

17. Action by a surviving partner against the heirs, before settlement of partnership affairs, for a debt, not sustained. See SURVIVING PARTNER. — *Blakely v. Smock*, 96 W. 611, 613.

18. A county judge having filed and obtained allowance of a claim against a deceased surety's estate pending in another county, it was held, that pending an appeal from such allowance, he might, under sec. 3835, bring an action in the circuit court to obtain uninventoried assets, notwithstanding the stay in county court by reason of such appeal. *Smith v. Schreiner*, 86 W. 19, 23 (See *RES JUDICATA*). See also *STAY OF PROCEEDINGS*.
—*Richter, J. v. Leiby*, 99 W. 512, 517.

19. In an action by heirs to set aside a fraudulent conveyance of the husband to a second wife, it is said, that "while their standing court may not be as meritorious as creditors' would have been, yet they are entitled to protection against the undue influence and secret frauds proved in this case". Deed set aside.

—*Disch v. Timm*, 101 W., 179, 192.

20. As to the statute making a fraudulent conveyance void, (sec. 2320) "a conveyance made with intent to delay a subsequent creditor comes within the statute. *Hoffman v. Junk*, 51 W., 613."

21. "It is not the honesty of the debt secured by, but the purpose of, the conveyance, to which the statute has reference. The mortgage in suit is none the less void though given to secure an honest debt, if given and received with intention to hinder and delay creditors. *David v. Birchard*, 53 W., 492; *Sweetser v. Silber*, 87 W., 102; *Bleiler v. Moore*, 94 W., 385."
—*Zimmerman v. Bannon*, 101 W., 407, 412.

22. A non-resident creditor is "governed by the same rule" as to proceedings for claims as a resident. See *CLAIMS*.

—*Winter v. Winter*, 101 W., 494, 496.

23. A voluntary transfer of personalty by a husband to wife, and a conveyance of realty at the same time through a third person, retaining a life lien for his personal support, must be "construed as one instrument," and the latter, under section 2306, being void as to creditors, the reservation making the conveyance a "gift in trust" for the husband's benefit,—therefore both are void as to creditors.

—*Stapleton v. Brannan*, 102 W., 26, 28.

24. "There can be no right in the administrator, under sec. 3832, to attack" a conveyance made long before even if made "with intent to defraud" a creditor of that time, and he can only do so "for intent to defraud the existing creditors, who alone are represented by him".

—*O'Malley v. O'Malley*, 102 W. 639, 640.

25. In an action on a note, by a creditor of a deceased non-resident, against the heirs, under sec. 3274, et al., it is, in effect held:

26. That "this is an equitable action requiring an accounting, and an attachment is not allowable in such an action". The heirs, "are not

liable in excess of such property (realty), or liable at all upon contract", and such provisional remedy is only applicable to enforce debts due on contract.

27. That there is "but one cause of action", notwithstanding other "incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary" parties to a complete settlement or for the protection of the rights of parties as between themselves.

28. That fraudulent grantees and their privies, if "either is in possession of any of the fruits of the fraud, he is" "a trustee thereof for the plaintiff", and they are proper parties to the suit.

29. "The plea of the statute of limitations upon the enforcement by action of a liability created by law, cannot avail the defendants, because the heirs were out of the state when the plaintiff's cause of action arose, and so continued. That prevents the limitation statute from running in their favor. Sec. 4231".

30. The "title to the property" "passed to the grantee" of the adult heirs, and whether "a voidable title passed or not depends" upon the good faith of the transfer.

31. The title of the minor heirs, by a foreign guardian, without authority from the courts here, did not pass to the grantee. See also FOREIGN GUARDIAN. PLEADINGS. —*Adkins v. Loucks*, 107 W. 587, 592.

32. In "a creditor's bill" to reach a debtor's interest in the realty and personalty of his deceased father's estate, conveyance of which by him to his wife was held void, a "return upon execution that no property can be found establishes, prima facie at least, the exhaustion of legal remedies. (Cases)".

33. Personal judgment against the wife and administrator of the father's estate was held erroneous, though otherwise sustained. (But see *Williams v. Smith*, 117 W. post.)

34. And "the legal rights should be first exhausted against the real estate, to the exoneration of the personalty claimed by others," but the claims being more than both, the reverse order is undisturbed. See also HUSBAND AND WIFE. —*Oppenheimer v. Collins*, 115 W., 283, 288.

35. On judgments against S., a receiver was appointed and commenced suit to collect against S. and the executors of the will of S.'s wife, by which will S. was bequeathed the income of personalty to be paid by such "executors and trustees",—the estate being "in process of settlement in the hands of her executors",—and it is held:

36. Though sustained in *Oppenheimer v. Collins*, 115 W. supra, "where no objection was raised", the question "appears never to have been raised or decided in this court", and following the analogous rule in garnishment cases (See LIABILITY), it is now determined,—

37. That "either upon proceeding supplementary to execution or

upon a creditors' bill, the conduct of executors can" not "be controlled by a court other than that from which they derive their authority";

38. That "they are exempted from the broad language of secs. 3029, 3035", and that "supplementary proceedings" "cannot be maintained as against these executors", and the injunction proceedings interfering with their disposition of such income, "should have been dismissed".

39. However, "it may be stated generally that, except for express statute, all property of a debtor is liable for his debts".

40. "We have been referred to no statute exempting personal property held in trust, nor the proceeds nor income thereof, when the debtor is absolutely entitled thereto, so that he can sell or assign.

41. Secs. 2083, 2089" "apply only to real estate", contrary to New York statutes, and "we cannot view these sections as exempting from liability for debt the income of the personal estate held in trust for appellant S., which is payable to him absolutely and without condition.

42. Being so payable, his power of transfer and alienation is absolute. *Lamberton v. Pereles*, 87 W. 449, 461 (See TRUST VARIATION). He could by his own volition transfer this valuable property right to the judgment creditor or to the receiver in part satisfaction of the judgment.

43. It is competent for a court of equity, acting upon the debtor personally, to compel him to make such transfer, or, in lieu thereof, to effectuate that result by its decree. Such transfer can be as complete and of as full effect as any the debtor could make, to vest in the assignee complete ownership and right to demand payment from the trustees, and to hold them to liability in case they disregard his rights after proper notification and demand". (Approvingly quoted in *Mangan v. Shea*, 158 W. 619, 625. See TRUST VARIATION).

—*Williams v. Smith*, 117 W. 142, 144.

44 "A transfer of property in fraud of creditors is good as between the parties, and as to all persons except the creditors defrauded."

—*Zahl v. Billings*, 118 W., 459, 461.

45. Where in an action between plaintiff and defendant to construe the will of defendant's wife, plaintiff was adjudged the owner of an obligation against defendant arising out of the wife's estate but not due until defendant's death, the latter was not "a judgment debtor by virtue of the judgment in" such action,

46. Hence "plaintiff was at most a mere general creditor, without lien of any kind upon" defendant's "real estate, and cannot attack the transfers" of defendant to a third party, on the ground of fraud,—in a creditor's action.

—*Miller v. Drane*, 122 W. 315, 317.

47. Where an insolvent "conveyed his real and personal property to his wife", "without consideration a few days prior to his death with intent to defraud his creditors", and his wife "colluded with him to

carry out such purpose", and plaintiff had filed and had allowed his claim in administration proceedings which "have been closed", there being no assets to pay the debts,—it is held:

48. In an action to set aside the transfer "the court properly awarded judgment pursuant to secs. 3835 and 3836, declaring the transfer void as to the creditors of the deceased and subjecting the property to the payment of the debts";

49. Through "a receiver, with the usual powers and duties, to take possession", sell it "and apply the proceeds" to such payment;—
50. The administrator having been discharged, "has no interest in this litigation", "is not a proper party", and "is not entitled to appeal".

51. The widow, being "actively involved in the fraud", is held not entitled "to participate in the proceeds", "because she had applied a portion of her individual estate in payment of her husband's debts";

52. Nor is she entitled to "an allowance out of this property for her support and the support of their minor children during administration", she having "elected not to claim these allowances when the administration" "was had in county court". —*Baldwin v. Frisbie*, 163 W. 26, 29.

53. "An execution being returned unsatisfied" "is the prime essential of a creditor's suit (*Harrigan v. Gilchrist*, 121 W. 127, 273)."

54. Where a creditor purchased at an execution sale, obtaining "the sheriff's certificate thereon", this "must be considered in effect as a satisfaction of the judgment". The full amount was here bid.

55. Where in an assumed creditor's action plaintiff asked that an alleged forged will be set aside upon sufficient facts set forth it is held that the county court having "properly assumed jurisdiction of the estate"; there "primarily should be tested" the question raised;

56. And under sec. 2836b, the court directed the circuit court "to certify the" proceedings "to the county court" "for further proceedings". —*Komorowski v. Jackowski*, 164 W. 254, 257.

CROP SHARING.

See RENTS AND PROFITS.

CROSS EXAMINATION.

See also DISCOVERY. EXAMINATION OF WITNESSES. IMPEACHMENT OF WITNESSES.

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Party—continued

Fraudulent transfer, 24.

Ill-feeling between, 27.

Nominal party, 34.

Not absolute right, 13, 14, 25.

Payment defense, 26.

Purpose of examination, 11.

Truth aids, 17, 29.

Right: restrained, 3, 19.

Absolute within limits, 30.

Regulated from bench, 31.

Rule of cross examination, 5.

Examined in chief, 5.

Not applied to party, 7, 12.

Not beyond this limit, 6.

Testing memory, etc., 5.

Written such a thing, 9.

Must exhibit, 9.

1. "On the cross-examination of a witness, anything which shows his friendship or enmity to either of the parties to the suit is commonly a proper subject of inquiry."

2. "So also is anything which tends to show that, in the circumstances in which he is placed, he (the witness) has a strong temptation to swear falsely."

3. The right "must of course be restrained within reasonable limits, * subject to the discretion of the judge."

—*Kellogg v. Nelson*, 5 W. 125, 131.

4. On credibility of witnesses, "questions tending to show the present or recent places of residence, occupation, association and acquaintances * are proper and cannot be considered as irrelevant," on cross-examination.

—*Kirschner v. State*, 9 W. 140, 144.

5. "The rule is, that cross examination is to be confined to the matters about which the witness was examined in chief, subject to the latitude allowed for the purpose of testing his intelligence, memory, credibility and fairness".

6. "And neither party should be allowed, in cross-examining his adversary's witness, to go beyond this limit, and introduce independent matters tending to establish his own side of the case".

7. But the reason therefor "would seem to fail entirely where the question relates to the examination of a party to the suit". "It is very doubtful, therefore, whether a departure in such a case from the ordinary rule of cross-examination would be sufficient, even though the objection were made upon that ground, to reverse the judgment".

—*Knapp v. Schneider*, 24 W. 70, 71.

8. A witness may be cross-examined to show that he "was interested in the event of the suit", "for the effect it might have upon his credibility".

—*Suit v. Bonnell*, 33 W. 180, 183.

9. The rule laid down by Greenleaf "is, that a witness cannot be asked, on cross examination, whether he has written such a thing, stating its particular nature and purport; the proper course being to put the writing into his hands and ask him if it is his writing".

—*Teegarden v. T. of Caledonia*, 50 W. 292, 296.

10. "It is always a matter somewhat within the discretion of the court, to what extent a cross examination shall be permitted upon the question of feeling or bias which a witness may have in favor of the party calling him, or against the opposite party."

—*Luck v. Ripon*, 52 W. 196, 202.

11. "One of the purposes of cross examination is to detect and expose the fallacy of statements made on direct examination".

—*Trowbridge v. Sickler*, 54 W. 306, 310.

12. "Probably the fact that the witness was a party to the action would justify the court in its discretion in allowing a broader range of cross examination than would be allowed were the witness not a party. *Knapp v. Schneider*, 24 W. supra.

13. But that is not a right of the adverse party, and ordinarily the rules of cross examination are the same whether the witness be a party or not. *Howland v. Jencks*, 7 W. 57.

14. While, therefore, it might not have been error to allow the proposed cross examination, it certainly was not error to disallow it."

—*Norris v. Cargill*, 57 W. 251, 255.

15. The witness being called for the defendant, "we think the court should not have permitted the witness to be questioned on his cross-examination as to any matter not inquired of by the defendant on the direct,

16. Or, if permitted to do so, the court should not have allowed the plaintiff to contradict his answers."

—*Stutz v. C. & N. W. Ry. Co.*, 73 W. 147, 156.

17. "The right of cross-examination is an important one. It may greatly aid in eliciting the truth, and in giving proper estimation of the weight and value of testimony.

18. It should be indulged by the court liberally, so long as it seems to promise to lead to the discovery of truth or the elucidation of the matter under investigation.

19. But it is a right which is liable to be abused", "so it must be subject to the control and discretion of the trial judge". When it becomes "profitless" and an "obstruction", "it may become necessary for the trial court to intervene."

20. "A large measure of discretion must be permitted", "else the time of the court may be squandered, and the rights of litigants frit-

tered away, by vain repetitions and irrelevant investigations". Newman, J.
—*McMahon v. Eau Claire W. W. Co.*, 95 W. 640, 642.

21. "The cross-examination of a witness on a mere collateral matter, not affecting credibility, but tending to disgrace the witness, was properly excluded. *Emery v. State*, 101 W., 627; *Jones Ev.* § 836".

—*Crawford v. Christian*, 102 W., 51, 53.

22. The rule is well known that the cross-examination of a witness should be confined to matters brought out on the direct examination. *Norris v. Cargill*, 57 W., supra; *Lueck v. Heisler*, 87 W., 644.

23. It is also true that in the discretion of the court a broader range of cross-examination should be allowed in the case of a witness who is also a party. 3 *Jones Ev.* § 844.

24. This latter rule is most frequently applied in cases of alleged fraudulent transfer of property, where the party" has testified as to ownership, "the circumstances of the transfer may be fully gone into at cross-examination. *Kalk v. Fielding*, 50 W., 339."

25. But an obiter intimation in *Weadock v. Kennedy*, 80 W., 449, "that a party may be always cross-examined on the whole case whenever he has testified as to any fact in the case," is disapproved, and "there was no intention to depart from the well-established rules above cited.

26. Certainly, an affirmative defense of payment cannot be proven by cross examination when the party has not given any testimony as to the claim which is alleged to have been paid."

27. "It was entirely competent to show by cross-examination that there was ill-feeling between the plaintiff and defendant, or that trouble had occurred between them, and the general character of the trouble;

28. But it was not competent for counsel to inject into the case, by statement or insinuation, charges of lying, theft, and perjury," and "the mere sustaining of objections, without fitting rebuke is no adequate remedy for the evil."
—*Sullivan v. Collins*, 107 W. 291, 295.

29. "Cross-examination is regarded as one of the most efficient means of discovering the truth, and so long as there is any reasonable ground to suppose that it is being pursued legitimately it should not be disturbed".

30. "The use of it is not a mere privilege subject to discretionary judicial authority,—it is a right. The judge may regulate its use, stopping just short of any disturbance of the right itself. To go further is improper.

31. The right is so valuable to litigants and the opportunity to abuse it is so constant and often embraced that some regulation thereof from the bench is necessary".
—*Ill. S. Co. v. Jeka*, 123 W. 419, 429.

32. "Ordinarily the cross-examination of a witness should be confined to matters brought out upon the direct examination.

33. In case the witness is also a party to the action, a somewhat broader range is allowed. *Sullivan v. Collins*, 107 W. supra.

34. While the witness "here", the plaintiff, a trustee seeking "direction from the court", "was a party to the action, he was only nominally such; and it may well be doubted whether, in the application of the rules as to cross-examination, he should be considered as in any different class from the ordinary witness." —*Winn v. Itzel*, 125 W. 19, 28.

35. "A party should not be deprived of this right by so limiting the scope of the cross-examination that the value and weight of the evidence given on direct examination may not be fully tested".

—*Montanye v. Northern Elec. Mfg. Co.*, 127 W. 22, 34.

36. "Cross-examination to discredit a party", is not "any different from that in respect to any other witness".

37. "Matters 'utterly irrelevant'" "cannot be proved on cross-examination for the purpose of impeachment", or "established by any method for any purpose.

38. A witness may be asked on cross-examination if he has not been convicted of the commission of a criminal offense for the purpose of discrediting his evidence, because it is competent to prove such conviction as an independent fact for the same purpose", it being relevant as to credibility. (Citations).

39. "True, proof of independent facts of the character stated must ordinarily, first, as a matter of justice to the witness, be preceded by his examination in respect thereto, but such examination is permissible because the facts sought to be elucidated are not wholly irrelevant".

40. "When questions are merely asked to browbeat, so to speak, or to annoy or confuse, or to create mere suspicion, they should not be allowed whether objected to or not. (Citation)".

—*Schwantes v. State*, 127 W. 160, 182.

41. Where an adverse party is called for cross-examination under sec. 4068, "his counsel has no right to re-examine him". (But, see par. 42, post). See also *DISCOVERY*. —*O'Day v. Meyers*, 147 W., 549, 558.

42. Where plaintiff called defendant's employee for cross-examination under sec. 4068, "the defendant has a right to re-examine such witness immediately after the examination by plaintiff's counsel as to all matters tending to explain or qualify the testimony already given", and may ask impeaching questions, but not examine "as to new matters",—and *O'Day v. Meyers*, 147 W. supra, is modified accordingly. See also *DISCOVERY*. —*Guse v. Power & M. M. Co.*, 151 W. 400, 406.

CURRENCY.

See MONEY.

CURTESY.

Actual seizin of wife, 6, 7.
Common law: definition, 3.
Four things requisite, 4.
Seizin in fact, 6.
Statute change, 5.
Conveyance to exclude, 9.
Creditor's right: dower, 10.
Curtesy subjected, 11.

Dower and curtesy, 12.
His children only, 1.
Husband's interest, 8.
None before death, 13.
Remainder or reversion, 14.
Dower estate outstanding, 14.
Statutory modification, 5.
Tax deed title, 2.

1. A surviving husband is entitled to an estate by curtesy in the real estate descending to his children by the wife only, where the wife left children by a former marriage and dies intestate.

—*Kingsley v. Smith*, 14 W. 360.

2. A tenant by curtesy cannot get title in himself by tax deeds for unpaid taxes either for the period before or after his tenancy commenced.

—*Phelan v. Boylan*, 25 W. 679.

3. "An estate by the curtesy", at common law "is commonly defined to be the interest to which the husband is entitled upon the death of the wife, in the lands or tenements of which she was seized in possession, in fee simple or in tail, during their coverture, provided they had lawful issue born alive which might by possibility inherit the same estate as heir to the wife. 4 Kent. 29.

4. Four things were requisite to the existence of this estate, namely: marriage, actual seizin of the wife, issue, and death of the wife. 4 Kent. 28; 1 Washb. on Real Prop. 127 et seq.

5. Under our statute, the birth of issue is not essential to the existence of the estate (Sec. 2180), though, if the wife at her death leave issue by any former husband, to whom the estate might descend, such issue takes the same discharged from the right of the surviving husband to hold the same as tenant by the curtesy."

6. "By the strict rules of the common law, there must not only be a legal seizin in the wife, but seizin in fact, or actual entry taken—pedis possessio,—or the estate would not vest, though the former strictness in this respect has been relaxed."

7. "In some cases, especially of wild and incumbered land, it has been held that actual seizen in the wife was not essential, but that legal seizen or ownership, with the right of entry on the part of the wife, or constructive possession, was a sufficient seizen to give the husband curtesy. (Cases)."

8. "The husband's interest in the wife's land is not the land itself." "When actual possession is acquired, then his marital rights will attach, whatever they may be".

—*Westcott v. Miller*, 42 W. 454, 465.

9. A conveyance to a married woman to exclude curtesy of her husband upon her death, held valid. See DEVISE.

—*Van Osdell v. Champion*, 89 W., 661, 665.

10. Though "the dower interest of the wife cannot be reached by creditors of the husband" on his decease,

11. Yet it is held that on her decease, "the right of her creditors to have her estate subjected to the payment of her debts is paramount to the right of" the husband to curtesy.

12. "There was a close analogy between dower and curtesy at common law, but this analogy has been destroyed by statute. Curtesy initiate has been abrogated in this state. Secs. 2342 and 2180".

13. "The husband acquires no interest in the lands of his wife prior to her death. She may convey or devise her lands and entirely defeat his right to curtesy". —*Schmidt v. Raymond*, 148 W. 271, 273.

14. ("The husband cannot be tenant by the curtesy of a remainder or reversion of his wife expectant on an outstanding particular freehold estate, unless the particular estate falls into the inheritance during coverture. Where the wife is heir in fee to real estate subject to the dower of her mother, the husband will not have curtesy in such estate if the mother is living at the death of his wife". N. Y., Mass., and other cases cited. 8 R. C. L. 398, and 11 L. R. A. 826, note,—to the same effect.—12 Cyc. 1011.)

CUSTODY AND COMMITMENT.

See also INFANTS. PARENT AND CHILD.

Constitutional, 11, 18.

Equity jurisdiction, 2.

Guardianship, 2, 5, 13.

Not police power, 15.

Helpless persons, 1.

Industrial school, 1, 6.

County expense, 7.

Judges can commit, 8.

Parent's right, 1.

Magistrate powers, 2, 4.

Unknown to law, 4.

Maintenance delegated, 9, 10, 12.

Police power, 1, 3.

Equity not, 15.

State guardianship, 11.

State public school, 16.

Judge of court, 17, 18.

Substitute for parent, 11.

Court appointed, 13.

1. "It is the duty and policy of the state to provide efficient means, in its discretion, for the care of all destitute and helpless persons within it", and commitments of destitute children with the care and custody to the plaintiff, organized under "the industrial school act, ch. 325, of 1875" (now sec. 1786), are upheld, as not being, "imprisonment", and not "intended to foreclose the right of a parent, when competent, to resume the custody and care of his child". See also POLICY OF THE LAW. PAUPERS. —*Milwaukee Ind. Sch. v. Milwaukee Co.*, 40 W. 328, 338.

2. The proceeding before a county judge, as magistrate, and the orders of the judge as to the custody of the child, under the statute as to abused and neglected children, Ann. Stats. sec. 4587b (now sec. 4052b, in sub-

stance), "did not constitute any valid objection to the jurisdiction of the circuit court to hear and determine" a petition for the appointment of guardian of such child, and consequent custody of person and estate.

3. The statute, like sec. 1786, as to commitment to an industrial school "is founded upon the police power of the state", and is valid. *Milwaukee Ind. Sch. v. Milwaukee Co.*, 40 W. supra.

4. "The proceeding before the county judge, although judicial in its character, was before him as a magistrate, and was not one in any court known to the law. It was, therefore, no bar to the appointment of a guardian by the circuit court, in the proper exercise of its general equity jurisdiction over infants."

5. While a court of equity should not lightly "exercise its jurisdiction" (*Meyer v. Garthwaite*, 92 W. 571, 573; see CONCURRENT JURISDICTION), yet, "in the present case, when the petition was presented to the circuit court, no application had been made to the county court to appoint a guardian for the infant, and there was no obstacle to the exercise by the circuit court of its concurrent jurisdiction."

—*In re Gdnsp. of Klein*, 95 W. 246, 249.

6. As to the commitment of children to the Wis. Industrial School for Girls, by judges of courts of record, it is held:

7. That while the statutes, secs. 1547, 1786, are not explicit, the expense of maintenance is properly payable by the counties;

8. That "judges of courts of record" may constitutionally make such commitments;

9. That "the duty of maintaining dependent children, so far as assumed and exercised as a function of government", may be "delegated to a private corporation to be performed at public expense".

10. That "children not paupers or restrained of their liberty as punishment for crime" can "be maintained at public expense by a private corporation".

11. "Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated".

—*Wis. Ind. School for Girls, v. Clark Co.*, 103 W. 651, 654.

12. Following *In re Klein*, 95 W. supra, where a child was awarded to the mother in divorce proceedings in circuit court, and guardianship and custody was afterwards given to a society, by the county court, after a hearing under sec. 4587b (now sec. 4052b), such child being subsequently released by habeas corpus proceedings,—

13. On later application by an uncle, the circuit court appointed an aunt guardian and took the custody from the mother; she and the father and the uncle, all being unfit to have the child;

14. Thereafter, on habeas corpus issued out of the supreme court, such appointment was sustained. "The circuit court, in dealing with the subject of guardianship and custody of minors, acts as a court, and judicially, in the broadest and highest sense of that word",

15. And its "order is not dependent either upon the police power of the state, or upon the right of either parent as against the other, but rests upon considerations of the welfare of the child itself".

—*In re Stittgen*, 110 W. 625, 628.

16. While sec. 573f, as to commitment of dependent children to the state public school, "provides that the proceeding shall be before the county judge",

17. "We are of the opinion that had the proceedings been before the county judge sitting as a court they would have been valid".

18. "It is settled in this state that the county judge has jurisdiction of such proceedings", and "that the granting of such power to the county judge is not unconstitutional". *Wis. Ind. Sch. v. Clark Co.*, 103 W. supra; (other cases, supra).

—*State ex rel. Spritka, v. Parsons*, 153 W. 20, 22.

CUSTOM.

See USAGE.

CY PRES.

See also CHARITABLE TRUSTS.

Elizabeth statute, 2.
Judicial power only, 1.

Liberal construction, 4.
Sovereign power, 3.

1. The courts of this state cannot exercise this prerogative, and are not "clothed with other than strictly judicial power". See CHARITABLE TRUSTS.

—*Heiss v. Murphey*, 40 W. 276, 292.

2. As to the extent involved in 43 Eliz. applicable, and not in force in this state. See CHARITABLE TRUSTS.

—*Webster, Extr. v. Morris*, 66 W. 366, 391.

3. "The doctrine of cy pres, so called, is not recognized and acted upon by the courts of this state. That doctrine is enforced by the English court of chancery, and by some courts in this country. But this court has held that the doctrine of cy pres rested upon prerogative or sovereign power, and was not strictly a judicial power, and consequently the courts of this state could not enforce it. *Ruth v. Oberbrunner*, 40 W. 238; *Heiss v. Murphey*, 40 W. 276."

—*Will of Fuller*, 75 W., 431, 434.

4. "The ex pries doctrine, as indicative of prerogative authority, does not prevail in this state, but as regards liberal rules of construction of charitable trusts, applied in chancery in England independent of the statute of Elizabeth (43 ch. 4), it does prevail". Syl. by Marshall, J., and full discussion. — *Harrington v. Pier*, 105 W. 485.

DAMAGES.

See also ACTIONS BY EXTR. OR ADMR.

Executory contract, rule, 6.

Contemplation of parties, 9.

Hadley v. Baxendale, 8.

Market price, 6, 7.

Husband's death, 13.

Widow may settle, 14, 15.

Widow's right, 13.

Infant, death of, 4.

Insanity proceedings, 17.

Liquidated:

Fixed damages, 2.

Money payment, 1.

Penalty, when, 2, 3.

Substantial breach, 16.

Mitigation, 12.

Specific work, breach, 5, 10.

Profit ascertained, 11.

1. "The doctrine of liquidated damages is not applicable to agreements for the payment of money merely".

2. Held that "where the damages were uncertain and incapable of definite ascertainment, the damages fixed in the contract would not be considered in the nature of a penalty, but might be recovered".

3. But "where from the very nature of the provisions of the contract the actual damage may be accurately ascertained and may be trifling, it will be considered as a penalty".

—*Fitzpatrick v. Cottingham*, 14 W. 219, 221.

4. Damages for death of infant are recoverable. See INFANTS.

—*Potter v. C. & N. W. Ry.*, 21 W. 372.

5. The rule of damages in "breach of contract for doing a specific work" is stated, and differs from the rule in case of "personal services". See CONSTRUCTION OF CONTRACTS.

—*Nilson v. Morse*, 52 W. 240, 255.

6. "The general rule in actions to recover damages for the breach of an executory contract to sell and deliver goods, is that the difference between the market price of the goods at the time and place specified in the contract for delivering the same, and the contract price, is the measure of damages".

7. But this rule does not apply "if no such goods can then be obtained at that place".

8. "In the leading case of *Hadley v. Baxendale*, 9 Exch. 341, (S. C. 26 Eng. Law & Eq. 398), the doctrine of which has been adopted by

this and many other courts, the rule applicable to this case was thus stated by Baron Alderson:

9. 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it'." —*Cockburn v. Ashland L. Co.*, 54 W. 619, 623.

10. The rule as "recently laid down by this court in *Nilson v. Morse*, 52 W. supra," is "that 'the rule in case of a breach of contract for doing specific work for a specified price is the profit the person would have realized had he been permitted to perform the work'.

11. This profit, of course, is ascertained by the difference between the contract price and the cost of doing the work. There can be no other rule of ascertaining it'.

12. "It is affirmative with the defendants to mitigate or lessen the damages which approximately and naturally followed the breach of their contract. (Cases)". —*Nash v. Hoxie*, 59 W. 384, 389.

13. While "an action to recover damages for the wrongful killing of her husband", must be brought by the personal representative of the deceased, yet the widow may bring an action "to recover the note and mortgage which the defendant executed in settlement of the damages for wrongfully killing plaintiff's husband.

14. It seems to us there can be no doubt but the plaintiff had authority to settle with the defendant for these damages'.

15. Being the beneficiary, entitled to recover in an action by the personal representative, "we can therefore see no possible objection to sustaining a settlement made by her, and giving her the full fruits of it". (By amdt. of ch. 186, L. 1913, to sec. 4256, the husband, widow or parent, may now bring such action for damages directly).

—*Schmidt v. Deegan*, 69 W. 300, 303.

16. "Before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement,—a breach which has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary".

—*Hathaway v. Lynn*, 75 W., 186, 189.

17. As to damages awarded against petitioners for insanity examination, on dismissal of proceedings. See INSANE PERSONS.

—*Manz v. Klippel*, 158 W. 557, 560.

DAY.

See TIME.

DEAD BODIES.

Administrator, etc., 9.
 Funeral charges, only, 10.
 Adult child, parent, 15.
 Attitude personal, 6.
 Cemetery lot, 1.
 Close personal intimacy, 5.
 Died remotely, 4.
 Friendship eliminated, 11.

Nearest relative, 2.
 Legal right, 3.
 Order of right to, 8.
 Parent to minor, 14.
 Statutory recognition, 7.
 Wife surviving, first, 12.
 "Relatives" includes, 13.

1. "Where one is permitted to bury his dead in a public cemetery, by the express or implied consent of those in proper control of it, he acquires such a possession in the spot of ground in which the bodies are buried as will entitle him to action against the owners of the fee or strangers, who, without his consent, negligently or wantonly disturb it". *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135. So applied.

—*Hollman v. City of Platteville*, 101 W., 94, 97.

2. The rights of relatives being undetermined here, "from the authorities above cited, and from original reason, the conclusion seems to us irresistible that in the nearest relative of one dying, so situated as to be able and willing to perform the duties of ceremonious burial, there rests the right to perform it.

3. And that this is a legal right, which, as said in some of the cases, it is a wrong to violate, and which, therefore, courts should protect and vindicate".

4. "While in the case of one who died remote from those of closer affinity the mere relationship of contract may suffice to arouse such duty in absence of statutes giving charge to some public officer,

5. In normal conditions of human relationship common consent and custom recognize the right and the duty to rest upon those who bore to the deceased in life the closest personal intimacy of acknowledged and lawful relationship."

6. "Fiction it may be, but none the less actual, that the attitude of the widower in conferring upon the body of his departed wife—the parent to that of his child—is personal".

7. "Our statutes give general recognition to this idea by directing bodies of strangers or convicts to be delivered to their 'relatives or friends'. Secs. 1437, 4926.

8. From this point of view, we think, are justified certain conclusions as to which, among the survivors, bear this duty and enjoy the right, which seem to be supported by the general current of authority.

9. First among these is, that the right is not vested in executors and

administrators, as seemed to be suggested in some English cases quoted somewhat inconsiderately in this country."

10. As to such representative, the matter of payment of the funeral charges "is the only relationship which such an official has to the subject". *Samuel v. Est. of Thomas*, 51 W. 549.

11. "In all normal and ordinary situations, mere intimacy of friendship should be eliminated, or at least subordinated to relations of kinship, as too intangible and indefinite for the law to lay hold of."

12. "We have no doubt that, save for very exceptional conditions, the right of burial of a dead body rests primarily with those connected with the deceased, in life, by some ties of legal relationship, and we agree with the great weight of authority that foremost and closest in such relationship stands the surviving spouse."

13. "We cannot doubt that the word 'relatives', in the above-cited statute, includes the surviving spouse, though in other statutes it may not. *Cleaver v. Cleaver*, 39 W. 96."

14. "That the duty and right of the parent toward the body of the minor child dying a member of his household,

15. Or of the adult child toward his widowed parent, either a member of the child's family circle, or not a member of any other, seems too clear to warrant discussion."

—*Koerber v. Patek*, 123 W. 453, 459.

DEATH.

See BIRTH, ETC. CONSTRUCTION OF WILLS. PRESUMPTION OF DEATH. VESTING OF ESTATES.

DEBTS.

See also CLAIMS. SETOFF.

Agreement to take part, 6.

Other creditors, 6.

Authority to sell, 5.

Definition, 1.

Due deceased, non-resident, 16.

Executor's: own debt, 2.

Due the deceased, 10, 17.

Foreign estate settled, 4.

Gratuitous agreement, 9.

Jurisdiction given, 16.

Presumption of, 3.

Estate duly settled, 4.

Party chargeable, 11.

Allowance, etc., 13.

Intestate estate, 12.

Rights fixed at death, 15.

Testate estate, 11, 14.

Two creditors agree, 7.

Executor one of them, 8.

1. "'Debt' itself is commonly and generally used to describe all obligations to pay money, whether arising from contract, or imposed by law as a compensation for injuries".

—*Smith v. Omans*, 17 W. 395, 396.

2. Executor cannot, in equity, sell or pledge assets for his own debt. See EXECUTORS AND ADMINISTRATORS. —*Weir v. Mosher*, 19 W. 311.

3. "There can be no legal presumption that the testator died in debt, and, in the absence of such presumption the burden of proof is necessarily upon the plaintiff, who asserts the fact, to prove".

4. In case of a foreign estate duly settled at the place of domicile, held, that "evidence that the will was probated and the estate fully administered upon in the county where the testator lived at the time of his death, would be sufficient prima facie to show that there were no debts remaining; and would change the burden of proof".

—*Markwell v. Thorn*, 28 W. 548, 562.

5. Authority to sell, "confers no power to sell or transfer in payment of the debts of the principal". —*Butts v. Newton*, 29 W. 632, 640.

6. "The law is well settled, that if, on the faith of a creditor's agreement to accept a part of his debt in full satisfaction, other creditors are induced to relinquish their demands on the debtor, the creditor who thus agrees cannot recover the balance of his debt, as it would be a fraud on the other creditors".

7. Held likewise applicable where two creditors each agree to relinquish their entire debts, and one does so on the faith of the other's promise.

8. Where the releasing debtor does so as executor of an estate, held that "prima facie the release of the executor is valid, and comes fully within his general power to dispose of the effects of the estate", the burden being upon the complainant to show that such release was illegal.

9. An agreement "to surrender and discharge all his debts against the defendant, providing the defendant would, within a reasonable time, pay its indebtedness to its former pastor," which agreement was accepted and complied with by the defendant, "at a good deal of trouble and expense", was without consideration, and "was a mere gratuitous engagement, and void at law".

—*Davenport v. First Cong. Soc.*, 33 W. 387, 390.

10. As to debts of an executor due the deceased. See INVENTORY AND APPRAISAL. —*Lynch v. Divan, Extr.*, 66 W. 490, 492.

11. "Upon the death of a person his property, not exempt, at once becomes 'chargeable * with the payment of all his * debts', whether he dies testate or intestate. Secs. 2270, 2277, 2281. If he leaves a will, then, subject to the payment of his debts, the rights of parties under it become vested immediately upon his death; *Scott v. West*, 63 W. 552; *Newman v. Waterman*, 63 W. 616.

12. If he dies intestate, his personal property, not exempt, must be

applied and distributed in the manner and in the order described by statute. Sec. 3935.

13. Out of such personal estate certain allowances are to be made to widow and children, and only the excess is to 'be applied to the payment of the debts of the deceased, with expenses of administration and funeral charges'. Ibid,

14. The same is true, to a certain extent at least, where the deceased dies testate. Ibid; *Baker v. Baker*, 57 W. 382; *Est. of Henry*, 65 W. 551.

15. Thus it appears that immediately upon the death of E. the rights of all his creditors at once became fixed, and the laws of distribution at the same time fastened down upon his entire estate". See also SET-OFF.
—*Union Nat. Bk. v. Hicks, Admr.*, 67 W. 189, 191.

16. "Debts due the deceased" nonresident are deemed "personalty suitable for conferring local probate jurisdiction". See JURISDICTION.
—*Bragg v. Gayner*, 85 W., 468, 485.

17. Debt of the executor personally to the deceased, how treated. See EXECUTORS AND ADMRS.

—*Est. of Robinson v. Hodgkin*, 99 W. 327, 332.

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1. Delivery of deed to register for the grantee with subsequent assent of the grantee, is a valid delivery.

—*Cooper v. Jackson*, 4 W. 537, 553.

2. That a deed may be shown to be a mortgage by parol, is said to be an invasion of the statute of frauds on principle, and can be sustained if at all only on authority, and cannot further be extended to create an express trust from a deed. See PAROL.

—*Rasdall v. Rasdall*, 9 W. 379, 392.

3. "As a general rule, it is the duty of the vendor to prepare the deed", but the vendee must demand, before the vendor is in default.

—*Seeley v. Howard*, 13 W. 336, 338.

4. The center of the highway or stream, or known place of beginning, and the most certain description controlled. See CONSTRUCTION OF DEEDS.

—*Gove v. White*, 20 W. 425, 431.

5. "Conveyance by a trustee having the legal estate * the title passes although the conveyance is in violation of the trust", but a trustee "acting under a power simply" does not pass title "unless the power is pursued".

—*King v. Whiton*, 15 W. 684, 688.

6. A deed reciting "that the sale was made in pursuance of an order of the county court", with other data of the proceedings for sale, and

purporting to be made by an administrator is "prima facie evidence that the title of the decedent had passed to and vested in the grantee named in it, and the same should have been received in evidence".

7. Such deed "was presumptive evidence that the person (administrator) so executing was such officer, until the contrary was shown by the party claiming adversely to the deed".

8. "The objection that W. did not sign and seal as administrator is untenable. He did not write the words showing that he was administrator after his signature, but that was unnecessary. The deed recited that he executed as administrator, and that was enough; and besides, the acknowledgment showed the representative character in which he acted".

9. The omission of "the year when the execution of the deed was acknowledged" from the notary's certificate, is held to be immaterial, the day and month being the same as in the deed, and the acknowledgment is "assumed to have taken place before the recording of the deed".

—*Chase v. Whiting*, 30 W. 544, 547.

10. A sheriff's deed not purporting to include dower, does not bar it. See **DOWER**.

11. The ten year adverse statute does not "protect the person in possession unless the premises claimed were included in the written instrument", and dower is held not to be included if not mentioned.

—*Cowan v. Lindsay*, 30 W. 586, 590.

12. Parting with complete control, is essential to delivery. See **ESCROW**.

—*Pruitsman v. Baker*, 30 W. 644, 646.

13. Where only one witness signed "in the usual place", and "another at the left hand, beneath the certificate of acknowledgment," it was held that "the deed was sufficiently witnessed to entitle it to be recorded; and, as a matter of course, the record thereof was competent evidence".

—*Webster v. Coon*, 31 W. 72, 73.

14. "At common law a deed was valid without attesting witnesses".

15. "And this being the case, we are of the opinion that, under the statute of 1839 (there being "no negative words in the statute of 1839 which declare that a conveyance, to pass title even as between the parties, must be witnessed and acknowledged"), it was in no wise essential to the validity of a conveyance as between the parties, that it should be attested; and that, consequently, the mortgage in the present case was effectual to create a lien upon the mortgaged premises".

16. "As the mortgage had not been witnessed, the record thereof would not have been constructive notice to a subsequent purchaser".

—*Gilbert v. Jess*, 31 W. 110, 115.

17. The grantor may authorize an agent "to insert the name of the grantee" after execution; but this does not authorize putting in a stranger's name. See OMISSIONS.

—*Schintz v. McManamy*, 33 W. 299, 302.

18. A deed fraudulently obtained ostensibly for the benefit of a third party, held not void, but in equity held in trust for such party. See TRUSTS.

—*Lombard v. Cowham*, 34 W. 486, 491.

19. "There is no set ritual of delivery" of a deed. See DELIVERY.

—*Bogie v. Bogie*, 35 W. 659, 667.

20. The administrator's deed "when read in evidence, raised a presumption that all the proceedings in the county court preliminary thereto were regular, and that it conveyed the title to the premises in question".

21. But when the record is introduced, and it is made to appear affirmatively that there was nothing on file or of record, "to show that the will had been proved", the presumption then was that no will had been probated, unless it appeared "that a portion of the records or papers" may have been lost.

—*Chase v. Ross*, 36 W. 267, 272.

22. An administrator's deed, where publication or posting of notices was defective, is invalid. See SALE OF REALTY.

—*McCrubb v. Bray*, 36 W. 333, 340.

23. "It is a familiar rule, that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to make the registry thereof operate as constructive notice to a subsequent purchaser".

24. "The manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself till it was registered in full".

25. "The registration and index entries being incomplete, because showing that the mortgage had no subscribing witnesses, constructive notice could not be presumed of such a record. For the principle 'that the registry is notice of the tenor and effect of the instrument recorded, only as it appeared upon that record', fully applies".

26. Where the purchaser of the lots heard "that there was a defective railroad mortgage upon them", but did not look for it "because his abstract did not show it", this "was sufficient to put him upon inquiry", and he is held to have had actual notice.

27. "The rule is well settled, that a purchaser affected with notice may protect himself by purchasing of another who is a bona fide purchaser for a valuable consideration."

28. "For a similar reason if a person who has notice sells to another who has no notice and is a bona fide purchaser for a valuable con-

sideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it".

—*Pringle v. Dunn*, 37 W. 449, 460.

29. "In the absence of fraud, we conclude that where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey", a fractional proportionate "part of the whole consideration paid as the value at the time of the purchase" and "interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years".

—*Messer v. Oestreich*, 52 W. 684, 696.

30. Where A., occupying a confidential relation, is entrusted with money by B., for the purpose of buying land, and A. makes the purchase, taking the deed to himself in the assumed surname of B., his stepfather, "it must be presumed that" A. "took such conveyance to himself by mistake or inadvertence, and without the knowledge or consent of" B., "or in fraud or violation of the trust so imposed".

31. "A party claiming the money so entrusted was in fact a loan, gift or advancement, has the burden of proving it".

32. "A party claiming title as devisee of" A. "is not entitled to the protection of a bona fide purchaser for a valuable consideration, especially where" B. "was, at the time of making the devise and of the death of the deviser, occupying the premises with his family as a homestead".

—*Kluender v. Fenske*, 53 W. 118, 126.

33. "A date is not essential to a deed." "The real date of the deed is the time of its delivery". Kent, C. J., in *Jackson v. Schoonmaker*, 2 Johns. 234".

—*McMichael v. Carlyle*, 53 W. 504, 506.

34. The statute (sec. 2241) protecting "subsequent purchasers in good faith," does not protect "those who purchase with the knowledge of an outstanding unrecorded conveyance.

35. In such case, to purchase in good faith is to purchase without knowledge of the outstanding incumbrance, or any information sufficient to put the purchaser upon inquiry. *Mueller v. Brigham*, 53 W. 173.

36. There can be no question that the term 'conveyance', as used in that section, includes a mortgage."

—*Rowell v. Williams*, 54 W. 636, 639.

37. "The conclusion is inevitable that, if otherwise sufficient, a conveyance of land in fee, to take effect at a future time, is valid, and will vest the fee in the grantee according to the terms of the conveyance".

—*Ferguson v. Mason*, 60 W. 377, 385.

38. A quitclaim "deed passes to the grantee only the interest of the grantor in the lands conveyed,

39. Its effect at common law is probably the same as that prescribed by statute to a quitclaim deed in statutory form" under sec. 2208.

40. In such deed the grantee "took only the title which the grantor had, and is not in a position to claim protection as a bona fide purchaser, without notice of the plaintiff's interest in the lot. *Oliver v. Piatt*, 3 How. 333 (410); *May v. Le Claire*, 11 Wall. 217; *Dickerson v. Colgrove*, 100 U. S. 578. These observations have no reference to the effect of the registry laws".
—*Martin v. Morris*, 62 W. 418, 428.

41. "Under sec. 4154 (see *Chase v. Whiting*, 30 W. supra; *Ehle v. Brown*, 31 W. 405), the administrator's deed is prima facie evidence of the regularity of the proceedings prior to the sale, and is therefore a cloud upon the plaintiff's title, which he may have removed by proceedings in a court of equity. (Cases)" In this case the license was not signed by the county judge.

42. "The deed and the record thereof, under the statute above cited, being presumptive evidence of a valid title in the grantee therein named, creates such a cloud" as authorizes an "action to have the same declared void".
—*Hoffman v. Wheelock*, 62 W. 434, 438.

43. Where two of several grantors were "not named in the body of the deed as grantors", but duly signed it, the deed "was effective as a conveyance" of their interest.

44. "The deed purports to be acknowledged by some of the grantors on different days, in different counties, and before different officers, while there are only two witnesses.

45. But non constat the grantors were not all together when they executed the deed.

46. It would be a most 'violent and unreasonable presumption' in the absence of all proof to sustain it, to assume that they were not together".
—*Hrouska v. Janke*, 66 W. 252, 255.

47. As to effect of deeds and recitals therein as to consideration, as evidence. See CONDEMNATION.

—*Seefeld v. C. M. & St. P. Ry. Co.*, 67 W. 96, 98.

48. "Attestation and acknowledgment are formalities required by the statute to enable the deed to be recorded so as to operate as notice to the subsequent purchasers, but are not essential to transfer the title as between the parties," and so held as to a deed neither witnessed nor acknowledged. (Many cases). —*Leimenkugel v. Kehl*, 73 W. 238, 241.

49. A deed and mortgages given by the interested parties, but not as expressly provided in the will, were on their application, declared a nullity. See POWER.
—*Goebel v. Thieme*, 85 W., 286, 289.

50. "The evidence showed in what manner the consideration named in the deed was to be paid, and parol evidence was clearly competent for that purpose. (Me., Mo., Mass., cases); *Hahn v. Doolittle*, 18 W. 196".

—*Becker v. Knudson*, 36 W., 14, 18.

51. While "a power of attorney to convey lands must have the same requisites as a deed", "it is not essential" "that it should be either attested or recorded to be a valid power to convey lands, any more than the deed itself to be a valid conveyance. This has been repeatedly held by this court in respect to deeds. (Many cases); *Hewitt v. Week*, 59 W. 449".

—*Slaughter v. Bernards*, 88 W. 111, 120.

52. "In the absence of a showing of such facts",—"fraud, accident, or mistake"—"the rule is universal that the grantor in a deed will not be permitted to prove that a deed absolute on its face was given in trust for his benefit. *Fairchild v. Rasdall*, 9 W. supra; (other cases)". Also, sec. 2302.

—*Fillingham v. Nichols*, 108 W. 49, 52.

53. The power of attorney from wife to husband "to sell and convey any real estate", "was a mere power to sell and convey, importing authority to sell out and out for cash and not power to mortgage. That is elementary. (Many cases)".

54. A mortgage so given on a homestead, "with the wife's signature affixed thereto by her verbal request (by the husband), for the purpose of obtaining money for her use, together with a full execution of such purpose", is held not to bind her by estoppel, and "the judgment establishing the validity of the mortgage is reversed".

55. "Language cannot be judicially extended beyond its reasonable scope in order to effect the intent of parties, however obvious that intent may appear",—there being "no ambiguity in the language of the power of attorney in question." See also HOMESTEAD.

—*Minnesota S. Co. v. McCrossen*, 110 W., 316, 320.

56. A simple deed of conveyance is held not presumed to contain the whole contract. See CONTRACTS.

—*Brader v. Brader*, 110 W., 423, 431.

57. "Slight circumstances excusing" the grantee's "failure to examine the deed before accepting it are sufficient to prevent its being held, as a matter of law, that he was inexcusably negligent in that regard precluding any successful appeal on his part to the courts for redress. (Citation)".

—*Loyd v. Phillips*, 123 W. 627, 630.

58. Whether "covenants of seisin and of freedom from encumbrance" "run with the land or not" strictly speaking,

59. There is no doubt that the warranty to the original grantee, his heirs and assigns, of peaceable and undisturbed possession, does so. (Citations)".

—*Patterson v. Cappon*, 125 W. 198, 201.

60. As to a power of attorney and a revocation thereof, each duly recorded in the office of the register of deeds, it is held that, as "the common law required that a revocation of such authority be brought to the personal notice of the agent", therefore,

61. Actual, notice of revocation to the agent was necessary to be effectual, the statute not providing that recording was notice to him. (However, by amdt. of ch. 393, L. 1907, to sec. 2246, such recording "shall import notice to all persons, including the agent").

—*Best v. Gunther*, 125 W. 518, 520.

62. An action for services performed and money expended under a sealed power of attorney, "is upon the implied promise" to pay, "and not upon the sealed instrument", governed therefore by the six year statute of limitations.

—*Pierce v. Stitt*, 126 W. 62, 64.

63. Recording a release fraudulently obtained, is no protection to innocent purchasers. See CLAIMS. —*Franklin v. Killilea*, 126 W. 88, 98.

64. As to presumptions where a life tenant takes a deed pursuant to land contract in his own name, instead of in the remaindermen. See PRESUMPTIONS.

—*Perkinson v. Clarke*, 135 W., 584, 589.

65. While "a deed or grant to a person who does not exist at the time of the grant is void",

66. Still "it is recognized" "that if the court can find a certain person was intended as grantee, it matters not what name is given in the deed". (Cases).

67. Held, on the facts, "that the intention was to use the name of E. D. P. (deceased) to designate E. S. P. in his capacity as executor" of such deceased grantee. —*City Bank v. Plank*, 141 W., 653, 657.

68. "It is the settled doctrine of most courts in this country that a grantee in a quitclaim deed, in the absence of fraud, has no remedy either in law or in equity against the grantor for failure of title. (Many cases)." So held here.

—*Drott v. Stevens*, 163 W. 571, 573.

DEFAULT.

Against executor, etc., 1.
 Infants, non-residents, 3.
 Discretion of court, 4.

Negligence of solicitor, 2.

1. "Judgment by default against executors and administrators is not an admission of assets".

—*Chouteau v. Hooe*, 1 Pin. 663, 666.

2. Negligence of solicitor is not sufficient to set aside default, if the party himself is negligent. See ATTORNEY AND CLIENT.

—*Babcock v. Perry*, 4 W. 31, 40.

3. On default, "in the absence of denial the allegations of the complaint stand confessed in nonpresence of infant or nonresident defendants,

4. Although a discretion rests in the trial court to require proof thereof before rendering judgment if he shall think necessary to safety. *Sibley v. Weinberg*, 116 W. 1".

—*Wis. Nat. L. & B. Asso. v. Pride*, 136 W. 102, 104.

DEFINITIONS.

See WORDS AND PHRASES.

DELIVERY.

See also DEEDS. ESCROW. GIFT.

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1. "Delivery of the note was essential" "to pass title and give effect to the gift" of a note and mortgage.

—*Wilson v. Carpenter*, 17 W. 512, 516.

2. The "authorities establish that there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstance". Ryan, C. J.

3. Where deeds were drawn in the presence of the parties after acquiescence in the agreements, and the scrivener handed the documents to the parties, saying, 'I suppose these belong to you, John, and these to you, Mr. Bogie; you want to take care of them'; "no one directed him to do so. But he did it according to his habit in such cases, without dissent or comment from either of the parties. And each of them took the papers so handed to him, apparently in silence"; this was held to be a valid delivery, and effective notwithstanding an "immediate strife for the possession of the deed in question", which "came in some way into the" other party's hands; the court further held "he cannot revoke his deed, though he may have intended to revoke it, and however difficult of explanation his subsequent conduct may be, however soon and sore he may have repented of what he had done, nothing in his subsequent conduct—nothing in the subsequent conduct of both parties, even in concert, far less in controversy—can avail against the foregoing delivery".
—*Bogie v. Bogie*, 35 W. 659, 667.

4. "A deed may be delivered to a stranger for the benefit of the grantee, who may be ignorant at the time that it has been executed. If the grantee, when informed of the fact, assents to and accepts the conveyance, the deed takes effect, providing the rights of third parties have not intervened". —*McPherson v. Featherstone*, 37 W. 632, 641.

5. Testimony by grantees as to the delivery of a deed by a deceased grantor directly, is inadmissible. See TRANSACTIONS WITH DECEASED PERSONS.
—*Stewart v. Stewart*, 41 W. 624, 628.

6. "Without delivery, there could not be a making or execution of the note, for a promise to pay the sum named in it", as alleged in the complaint. "Hence, by necessary inference, the complaint alleges and the court found a delivery of the note".

7. "The statement in the complaint that after its execution the note was left in the possession of the maker, does not rebut the inference of due delivery thereof to the payee;

8. For certainly the holder (wife) of a note may leave it in the hands of the maker (husband), for convenience or safe keeping, without thereby cancelling the note, or destroying the effect of the original delivery thereof to the payee". —*Wochoska v. Wochoska*, 45 W. 423, 426.

9. "Undoubtedly the possession of the deed by the grantees is presumptive evidence of the delivery thereof by the grantor, and the onus

probandi is on him who denies the delivery, to rebut the presumption by proof”.

10. Circumstances, the relative position of the parties, failure to record until after the decease of the grantor thirteen years later, assessment of the land to the grantor with tax receipts in his possession, negotiations of the grantor as to sale, apparent want of consideration, etc., is held to rebut the presumption of delivery, and to outweigh the testimony of the grantees “to the effect that the grantor often admitted that he had conveyed the land to the appellants (grantees)”.

—*Stewart v. Stewart*, 50 W. 445, 448.

11. The formal delivery of a deed by a father to his son, and the deed then placed with the papers of both, is held immediately “effectual, and vested the legal title to the land described in the son,” notwithstanding that the father got the deed from the joint papers and destroyed it.

12. And the grantee is not affected by a declaration of trust of the grantor in a separate paper, at the time placed in the same package but not mentioned in the deed nor assented to by the grantee.

—*Rogers v. Rogers*, 53 W. 36, 38.

13. “The mere fact that one object” in making a deed, “was to save the expense and trouble of administering his (the grantor’s) estate after his death, does not qualify the delivery or change its legal effect”.

14. “Neither is the character of the delivery affected by the fact that Mrs. L. (grantee) placed the deeds, after delivery, where her husband, equally with herself, could have access to them”. *Rogers v. Rogers*, 53 W. supra.

—*LeSaulnier v. Loew*, 53 W. 207, 209.

15. Where there is “no testimony bearing upon the question, the legal presumption undoubtedly is that the deed was delivered at the date of its execution”.

—*Wheeler, Admr. v. Single*, 62 W. 380, 386.

16. Where the father furnished the funds, directed a note and mortgage therefor to be made in the name of his minor daughter, and received and kept the instruments in his possession, “such delivery inured at once to the benefit of his daughter, the mortgagee named therein, by way of advancement to her,

17. And he is precluded from asserting any trust therein, or in the debt secured thereby, resorting to him”, under section 2077, abolishing such resulting trusts”.

—*Cerney v. Pawlot*, 66 W. 262, 266.

18. On the matter of a questioned delivery as to “official and probate bonds”, acted upon by the approving officer, a stricter rule is applied as against the sureties. See BONDS.

—*Belden v. Hurlbut*, 94 W., 562, 570.

19. Giving a deed to a third person, to be delivered to the grantee on the grantor's decease, but to be returned to the grantor, if she recovers, is a nullity. See ESCROW.

—*Williams v. Daubner*, 103 W. 521, 523.

20. "The fact that a deed is duly recorded is prima facie evidence of its due delivery. 1 Devl. Deeds (2d ed.) § 292.

21. But this is a presumptive fact, merely, which may be rebutted by other evidence showing, as matter of fact, that there was no delivery. Id."

—*Smith v. Smith*, 116 W., 570, 573.

22. "Manual delivery" of a contract, may be proved to have been a condition precedent, by parol. See CONTRACTS.

—*Golden v. Meier*, 129 W. 14, 19.

23. "Possession of the deed (unrecorded) by respondent's wife at the time of her death, in the absence of any other evidence raises a presumption that it was delivered to her to take effect according to its import at the time of its execution,

24. And" the fact "that the instrument was not delivered until some years after its date raises a presumption that it was intended to take effect when so delivered." See also ADMISSIONS.

—*Chase v. Woodruff*, 133 W., 555, 559.

25. "As a general proposition it is true that delivery of a deed with intent to pass title does pass the title,

26. And that the surrender or cancellation of such deed does not revest the title in the vendor. *Slaughter v. Bernhards*, 97 W. 184".

27. "It is the intent to pass title which makes the delivery effective, although mere mental reservation on the part of the grantor cannot affect the question. *Rogers v. Rogers*, 53 W. supra.

28. When, however," it is "understood by both parties", that "conditions" are first to be performed by "the grantee, a mere manual tradition of the deed under the mistaken supposition that these prerequisites had been fulfilled, when in fact they had not, will not pass title irrevocably.

29. In such case the whole transaction is incomplete, and" "a court of equity has ample power to cancel the apparent conveyance". *DeVoin v. DeVoin*, 76 W. 66.

30. Where the parties "mutually relied on C.," the attorney, as to the method of carrying "out their understanding" and to "prepare the papers", and he decided upon a deed and bond back by the grantee to be signed also by the latter's wife, and he intended "the transaction should not be completed until she did sign", "his intention was in legal effect the intention of both parties,

31. And his forgetfulness and consequent mistake in handing over the papers before" such "material" signing by the wife, "was the for-

getfulness and mistake of both parties, for the correction of which a court of equity will afford relief by the cancellation of the deed".

32. "The subsequent delivery of the papers to C., with directions to deliver the deed to Z. (the grantee) when his wife had executed the bond and mortgage", does not "constitute a valid delivery in escrow". *Campbell v. Thomas*, 42 W. 437 (See Escrow).

—*Zoerb v. Paetz*, 137 W. 59, 64.

33. Where the grantor delivered the deed "to the scrivener for the purpose of having the same placed on record, but" "at the suggestion of the grantee it was not recorded until after the grantor's death",—held a valid delivery. —*Bates v. Winters*, 138 W. 673, 676.

34. Where decedent three years before his decease "executed a warranty deed of this farm to his wife", and kept the deed locked in a box where he "kept his money and valuable papers", until after his decease, —on the evidence it is held "that there had been no delivery" though she knew of the deed, and the testimony showing no word "or act which evinced an intention on his part to vest the title" in the wife, "except to make a deed". Three JJ. dissent.

35. "Delivery is largely a question of intention. (Cases). It may be accomplished by words without acts" or "conversely." (Cases). "But the grantor must part with his dominion and control over the deed with intention to pass title. (Cases).

36. There are authorities which hold that when it is shown that a deed has been properly executed a presumption of delivery arises. *Jones Ev.* (2d Ed.) 50 (44). Delivery may also be implied from circumstances. 21 Cyc. 1290, and cases cited.

37. The presumption of intention to deliver that might arise from the execution of a deed is overcome by showing that the grantor had the deed in his possession and under his control at the time of his death. *Schetler v. Stewart*, 133 Ia. 320; *Fisher v. Hall*, 41 N. Y. 416".

38. It is not decided "that a lesser degree of proof of delivery is required between husband and wife than in other cases".

—*Butts v. Richards*, 152 W. 318, 319.

DEMAND.

Foreign guardian, 7.

Not on sureties, 7.

Money to be refunded, 1.

Note or bill, 2.

Defense matter, 2.

English statute, 3.

Note or bill—continued

"Not elsewhere," 5.

Unnecessary, 4.

Presentation; services, 1.

Refused to pay, 8.

Implies demand, 8.

1. The doctrine of demand before action is commenced "does not apply to an action for money loaned, but is confined to a case like this, where

the money has been paid as the price of something sold and delivered to the vendee or payee, and where, because of some fact or circumstance not contemplated by either party to the transaction, the money so paid ought to be refunded". —*Stocks v. City of Sheboygan*, 42 W. 315, 316.

2. "The law seems to be well settled in this country, that a demand at the place named in the contract, bill or note, before suit, is not necessary; but that no such demand was made is a matter of defense on the part of the debtor, that he had funds at the place named, and was ready to make payment on demand at that place, and has suffered damage in consequence of the failure to make such demand, but not in bar of the suit".

3. "In the English and some of the American courts," the doctrine of demand is held more stringently as to commercial paper; the English "statute has entirely changed the rule in England, and made a demand upon the acceptor personally sufficient in all cases, except when the contract designates the place of payment with the additional words, and not elsewhere. (Cases)".

4. "But the exception was made to qualify the English statute, without which that statute would be in harmony with the rule almost universally recognized in this country, that demand at the place named before suit is not necessary. (Cases)".

5. "The words not elsewhere, inserted in the contract, do not make the payment conditional upon a demand at the place named. U. S. Bank v. Smith, 11 Wheat. 171; (cases)".

—*Com'l Nat. Bank v. C. M. & St. P. Ry. Co.*, 45 W. 172, 176.

6. Where all liability is denied, the presentation of a bill is no evidence of the value of the services. See SERVICES.

—*Hinton v. Coleman*, 45 W. 165, 171.

7. In a suit by a foreign guardian on a bond, "a demand upon the sureties is not requisite. *Elwell, J. v. Prescott*, 38 W. 274" (Cited under BONDS).

—*Vincent, Inf., by Gdn. v. Starks*, 45 W. 458, 463.

8. In an action for money received from plaintiff's assignor, an allegation "that 'the defendant refuses, and has ever refused, to account for or pay over' the indebtedness sued for", is held sufficient, on demurrer, to imply "a previous demand".

—*Brossard v. Williams*, 114 W., 89, 90.

DEMURRER.

See also PLEADINGS.

After trial on merits, 17, 18.
By way of answer, 27.

Capacity to sue, 23, 24.
Demurrer ore tenus, 25.

Capacity to sue—continued

Not general demurrer, 26.

Special demurrer, 23.

Character of action, 2.

Counterclaim: answer, 5.

Counterclaim only, 10.

County court, 8.

Petition in proceedings, 13.

Treated as objection, 14.

Different cause of action, 22.

Excess of parties, 9.

Joint demurrer, 3.

Motion to quash, 8.

Petition: county court, 8.

Objection to evidence, 1, 11.

Nature of action, 2.

Not appealable, 20.

Ore tenus demurrer, 4.

Appealable when, 20, 21.

Capacity to sue, 25.

Equity jurisdiction, 19.

More latitude, 15.

Objection to evidence, 1, 11, 20.

Preliminary proceedings, 16.

Reaches back to first, 6.

Counterclaim; answer, 7.

Counterclaim only, 10.

Striking out, frivolous, 12.

1. "The objection to any evidence being received on the ground that the complaint does not state facts sufficient to constitute a cause of action, is in the nature of a demurrer ore tenus to the complaint; and upon such a demurrer, as upon any other, the court must determine from the facts alleged what the cause of action stated, or intended to be, is, and whether such statement is sufficient".

2. "It (the court) must determine whether the action is in tort or upon contract, or whether a proceeding in equity was intended; and for this purpose none of the allegations material as showing or tending to show the character of the action or the intention of the pleader can be overlooked or rejected as surplusage".

—*Rothe v. Rothe*, 31 W. 570, 572.

3. "The rule is, that a joint demurrer by two or more defendants, on the ground that the complaint does not state a cause of action, is bad, if the complaint shows a cause of action against one of them".

—*McGonigal, Judge v. Colter*, 32 W. 614, 625.

4. In a demurrer ore tenus "the objection being taken for the first time at the trial, a more liberal rule of construction prevails in support of the pleading than if it had been formally demurred to"; "and the defendants can take no more advantage of their answer than if it had not been put in".

—*Lutheran E. Ch. v. Gristgau*, 34 W. 328, 334.

5. "A demurrer lies to an answer containing a counterclaim, when it appears upon its face that it does not constitute a counterclaim to the action."

6. It is a "familiar rule that a general demurrer to any pleading reaches back in its effect through the whole record and attaches to the first substantial defect in the pleadings".

7. Whether or not this rule applies to "a demurrer to a counterclaim alone", it is held to apply when the "demurrer is not only to the answer as a counterclaim, but as a defense also"; and the court, therefore, must determine, "whether the complaint states a cause of action".

—*Dietrich v. Koch*, 35 W. 618, 626.

8. "The motion in the county court to quash the citation and dismiss the proceedings" being on a petition "to vacate and set aside the probate" of a will, "is equivalent to a demurrer on the same grounds or for the same reasons, to a complaint in an ordinary civil action", and is a proper and convenient practice.

—*In re Estate of Holden: Meadows' Appeal*, 37 W. 98, 103.

9. An excess of parties "cannot, in general, be reached and corrected by a demurrer. *Willard v. Reas*, 26 W. 540, and cases cited.

The exception to this rule is where a wife is improperly joined with her husband as plaintiff."

—*Marsh v. Board of Suprs.*, 38 W. 250, 253.

10. A counterclaim "is certainly a pleading to the complaint. And the old rule that demurrers reach back to the first defective pleading still applies where the complaint discloses want of jurisdiction or fails to state a cause of action (cases); and demurrers to returns to original writs go back to the petition or information on which the writ issued. (Cases). So the demurrer here (to the counterclaim) reaches the merits of the complaint".

—*Lowe v. Hyde*, 39 W. 345, 355.

11. "Rejecting all evidence under the answer is equivalent to sustaining a general demurrer to the answer interposed ore tenus at the trial".

—*Strong v. Hooe*, 41 W. 659, 670.

12. "There is now no distinction in the practice as to striking out a demurrer as frivolous, and overruling it, since the privilege of answering is allowed in either case. (Cases)".

—*Malone v. Roby*, 62 W. 459, 462.

13. A petition to have administration proceedings declared void, and for proper administration, being demurred to as to jurisdiction and failure of the facts to constitute a cause of action, "as though it were a complaint in an action", it is said, that while this is not its nature, and that "it is more in the nature of a motion in an action";

14. Yet "the demurrer" may "be treated as an objection" to award any relief, and that "the material questions in the case are, perhaps, as well brought to the notice of the court in the form of a demurrer to the petition as in any other way". It was so treated and considered in all three courts.

—*Est. of Leavens*, 65 W. 440, 445.

15. In the case of a demurrer ore tenus "it has long been settled in this court that, where the sufficiency of the complaint is thus raised for the first time, more latitude of presumption will be indulged to sustain it than where the objection is taken by regular demurrer. *Teets-horn v. Hull*, 30 W., 162; *Hazleton v. Union Bank*, 32 W., 34."

—*Hagenah v. Geffert*, 73 W., 636, 641.

16. Where it is contended that "the effect of certain preliminary proceedings in the action is to establish the validity of the answer," which was demurred to, it is held that on the "demurrer we cannot consider anything but the complaint and answer."

—*Pritzlaff Hardware Co., v. Carlson*, 76 W., 33, 35.

17. On demurrer and then answer to the merits, in the county court, to an application to set aside a final judgment for fraud, that court tried the case on the merits, but on appeal it was tried on the demurrer only;

18. "While we do not recommend the practice of resorting to a demurrer after a trial upon the merits", yet, it is held, that "the demurrer" was properly overruled. See also FRAUDULENT ORDERS.

—*Creamer v. Ingalls*, 89 W. 112, 119.

19. Objection to jurisdiction of a court of equity, and by demurrer ore tenus. See JURISDICTION.

—*Meyer v. Garthwaite*, 92 W. 571, 572.

20. A ruling, though "embodied in a written order," "upon an objection to evidence, although for convenience it is called a demurrer ore tenus, is not a demurrer within the meaning of the statutes," sec. 3069, and "no appeal is allowed from such a ruling." *Smith v. Kibling*, 97 W., 207, 208.

—*Mandelert v. Superior C. L. Co.*, 104 W., 423, 425.

21. In distinguishing *Mandelert v. Superior C. L. Co.*, 104 W., supra, it is held that a judgment, dismissing the complaint on a demurrer ore tenus, "based solely upon the insufficiency of the complaint," is appealable.

—*Dow v. Deissner*, 105 W., 385, 388.

22. "If facts are stated constituting a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer. (Cases.)"

—*Bieri v. Fonger*, 139 W., 150, 153.

23. "It having appeared by the complaint" that plaintiff "was appointed administrator on a legal holiday, and no objection to his legal capacity to institute the action having been raised by special demurrer, the right to object thereto is waived.

24. If want of legal capacity to sue does not appear by the complaint it may, of course, be taken advantage of by answer. Sec. 2653.

25. A demurrer ore tenus was interposed in this case, but such a demurrer goes to the cause of action and does not reach plaintiff's want of legal capacity to sue. (Case).

26. The objection that plaintiff has not legal capacity to sue cannot be taken by general demurrer. (Case). It can be taken only by special demurrer or answer. (Cases)."

27. An answer alleging the appointment "is wholly void" because of

lack of jurisdiction, "may be said to be a demurrer by way of answer, but such a pleading is not recognized in this state. (Cases)."

—*Jenks v. Allen*, 151 W. 625, 628.

DEPOSITIONS.

See also DISCOVERY.

- Admit whole or part, 37.
- Party as a witness, 48.
- Adverse examination, 38.
- Adverse party, not first, 46.
- Door not opened, 42, 43.
- Either party may use, 44, 47.
- Make party his witness, 48.
- Other party, same subject, 45, 47.
- Parts as desired, 48.
- Appearance: waiver, 4.
- Benefit of both parties, 7.
- Certificate, defective, 16.
- Technical objection, 17.
- Commission depositions:
 - Admit or suppress, 26.
 - Commissioner's duty, 19.
 - Competency, 8, 9.
 - Consul of U. S., 23.
 - Court rules govern, 8.
 - Cross-examination, 36.
 - Defective certificate, 34.
 - Defects and irregularities, 25.
 - Exact place, immaterial, 1.
 - Form of oath, 31, 34.
 - Last interrogatory, 27, 28.
 - Oath, circuit court rule, 32.
 - Oral interrogatories, 18.
 - Without the state, 18.
 - Only to another state, 22.
 - Parties and attorneys, 1.
 - Presumption as to oath, 33.
 - Reading interrogatories, 13.
 - Returned for correction, 20.
 - Statutory rules, 8, 9.
 - Strictness of rules, 24.
- Commission, etc.—continued
 - Unofficial persons, 21.
 - Want of notice, 14.
- Competent at time, 5.
- Contempt proceedings, 15.
- County court:
 - Non-contested matters, 51.
- Evidence, when offered, 38.
- For party offering, 38.
- Notice and certificate, 50.
- Objections of party, 40.
- Opposite party's, 39.
- Status changed, 41.
- Opposite party's use, 6, 11.
- No different status, 41.
- Objections by other party, 40.
- Read whole or part, 30.
- Right of either party, 12.
- Read portion only, 29.
- Either party may, 44.
- Opposite party, 30.
- Other party, same subject, 45.
- Reason still exists, 3, 4.
- Residence objection, 10.
- Judicial notice, 10.
- Taken during trial, 49.
- Transactions with dec'd., 42, 43.
- Venue, want of, 2.
- Whole testimony, 7.
- Without the state, 18.
- Cross examination, 36.
- Notice or commission, 35.
- Witness in court, 3.
- Discretion in use, 3.
- Impeach or contradict, 3.

1. Deposition by commission and interrogatories need not necessarily be taken at the exact place designated, and "the presence of the parties or their attorneys is an impropriety", and they "could put no questions * and could not in any way interfere".

—*Sayles v. Stewart*, 5 W. 8, 12.

2. "The want of a venue or statement of the place where it was taken * does not invalidate it".

—*Fisk v. Tank*, 12 W. 276, 299.

3. Where the reason for taking deposition still exists, it may be admitted or not in the discretion of the court if the witness is there present; in such case "the other party has the right * of a viva voce" cross examination; and if excluded, "the deposition might be used to impeach or contradict" the witness. —*Thayer v. Gallup*, 13 W. 539, 541.

4. "If a party appears and cross examines or appears and objects to questions put or the evidence given by the witness, he thereby waives all objections which he might have urged on account of any defect or want of notice". Dixon, C. J. —*Miller v. McDonald*, 13 W. 673, 674.

5. Deposition is received as proper, where the witness was competent at the time of taking it, and the subsequent marriage to the party "did not affect that testimony, the cause for taking the deposition still existing". —*Cameron v. Cameron*, 15 W. 1, 5.

6. Where not used by the party taking, deposition may be read in evidence by the opposite party against objection.

7. The statute is "clearly designed to enable the whole testimony of a witness to be secured for the benefit of both parties in one deposition", and both have "corresponding rights of examination and cross-examination at the taking", though the party producing cannot impeach the witness as to credibility. —*Juneau Bank v. McSpedon*, 15 W. 629, 631.

8. The strict technical statutory rules for taking a deposition within the state do not apply to foreign or commission depositions, which are governed by the court rules, subject however to the same objections as to incompetency.

9. The statute "was not intended to prescribe or regulate the manner of taking depositions without the state, but rather relates to the nature and competency of the evidence, when taken".

—*Horton v. Arnold*, 18 W. 212, 220.

10. An objection that "it did not appear that the witnesses resided more than thirty miles from the place of trial" is not sustained: "The place of residence of each witness is stated in his deposition; and the court, taking notice of the geographical divisions of the state, must know that they resided more than that distance from the place of trial".

—*Hinckley v. Beckwith*, 23 W. 328, 332.

11. A deposition "may be read in evidence by the opposite party, if the party at whose instance the same was taken declines to read it."

12. "The rule seems to substitute the deposition for and in place of the deponent, and to give to either party the same right to use the deposition that he would have to call the deponent as a witness, were he personally in court".

—*Hazleton v. Union Bank*, 32 W. 34, 44.

13. "Permitting a witness to read the direct and cross interrogatories before giving his testimony tended to defeat the entire purpose of a cross examination, by enabling a witness to think out and prepare in advance his answers", yet "there was no error in refusing to suppress the depositions", though "a deposition taken under such circumstances was not entitled to the same weight as a deposition taken where the witness had not studied the interrogatories in advance of giving his testimony".
—*Allen v. Seyfried*, 43 W. 414, 418.

14. "The objection of the appellant to the depositions for the want of notice", of the taking or of the affidavit on which founded, "was waived by his joining in the commission and submitting cross interrogatories. (Cases)".
—*Benham v. Purdy*, 48 W. 99, 100.

15. The proceeding when witness refuses to answer, outlined. See CONTEMPT.
—*State ex rel. Lanning v. Lonsdale*, 48 W. 348, 370.

16. An objection to depositions at the trial, because the certificate of the commissioner stated that they were to be used "in the county court of said county, whereas this cause was pending in the circuit court", is overruled as coming too late, the court saying:

17. "The objection was simply technical, and if it had been taken before the trial commenced it could have been obviated by an amendment of the certificate of the officer before whom the same were taken. See Sec. 4091."
—*Wausau Boom Co. v. Plumer*, 49 W. 118, 119.

18. Where a deposition is noticed for oral interrogatories without the state and plaintiff's attorney appeared, but defendant sent written cross interrogatories, the latter made the commissioner his agent for putting such interrogatories.

19. "If a given interrogatory, and especially one involving several questions, was not fully or was evasively answered, he (the commissioner) might have repeated it, and called the attention of the witness to the particular part of the interrogatory not answered, or to the part wherein a direct answer had been evaded". But such evasion or failure to answer is not ground for suppression of the deposition.

—*Trowbridge v. Sickler*, 54 W. 306, 309.

20. Where "depositions were returned to the commissioner in Canada for correction by signing his name as a commissioner instead of consul of the United States, this was not error. (Cases).

21. It is suggested, but not decided, that the statute authorizing commissions, contemplates their issue to unofficial persons not otherwise authorized to take depositions,

22. And the issue of commissions only to persons in another state or territory of the Union.

23. Consuls of the United States are authorized to take depositions without a commission, and a commission is needless. (Cases).

24. And it is questionable whether the strict rules of taking depositions by commissioners ought to be applied in such a case, where the proper notice, as in this case, was given of the examination of certain witnesses whose residence is given in a notice before a consul of the United States in one of the provinces of Canada, and the time and place are also given in the notice."

25. "Defects and irregularities in taking depositions, and in the examination of witnesses thereon, will be disregarded if they are merely formal, and do not affect the rights of the parties. (Cases).

26. And it is a matter of discretion to admit or suppress depositions taken under a commission, even where there has been an irregularity in the examination of witnesses. *Wanzer v. Hardy*, 4 W. 229".

27. "The strict rule laid down by some authorities, that if this last (general) interrogatory is not answered the deposition will in general be suppressed", "must rest upon the other rule that it must appear that by such an omission the opposite party might have been prejudiced.

28. It is doubtful if there is no appearance on the other side, and no cross interrogatories, whether the opposite party can complain of the omission".
—*Semmens v. Walters*, 55 W. 675, 681.

29. Counsel may "read only a portion of" a deposition taken at his instance; if the opposite party "desired to have the remainder of the deposition read to the jury, he was quite at liberty to read it".

30. In *Juneau Bank v. McSpedon*, 15 W. supra, "a party offered to read a deposition taken at the instance of the opposite party, but was allowed to read only his own cross examination of the deponent. It was held that he had the right to read the whole deposition, and the judgment for the opposite party was reversed because he was denied that right".

—*Morrison v. Wis. Odd Fellows Ins. Co.*, 59 W. 162, 171.

31. "The statutes nowhere prescribe the form of an oath" in case of deposition by commission. "Sec. 4112, has no reference to" such deposition.

32. But the circuit court Rule 17, Sec. 5, "does prescribe the form of such oath, and in order to make the deposition admissible as evidence the oath should be administered substantially in the form prescribed".

33. When the commissioner according to the rule certifies "that the witness was duly sworn or affirmed before giving his evidence", "it will be presumed that he administered the oath in the form prescribed by the rule." (Cases).

34. But when the commissioner certifies the oath he administered, in this case "to tell the truth, and nothing but the truth", and not in the form prescribed by the rules, the defect appearing "affirmatively on the face of" the deposition, "it was clearly irregular and defective, and should have been suppressed on motion of the defendant. (Many cases)".

—*Cross v. Barnett*, 61 W. 650, 653-4.

35. "A party may take the deposition of his witness out of the state in a proper case, either on notice and oral interrogatories, or on commission and written interrogatories, at his option.

36. If he elects to take the same in the latter mode", it is held that the adverse party cannot "cross-examine the witness orally", and it is immaterial that the witness is a party. See also *DISCOVERY*.

—*Neeves v. Gregory*, 86 W. 319, 321.

37. As to whole deposition otherwise inadmissible, being admitted on introduction of a part thereof by the opposite party. See *EVIDENCE*.

—*McNally v. McAndrew*, 98 W. 62, 65.

38. An adverse party or other "deposition or examination taken out of court does not become evidence for a party taking it, or any party to the cause, till offered and received as evidence, and (that) it is then evidence only for the party who offers it.

39. In all cases where a party offers in evidence a deposition taken by the opposite party, he makes it his own evidence;

40. The latter can then object to his own interrogatories therein, the same as if propounded by the former, and can object to the competency of the witness the same as if the deposition were taken for his adversary. *Jones Ev.*, 703.

41. The use of a deposition by one party, taken by the other, gives it no different status in the case than the evidence of a party, or of a witness called into court in his behalf, when called to the stand by his opponent. *Hazleton v. Union Bank*, 32 W., supra."

42. The mere fact of a party being "examined otherwise than as a witness," as to transactions with a deceased agent through whom the opposite party derived his title, the testimony being incompetent under sec. 4070, "did not open the door for" the first party "to testify on the trial.

43. The foundation for the examination of a party as to transactions with a deceased agent must be laid by the opposite party".

—*Maldaner v. Smith*, 102 W., 30, 39.

44. "The prevailing rule is, as we think, that either party may read such parts of a deposition as are relevant and relate to any distinct transaction,

45. And that the other party may introduce such other portions as relate to the same subject and tend to explain that which has been read. *Jones Ev.*, 703; *Parmenter v. B. H. T. & W. R. Co.*, 37 Hun, 354; *Parker v. Chancellor*, 78 Tex., 526; *Dawson T. & G. Co. v. Woodhull*, 67 Fed. Rep., 451; (other cases)".

46. "Of course, in examinations of this kind, the plaintiff (the adverse party examined) would have no right to offer the deposition so taken in the first instance;

47. But should the defendants offer a portion relating to a given

subject, the other side would have the right to read additional portions as explanatory thereof".

—*Wunderlich v. Palatine F. Ins. Co.*, 104 W., 382, 385.

48. Where plaintiff had taken defendant H.'s deposition, such witness being "present and sworn at the trial", a ruling "to the effect that, if the deposition was offered in evidence (by plaintiff), it would constitute H. the plaintiff's witness, subject to the ordinary rules against impeachments", and he was subsequently "allowed to introduce such specific portions of it as he did offer", or desired to offer. Held, not error.

—*Spuhr v. Kolb*, 111 W., 119, 121.

49. "Refusals by the court to permit the use in evidence of a deposition taken and filed during the progress of the trial," are upheld under sec. 4090.

—*Herman v. Schlesinger*, 114 W., 382, 395.

50. It is indicated and assumed that the "notice and certificate" attached to a deposition, were improperly admitted in evidence to show by inference the location and imprisonment of the witness at the time the deposition was taken.

—*Jakopac v. Newport M. Co.*, 153 W. 176, 185.

51. (For the procedure in county court in non-contested matters, as to depositions within and without the state, and forms applicable thereto,—see Zimmerman's Probate Practice, §§ 421-426.)

DEPUTY.

See OFFICERS.

DESCENT AND DISTRIBUTION.

See also HEIRS. JUDGMENTS. SETTLEMENT. SURVIVORSHIP.

Administrator's right, 3, 5.

Agreement modifying, 30.

Action for property, 31.

Approved in part, 33.

Contrary to the will, 45.

Creditor's rights, 32.

Election of widow, 44.

Stipulation disregarded, 41.

Blood of ancestor, 12, 13.

Ancestral blood or not, 14, 15.

Descends to next of kin, 13.

None ancestral, 16.

Certificate: joint owner, 46.

Improper recital, 47.

Of descent; unknown heirs, 48.

Degrees of kin:

Grandmother, uncles, 19.

Descent, next of kin, 12, 13.

Ancestor blood or not, 13, 15.

Equally to next of kin, 28.

Inherit equally, 14.

No ancestral blood, 16.

Not to personal estate, 17, 18.

Devisees: from death, 4.

Same amount as law, 25.

Homestead descent, 49.

Husband sole heir, 37.

Intestacy presumed, 38.

Kindred of half-blood, 1.

Blood ancestral and not, 15.

Kindred, etc.—continued

Inherit equally, 14.

Rules of civil law, 12.

Lands descend on death, 2, 5.

Vest, subject to rights, 3.

Legacies: Sale of remainder, 26.

Negative testate proof, 37.

Intestacy presumed, 38.

“Parents”: definition, 21.

Father and mother, 29.

Personal estate, 17, 18.

Does not descend, 20.

Not inheritable, 20, 24.

Residue: definition, 35.

Agreement, on objection, 41.

Held in trust, 40.

Intention as to, 42, 43.

Widow's election, 36.

Take as a class, 27.

Unmarried infant, 6.

Blood of ancestor, 12.

Brothers and sisters, 7.

No other direction, 39.

No other issue, 11.

Personalty case, 23, 24.

Sold by guardian, 10.

Sold during lifetime, 9.

Statute construed, 8.

Widow: intestate residue, 22.

Deceased, leaving another, 34.

Election; agreement, 41.

Election; another widow, 34, 36.

Election; not affect residue, 44.

Failing to elect, 22.

Will assumed valid, 50.

Judgment upheld, 51.

1. The statute, sec. 2272, providing that “kindred of the half-blood shall inherit equally with those of the whole blood, in the same degree”, applies in all cases including those, “where the intestate leaves issue, or a widow, father, mother, brother or sister”.

—*Perkins v. Simonds*, 28 W. 90, 92.

2. “By the common law the real estate descended to the heir immediately upon the death of the ancestor;” the personal representative had nothing to do with the lands, rents or profits.

3. The legal title still vests in the heirs, subject to be divested on sale for debts, etc. *Stark v. Brown*, 12 W. 572, 582; and subject to the rights of the personal representatives for the purposes of administration enumerated. See REAL ESTATE. —*Jones v. Bullstein*, 28 W. 221, 227.

4. Under a will the devisee takes from the death of the testator after probate of the will. See TITLE. —*Bridge v. Ward*, 35 W. 687, 692.

5. “On the death of M., intestate, the lands described in the complaint descended immediately to his heirs, and the administrators subsequently appointed took no interest therein except the mere right of possession pending the administration”, and the latter are not proper parties in a suit to restrain the issue of tax deeds on the lands.

—*Marsh v. Board of Suprs.*, 38 W. 250, 252.

6. The real estate of an unmarried infant, “which he inherited from his mother, descended to his surviving brothers and sisters in equal shares”. (Sec. 2270, subd. 5)

7. “In *Perkins v. Simonds*, 28 W. 90, we held, after much investigation, that in such a case the surviving brothers and sisters inherit from the ancestor and not from the deceased child. As applied to the present case”, the plaintiff took “in the same manner in which he would have taken it had F (the infant) died before his mother”.

8. The statute "was borrowed from Massachusetts", is substantially the same in the statutes of 1839, 1858, and at present, received such prior construction, and the court says, "we must adhere to the rule thus established".

9. If, however, such real estate had been sold during the lifetime of the infant, "for his support and maintenance, or for his education, as it might have been under the statute", then "the purchaser at the guardian's sale would take the title".

10. "The existing condition of the title is regarded; and when the property has been sold at the guardian's sale for the benefit of the infant, the provision regulating descent does not apply".

—*Wiesner v. Zaun*, 39 W. 188, 204.

11. The statute (substantially Subd. 5 & 6, sec. 2270, before amended as to 'testamentary gift' by ch. 219, L. 1883, and as to personalty by ch. 23, L. 1893), "considered in *Perkins v. Simonds*, supra, has no application to this case, notwithstanding the decedent died under age, not having been married, for the reason that her mother left no other issue", and the infant, "and not her mother, is the person from whom the succession to the estate in controversy is to be traced," i. e. whether to "paternal grandmother" or maternal uncles.

12. With reference to the statute (sec. 2272) providing for inheritance "according to the rules of the civil law", held "we cannot adopt" the view that "the foundation principle of our statute of descents is to confine the descent of ancestral estate to those who are of the blood of the ancestor from whom the same descended."

13. But the "leading, controlling principle" is that "where no other provision is made, the same shall descend to the next of kin to the intestate, whether of the blood of such ancestor or not".

14. "We think the plain grammatical construction of the clauses (sec. 2272 and subd. 4, sec. 2270) under consideration is, that kindred of the intestate of the half blood shall inherit equally with those of the whole blood in the same degree, in all cases, except that if the estate is ancestral, only such kindred of the half blood as are of the blood of the ancestor from whom the state came, shall inherit."

15. "The Michigan statute of descents is like ours, and the supreme court of that state has held that where some of the next of kin to the intestate are of the blood of the ancestor, and others of them are not, the statute excludes the latter from the inheritance of ancestral estate.

16. But if none of the next of kin are of the blood of the ancestor, they shall inherit to the exclusion of the kindred of the blood in a more remote degree from the intestate. *Ryan v. Andrews*, 21 Mich. 229".

17. "Thus far we have considered the case on the hypothesis that sec. 2272 is applicable to the distribution of personal estate which came to the intestate from an ancestor";

18. But it is held, "that the limitation in sec. 2272, upon the descent of ancestral estate, is not applicable to the distribution of intestate per-

sonal estate, but that the same must be distributed in all cases in accordance with the general rules of the statute of descents; that is to say, to the next of kin of the intestate, whether of the half or whole blood, without regard to the source from whence the estate came”.

19. The paternal “grandmother is one degree nearer of kin than the uncles” on the mother’s side, and she is held to take in preference to the uncles.

20. “Ordinary personalty has no heritable quality. It does not descend to the heir”. See also **PERSONAL ESTATE**.

—*Est. of Kirkendall: Cramer’s Appeal*, 43 W. 167, 172.

21. “The word ‘parents’, both by derivation and common understanding, means the natural parents”. So held as to adopted child in reference to descent of its estate. See also **ADOPTION**.

—*Hole v. Robbins*, 53 W. 514, 520.

22. A widow failing to elect, cannot share in intestate residue. See **WIDOW**.

—*Hardy v. Scales*, 54 W. 452, 457.

23. Where one of two minors, who received personalty from the intestate estate of their mother, died, unmarried and intestate, leaving her sister and father surviving, it is held under subd. 6, sec. 3935, that such personalty should go to the father under the general rule of subd. 2, sec. 2270, and not to the sister under subd. 5, sec. 2270. (This was before the amendment of subd. 5, sec. 2270, by ch. 23, L. 1893, adding, “and all personal property which belongs to such deceased child by reason of distribution under subd. 6, sec. 3935.”)

24. “The difficulty is that mere personalty is not heritable,—does not descend to the heir,—and has not the qualities of ‘ancestral estate’”. *Kirkendall’s Est.*, 43 W., *supra*, as to descent and distribution, discussed and approved.

—*Shuman v. Shuman*, 80 W. 479, 482.

25. Whether by descent or purchase, where the devise in quantity is the same as under the laws. See **DEVISE**.

26. As to sale of remainder or reversion, to pay legacies before the expiration of a life estate. See **LEGACIES**.

—*Will of Root*, 81 W. 263, 266.

27. “‘It is a general rule that those who take property as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take equal shares’. *Reeve*, *Descent* 105, 123; *Knapp v. Windsor*, 6 Cush. 156; (other cases)”.

28. Where realty descended to the father and mother, under the statute (*Terr. 1839*, p. 184, sec. 38), ‘equally to the next of kin in equal degree’, “as they took by descent, and not by purchase, as by grant or devise, we think that they took as tenants in common and by moieties, and not by entireties, and therefore that upon the death of the mother

her interest did not go to the father, her husband, by right of survivorship", but to her heirs.

29. "The father and mother of B. (the intestate) inherited his estate equally, by reason of the relation of each to him, and not by reason of their relation to each other as husband and wife. The right of each is separate and distinct, and is in no way dependent upon the right of the other". See also KIN. —*Brown v. City of Baraboo*, 90 W. 151, 154.

30. A will gave the widow and children the property with control in the widow during life. A written agreement by all modifying the terms of the will was filed, in which the widow "waived her right to control the estate, except \$12,000.00 thereof", of which she was to have the income and the principal if "necessary for her comfortable support", with power of sale but not to devise. Judgment was entered approving the agreement, and assigning the residue and the remainder "undisposed of at the death of" the widow, to the children, and the executor discharged.

31. In an action of replevin by the administrator of the widow's estate against the admr. de bonis non of the testator's estate who had possession of the property, held,—

32. That "no further administration of" the testator's estate was "necessary or proper", the distributees already having title and "right to the possession thereof subject to the rights of" the widow's "creditors, and subject to the expense of administering her estate.

33. The administrator of her estate is entitled to such possession till all claims "contracted for her 'comfortable support,'" "and the expenses of the administration shall have been paid. The remainder will then be distributable" to those entitled thereto under the assignment in the testator's estate. —*Hinn v. Gersten*, 122 W. 222, 227.

34. Where a will provided that the "residue" be given one-fourth to each, being to a named wife, to two brothers, and an adopted son, the wife predeceasing the testator and he leaving another wife, who elected to take under the law, it is held,—

35. That the word 'residue' used in "its usual and legal meaning", was what was left after payment of debts and expenses, and after payment of the widow's share under her election;

36. And that of such residue, each of the two brothers received one-fourth, the son one-fourth and that the remaining one-fourth to such deceased wife having lapsed, became intestate property, and went also to the son as such, he being the testator's sole heir.

—*In re Bradley's Will*, 123 W. 186, 193.

37. "The uncontroverted evidence that" a husband was his wife's "sole heir at law proved his succession to whatever title she had. He was not called upon to show negatively that she did not die testate.

38. As the primary right of succession is by the law of inheritance,

plaintiff was entitled to rest on the legal presumption of intestacy until that was rebutted by evidence. *McClanahan v. Williams*, 136 Ind., 30".
—*Chase v. Woodruff*, 133 W., 555, 558.

39. Where, under a will, estate was assigned to a minor child, and he afterwards dying under age without issue, leaving a mother, "brothers and sisters and issue of deceased brothers and sisters, children and grandchildren of" the testator, it was held, under subd. 5, sec. 2270, that there being "no direction" in the will for other disposition, such estate descended to such children and grandchildren.

—*Bowker v. Shields*, 140 W. 330, 332.

40. Where a will provided certain legacies and annuities, and that all the residue be held in trust for ten years, and then to be distributed to numerous legatees, including thirty per cent to the widow, on objections filed by the heir,

41. Adjustment of the contest was made by written stipulation signed by all interested, except a Home for the Aged and the guardian ad litem for minors, in which the widow elected to take under the law, and it was stipulated that the thirty per cent to her under the will became intestate property and descended to the heir,—it was held:

42. That the testator as to the residue, "treated it throughout as a separate quantum of his estate", and intended it "should go to the residuary legatees generally, without restriction of a particular part thereof to each one";

43. "That the intention must be gathered from the four corners of the instrument under the facts and circumstances surrounding him,"

44. And "while the widow's renunciation may affect the quantity of the residue, it cannot affect his disposition thereof", and the whole belongs to "the residuary legatees after the widow dropped out," and none "become intestate property".

45. Therefore, "the stipulation of the parties for a distribution of the estate contrary" to the will "must be disregarded," and the will executed "in accordance with its terms. Will of Dardis, 135 W., 457; Will of Rice, 150 W., 401; (See PROBATE OF WILLS). See also VESTING OF ESTATES, ETC.

—*Will of Reynolds*, 151 W., 375, 382.

46. An ex parte proceeding in county court as to survivorship of land to the wife, a joint owner, on the death of her husband, brought by a grantee of the wife, the latter testifying at the hearing,—

47. A recital in the certificate issued as to the conveyance by the wife to such grantee and that she "is now the owner in fee simple" of the premises conveyed", is held not res adjudicata and that it "had no place in the certificate, added nothing to it, and concluded no one".

—*Krueger v. Buel*, 153 W. 583, 589.

48. Certificate of Descent under sec. 2276a, and quit claim deed, for ten-year adverse possession, upheld as against unknown omitted heirs. See TITLE. —*Bourne v. Wiele*, 159 W. 340, 343.

49. The homestead descends and vests in the widow and "then living heirs", at the death of an intestate. See also HOMESTEAD. —*Miller v. Hart*, 161 W. 611, 614.

50. Where executors and trustees for a period of years acted as such on the assumption that the will was valid, and also in accordance with agreements of the interested parties, and the "parties interested participated in and assented to the various transactions and the administration of the estate resulting in the order of distribution and discharge",

51. Such judgment is upheld, regardless of whether the will was valid or not. —*Will of Allis*, 163 W. 452, 459.

DEVISES. DEVISEES.

See also CONSTRUCTION OF WILLS. VESTING OF ESTATES, ETC.

Condition: not to alien, 9.
Curtesy of husband, 10, 11.
Debt liability, etc., 12.
Dower, profits, waste, etc., 10.
Not convey for time, 14.

Definition, 1.
Bequeath, devise, 2.
Real estate, 2.
Devise of son's lands, 3.
Son's devisee rights, 3.
Executed oral contract, 18.
Intestacy avoided, 17.
Legacy lien not trust, 20.
Lost writing to devise, 19.
Quantity as by descent, 4.

Quantity, etc.—continued
Common law rule, 5.
Devise or descent, 6.
Remainder, reversion, 4.
Residuum, void legacies, 16.
Intestacy avoided, 17.
Unless contrary intent, 16.
Void; legacy to residue, 7.
Because patent ambiguity, 15.
Conditions, what void, 9, 10, 11, 12.
Converted realty, 7.
Devise, undecided, 8.
Fall into residuum, 16.
Not convey for time, 14.
With power of sale, 13.

1. A devisee is "one who takes real property, under a will".
2. "Real estate is devised to a devisee", and bequeath is used for a legacy; "yet, according to Webster's Dictionary the verbs 'bequeath' and 'devise' are synonyms".

—*Chandler's Appeal: Est. of McCoy*, 34 W. 505, 509.

3. The fact that a father devised to another, lands claimed and owned by a son, "does not prevent the son from claiming" other lands devised to him, "under the will, without abandoning his claim to the lands

described in such will, and which were owned by him by a title paramount to that of the testator.” —*Allen v. Allen*, 58 W. 202, 211.

4. The devise to heirs being the same in quantity as by descent, it is said: “If they take under the will, undoubtedly they take an estate in remainder; but if by descent, they take an estate in reversion. And whether it be one or the other, it is a vested estate. Secs. 2033-37. For reasons which will presently appear, the question is not important (here).

5. It may be observed, however, that at common law the rule seems to have been well settled in England, and in many, perhaps most, of the United States, that a devise to the heir at law of precisely the same estate he would take by descent were there no devise, is void, and the heir takes by descent in such case and not by purchase. 4 Kent Comm. 507. The rule was changed in England by statute 3 & 4 Wm. IV, ch. 106.

6. Were it necessary to decide the question, we should probably be constrained to hold that, notwithstanding the residuary clause in the will, the heirs of the testator in this case take their estate in the city property by descent, because they would take the same estate therein had the will contained no residuary clause; and hence, that the estate is a reversion.” See also LEGACIES. —*Will of Root*, 81 W., 263, 266.

7. It seems that in case of “a void legacy of personal property, it would pass under the residuary clause, to the residuary legatees”; and it is so held here as to realty converted into personalty by equitable conversion;

8. “But it is claimed that a void devise of real estate is subject to a different rule, and that the property covered by it will not go into the residuum, but will pass to the heirs as intestate estate. This doctrine, certainly, has the support of many courts”. See cases in 13. Amer. & Eng. Enc. L. p. 40, n. 3. It is not “necessary to decide whether it is in force in this state”.

—*Milwaukee Protestant Home v. Becher*, 87 W. 409, 413.

9. “It is laid down as a general rule that ‘a condition, annexed to a conveyance in fee or by devise, that the purchaser or devisee should not alien, is unlawful and void. *

10. If the grant be upon the condition that the grantee shall not commit waste, or not take the profits, or his wife not have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from the estate in fee’.” 4 Kent Comm. 131; 2 Redf. Wills, 287, 290.

11. “But it has been held that land may be conveyed to a married woman so as to exclude her husband upon her death from becoming tenant of the premises by the curtesy. *Haight v. Hall*, 74 W. 152”.

12. A devise “upon the express condition that the premises should

'in no wise ever be subject to any debt, liability, execution, or attachment against him, existing at this time or at any time hereafter' ", being "unlimited in point of time," is held void.

—*Van Osdell v. Champion*, 89 W. 661, 665.

13. A widow as residuary devisee, with power of sale as executrix, took title at once, personally, to the realty. See TITLE.

—*Hiles v. Atlee*, 90 W. 72, 78.

14. In a devise in fee, with a condition not to convey for a period, the condition is void. See CONSTRUCTION OF WILLS.

—*Zillmer v. Landguth*, 94 W. 607, 609.

15. Void devise because of patent ambiguity, causing intestacy as to such portion. See CONSTRUCTION OF WILLS.

—*Willey v. Clark*, 105 W., 22, 23.

16. "Generally, void legacies fall into the residuum of the estate and go to the residuary legatees. The only exception, is where there is a clear intent manifested by the will to the contrary.

17. The mere fact of making a will is so inconsistent with any other intent than that to provide for a disposition of all the property of the testator, that very strong and clear language is required to show a contrary intent. For that reason a residuary bequest in general terms is held to carry void and lapsed legacies," to avoid intestacy as to such estate. See also EQUITABLE CONVERSION.

—*Harrington v. Pier*, 105 W., 485, 497.

18. An oral contract to devise lands for services, where the services were performed and possession given of the lands, might be enforced. See PAROL.

—*Rodman v. Rodman*, 112 W., 378, 384.

19. An agreement in writing to devise realty is held valid and enforceable, though the writings be lost. See LEGACIES.

—*Dilger v. Est. of McQuade*, 158 W. 328, 330.

20. A devisee of land subject to legacy lien, is "not a trustee of an express trust", and the lien may be barred by the statute. See LEGACIES.

—*Nolan v. First Natl. Bank*, 161 W. 22, 25.

DICTUM, JUDICIAL AND OBITER.

See RULES OF PRACTICE.

DISCONTINUANCE.

- Absolute rights to, 1, 2, 3, 7.
- Cause necessary, 22.
- Modified to discretion, 18, 19.
- Affirmative decree, 9.
- Attorney's authority ended, 16, 17.
- Code does not affect, 3.
- Common law right, 1.
- Counterclaim and reply, 4, 6, 18.
- Defendant, affirmative decree, 9.
- Permit to restore, 5.
- Refusal to strike off, 5, 8.
- Court may deny, 13, 14.
- Equity practice, 2.
- Judicial action necessary, 10.
- Allow or deny, 11, 19.
- Judicial action, etc.—continued
- Discretion upheld, 19.
- Oral order sufficient, 10.
- Order denying effective, 13.
- Rights of others, 12.
- May substitute another, 14.
- Order on stipulation, 15.
- Real controversy, 22.
- Cause necessary, 22.
- Stipulation, not bar, 23.
- Oral testimony, 25.
- Special authority, merits, 26.
- Without costs, 24.
- Voluntary dismissal, 20.
- No practical difference, 21.

1. "1st. At common law, a plaintiff had the absolute right to discontinue his action before or after issue joined, and without leave of court".

2. "2nd. In suits in equity, under the former practice, the plaintiff might, in like manner, dismiss his bill, but such dismissal did not carry with it a cross bill interposed by the defendant. 2 Barb. Ch. Pr. 128 and cases cited."

3. "3rd. The right of discontinuance is not affected by the code, but remains the same, both in legal and equitable actions, as under the former practice". (But, see *Boutin v. Andreas*, 161 W. post.).

4. "The discontinuance of his action by the plaintiff left the issues made by the counterclaims and the reply thereto, pending in court and for trial". See also SET-OFF.

5. "The court correctly ruled in refusing to strike the cause from the calendar", and on application "should, under the special circumstances of the case, permit the plaintiff to vacate the order of discontinuance so entered by him, to the end that the whole controversy between the parties may be adjudicated in this action."

—*Bertschy v. McLeod*, 32 W. 205, 210.

6. The rule is established in this state (apparently contra to the New York practice) that the court cannot properly "grant the plaintiff leave to discontinue the whole action, in a case where the defendant has interposed a counterclaim".

—*McLeod v. Bertschy*, 33 W. 176, 179.

7. "The plaintiff had an undoubted right to discontinue his action," and there was "no error in that portion of the order".

—*Damp v. Town of Dane*, 33 W. 430, 434.

8. It was held in this case (32 W. 205, and 33 W. 176) and now adhered to on principle, as well as because *res adjudicata*, "that the plaintiff could not discontinue the whole action, even with the leave of

court, where the defendant had interposed a counterclaim consisting of a substantive cause of action against him".

—*McLeod v. Bertschy*, 34 W. 244, 248.

9. The rules of *McLeod v. Bertschy*, *supra*, quoted and adhered to, and applied in an action for accounting between partners, the plaintiff's intestate not being allowed to discontinue, on the theory that the defendant in such action "is entitled to an affirmative decree therefor, although he has not interposed a cross-bill or counterclaim".

—*Hutchinson, Admr., v. Paige*, 67 W. 206, 209.

10. The "efficacy and the necessity of judicial action to completely accomplish discontinuance", is recognized in the decisions, "upon plaintiff's application, or even on consent of all parties to the record. (Many cases)". An oral order, entered in the minutes, is held sufficient, in *Juneau v. Hooker*, 67 W. 322 (See RECORDS).

11. Varied and numerous considerations may need to be weighed by the court before reaching its conclusion whether to allow or deny effect to such attempt.

12. The effect of the termination of the suit upon others, either the defendant or third parties, or sometimes the public, is to be considered, and, if any prejudice to such persons is discoverable, whether it is such as to warrant retention of the suit."

13. An obiter dictum in *Noble v. Strachan*, 32 W. 314, "that the order denying the application for leave so to discontinue is a nullity, and may be disregarded entirely", is inaccurate", "and must be overruled". —*State ex rel. City of Milwaukee v. Ludwig*, 106 W. 226, 232.

14. "That the court had jurisdiction to refuse to allow the plaintiff to arbitrarily discontinue the case, and also jurisdiction to allow another plaintiff to be substituted in his place, was decided by this court in this very case. *State ex rel. Milwaukee v. Ludwig*, 106 W., *supra*".

—*Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 W., 493, 502.

15. Where "in exact conformity" to a stipulation, on "motion of defendant's attorneys", an "order was entered", "that 'the action be and is hereby dismissed without costs to either party',", "that certainly ended the proceeding (2 Wait, Prac. 515), leaving nothing further for appellant's (defendant's) attorney to do in regard thereto".

16. "The termination of the litigation, not by a closing thereof, by judgment, which of course might leave the attorney, for the time being at least, authorized to stand for respondent (plaintiff) in any further proceedings upon the judgment,

17. But by removing the litigation entirely from the court, ending it for all purposes, necessarily ended the authority of the attorney". See also VACATING JUDGMENTS.

—*Wawrzyniakowski v. Hoffman & B. Mfg. Co.*, 137 W., 629, 632.

18. "A plaintiff, before submission of his case, has" not "an absolute right to dismiss without prejudice to the trial of the issue on the counterclaim in case of there being one". *State ex rel. Milwaukee v. Ludwig*, 106 W. supra; *Anderson v. Horlick's M. M. Co.*, 137 W. 569.

19. "Earlier cases, such as *McLeod v. Bertschy*, 33 W. supra, to the effect that a plaintiff, as to his own claim has an undoubted right to discontinue, are modified by the later ones holding that the court may, in its discretion, refuse a request therefor, as in this case".

20. "In this case", "it was a voluntary dismissal which was sought, a mere discontinuance, leaving the plaintiff free to again resort to a judicial remedy for the same redress as before.

21. There is no practical difference between a voluntary dismissal and discontinuance".

22. There being "a real controversy", "and an issue is once duly made", "the plaintiff should not be allowed to trifle with judicial administrative facilities by discontinuing without cause".

—*Boutin v. Andreas*, 161 W. 152, 153.

23. "That a stipulation to dismiss does not constitute a bar to the action was held in *Bishop v. McGillis*, 82 W. 120".

24. And it is held "that a stipulation for a dismissal without costs would have no broader or different construction than a mere stipulation to dismiss".

25. "Assuming, but not deciding, that parol testimony was admissible to show the agreement entered into between the attorneys for the respective parties", it is held,—

26. That "an agreement by an attorney to dismiss an action upon the merits is" not "valid without evidence of special authority so to do." *Kelly v. Wright*, 65 W. 236.

—*Seymour S. Bank v. Rettler*, 164 W. 619.

DISCOVERY.

See also DEPOSITIONS. WRITINGS.

Administrator: in equity, 35.

All rights settled, 39.

Circuity of action, 37, 38.

Disbursed on claims, 41.

During administration, 36.

Find separate liability, 44.

Held in abeyance, 43.

Parties brought in, 42.

Proof from county court, 43.

Sums paid to heirs, 40.

Adverse party, sec. 4096, 3.

Admissibility, different, 11.

Adverse party—continued

As admissions, 12, 27.

Not of employees, 27.

Party examined, not offer, 26.

Admission, nature of, 12.

"Adverse party": definition, 51.

Affidavit for order, 61, 62, 64.

Counter affidavit, 63.

All material issues, 9.

Broad as cross-examination, 7.

Cannot otherwise prove, 9.

Cross examination nature, 66.

Adverse party—continued

- Discovery bill extended, 8, 9.
- Foreign: without state, 45.
- As other depositions, 47.
- General deposition statutes, 46.
- Letters rogatory, 50.
- Oral or commission, 49.
- Guardian: ad litem, not agent, 76.
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- Liberal construed, 17, 61, 67.
- More ample remedy, 18.
- Not strictly deposition, 10.
- Oral interrogatories, 24.
- As other depositions, 47.
- Foreign: oral or commission, 49.
- General deposition statutes, 46.
- In all cases, oral, 48.
- Non-resident party, 24.
- Order, if before issue, 6.
- Pleadings, limit, 5.
- Production of papers, etc., 28.
- Physical objects, 70.
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- Bill of discovery, 2.
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- Form and substance, 18.
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- Compelling inspection, 29.
- Credible denial, 32.

Compelling inspection—continued

- Not duty to gain control, 33.
- Papers of third party, 30.
- Possession rebutted, 31.
- Possession, whereabouts, 34.
- Concurrent jurisdiction, 35, 36, 37.
- Contempt proceedings, 1.
- County court: adverse examination, 20.
- Before court commissioner, 23.
- Filing of claim, 21.
- May be had therein, 23.
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- Admissibility as evidence, 74.
- Compel examination, 14.
- Equity concurrent, 36, 37.
- Executrix of dec'd, extr., 16.
- Governor National Home, 53, 54.
- Nature of discovery, 13.
- No remedy to enforce, 25.
- Order therein, 13, 15.
- Cross examination at trial, 52.
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- Re-examined close of, 52, 55, 59, 60, 65.
- Discretion of judge, 58, 59.
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- Incriminating evidence, 71.
- Avoiding civil liability, 71.
- Opinion of witnesses, 72.
- Trial court's discretion, 72, 73.
- Violation of primary law, 75.
- "Plead", may mean claim, 29.
- Refusal to answer, proceedings, 1.

1. The proceedings when a "witness has refused to answer certain interrogatories",—outlined. See CONTEMPT.

—*Lanning v. Lonsdale*, 48 W. 348, 370.

2. "The old bill of discovery was commonly used in aid of the jurisdiction of some other court". "It was not a matter of strict right, but depended upon a case being made coming within the proper discretionary powers of the court. The cumbersome nature of the proceeding finally lead to statutory enactments, even before legal and equitable jurisdiction were vested in the same court".

3. "In this state a bill for discovery was abolished, and provisions made for compelling an adverse party to testify at or before the trial, by secs. 54, 55, ch. 137 R. S. 1858", now sec. 4096.

4. "It seems to us that the object of our statute, as it now stands, is to elicit a full and complete disclosure of whatever may be relevant to the controversy,

5. To be ascertained, in case the pleadings are in, by the issues thereby made,

6. And, in case the issues have not been joined, then by such order limiting the subjects to which such examination may extend”.

7. “This court has already held that the scope of such examination may be as broad as that on cross examination. *Stuart v. Allen*, 45 W., 160.”

8. It is not “limited to cases where discovery might have been had in equity under the old practice”.

—*Kelly v. C. & N-W. Ry. Co.*, 60 W. 480, 484.

9. “The statute (sec. 4096) undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action.

10. This examination of a party at the instance of the opposite party is not strictly the deposition of a witness taken in an action,

11. And its admissibility as evidence on the trial is not governed by the provisions of sec. 4089”, as to not being used when the reason therefor no longer exists, etc.

12. “The examination of a party is in the nature of an admission so far as his answers are material to the issues in the action, and such admissions are always admitted as original evidence against him”. And the refusal to admit the adverse examination evidence on the trial, was held material error, not cured by such party being present in court.

—*Meier v. Paulus*, 70 W. 165, 170.

13. Under sections 3825, 3826, in the nature of discovery proceedings in the county court as to concealed, embezzled, etc., property, the court is “of the opinion”, that “no order can properly be made in regard to the property, if any, in the hands of the appellant, and concerning which his examination may be taken under said sections.”

14. And following Massachusetts and Michigan decisions, under similar statutes, “the only thing provided for by the statutes is the examination of the party charged, and power to compel him to submit to such examination, and there the power granted ends.”

15. (Under the subsequent amendment by chapter 23, L. of 1901, an order may be made “as shall be just and proper”, but as such “order shall not prevent the bringing of any proper action,” probably an order should not ordinarily be made, unless there is practically no controversy as to the result of the examination, or unless the parties acquiesce).

—*Saddington's Est. v. Hewitt*, 70 W. 240, 248.

16. An executrix of a deceased executor “may be compelled by the county court, upon application of some person interested”, “to make a disclosure upon oath of any money, property, or effects belonging to the estate” of which the deceased executor was executor, “which may

have come into her possession or under her control as executrix", or otherwise, under sec. 3825. See also ACCTS. OF EXTRS. AND ADMRS.

—*Reed v. Wilson, Extrs.*, 73 W., 497, 504.

17. "This court has frequently held that the examination thus authorized (by sec. 4096) was intended as a substitute for a bill of discovery under the old practice, and, being remedial, should be liberally construed. *Cleveland v. Burnham*, 60 W., 21; *Kelley v. C. & N. W. R. Co.*, 60 W., *supra*.

18. The object of the section was to abolish not only the form, but also the substance, of the old bill of discovery, and to enable the party to obtain the benefits of the bill, and also a more ample remedy, by taking the deposition of the adverse party as a witness in the case upon all questions involved in the issues. *Whereatt v. Ellis*, 65 W., 639.

19. The old bill of discovery was filed in a court of equity in aid of proceedings in another court of separate and independent jurisdiction. *Clark v. Berganthal*, 52 W., 106; *Kelley v. C. N. W. R. Co.*, 60 W., *supra*.

20. Here the discovery sought is in aid of the defense to the allowance of the plaintiff's claim in the county court.

21. The presentation of the claim to the county court is to be deemed the commencement of an action, within the meaning of the statutes of limitation. Sec. 4242; *Boyce v. Foote*, 19 W., 199; *Jones v. Keep's Est.*, 23 W., 45. (Cited under CLAIMS).

22. It seems to be, in effect, a civil action or suit at law. *Clark v. Bever*, 139 U. S. 96; *McBride's Appeal*, 72 Pa. St., 480. If it is not a civil action or suit at law, it is at least a 'proceeding' within the meaning of that clause of sec. 4096, which authorizes the taking of the 'deposition at the instance of the adverse party, in any action or proceeding'."

23. And it is expressly held that sec. 4096, for such adverse examination is applicable in the trial of a claim in the county court, and that the examination may be had for such purpose before a court commissioner as in other cases.

—*Frawley v. Cosgrove*, 83 W., 441, 443.

24. The clause of the statute for "oral interrogatories", applies "to every examination under sec. 4096, whether before or after issues joined, or within or without the state", and the applicant has a right to insist on such oral examination of a non-resident party.

—*Neeves v. Gregory*, 86 W. 319, 320.

25. On discovery, under sec. 3825, in the county court, "there is no remedy to enforce its delivery" but "another action must be brought for its recovery, in a court of general jurisdiction", for the property sought. *Saddington's Est. v. Hewitt*, 70 W. *supra*. See also CONCURRENT JURISDICTION.

—*Meyer v. Garthwaite*, 92 W. 571, 577.

26. Party examined "would have no right to offer the deposition so taken in the first instance." See DEPOSITIONS.

—*Wunderlich v. Palatine F. I. Co.*, 104 Wis., 382, 385.

27. The admission of depositions of mere employees of a defendant corporation, on adverse examination under sec. 4096, as amended by ch. 244, L. 1901, offered by plaintiff, and "read against the objections of the defendant", the witnesses being "present in the court", was held error, the rule of *Meier v. Paulus*, 70 W. supra, applying only to a "party" as "admissions".

—*Hughes v. C. St. P. M. & O. R. Co.*, 122 W. 258, 269.

28. A plaintiff may be examined "as an adverse party, under sec. 4096, in the proceedings instituted by the plaintiff to compel the defendant to produce its books and papers for inspection or to furnish foreign copies thereof", under sec. 4183.

29. As to adverse examination before issue joined, "the word 'plead' as thus used in the statute (sec. 4096), is not limited to a complaint, answer, or reply, but may extend to a claim urged in defense of a proceeding instituted by either party in aid of an action or defense, and which may be put in issue and tried".

—*Ellinger v. Equitable L. A. Soc.*, 125 W. 643, 646.

30. As to compelling production of private books or papers of a third party. See INHERITANCE TAXES.

—*State ex rel. Pabst B. Co. v. Carpenter*, 129 W., 180, 189.

31. An order to produce books and papers under sec. 4183, should be vacated "if the prima facie showing made in the moving papers for such order, that such books were in the possession or under the control of the plaintiff, was fully rebutted".

32. "So an unqualified credible denial" of the allegations of the "petition as to such possession and control necessarily constituted a full answer thereto, and called for a vacation of the order as requested". (Cases)

33. It was not "the duty of appellant, if he did not have control of the papers and records, to gain such control, since he was the rightful custodian, for the purpose of complying with the order", (*Bradstreet v. Bailey*, 4 Abb. Pr. 233),

34. Though there would be "some basis to rest upon," if the papers had "been shown to have come to appellant's possession", to require him to "produce them or show what had become of them". (Cases).

—*Schlesinger v. Ellinger*, 134 W. 397, 400.

35. "An action in equity by" an administratrix, "for a discovery of" estate property "and for an accounting", where she "alleges her

ignorance of the amount, the condition, and the nature of the estate” “withheld by the defendants under a claim of ownership,”

36. Was held properly instituted “in the circuit court during the pendency of the administration of the estate in county court.

37. Though discovery in the county courts may be had under such circumstances pursuant to sec. 3825,

38. Yet the necessity of bringing an action, either at law or in equity” “to enforce delivery or restoration”, “results in such circuitry and multiplicity of action that it is in itself sufficient grounds for suing in equity. (Cases)”.

39. When the circuit “court has entertained the cause it should retain it to settle the rights of all the parties interested in the litigation.

40. This necessarily entitled defendants to litigate their claims respecting the allowance of credits for any sums they claim to have paid the heirs of the decedent out of the estate which came into their hands,

41. And for any other sums they have properly disbursed in payment of claims against the deceased or his estate”. *Gianella v. Bigelow*, 96 W. 185 (See CONCURRENT JURISDICTION).

42. It is “appropriate” “to make such persons parties to the action and to litigate the question of his right thereto, if it is controverted by any interested party”.

43. Proof from the county court may “be adduced” for such determination, if available, or the action held “in abeyance until such facts may be shown” from the county court proceedings.

44. Where “the proof discloses that the property for which recovery is sought was held separately by the two defendants”, the judgment should find “separate liability”, and not joint.

—*Eisentraut v. Cornelius*, 134 W. 532, 537.

45. “A party residing in a foreign country is ‘without the state’ and comes clearly within the statutory provision”, for adverse party examination under sec. 4096.

46. The general provisions of secs. 4110, 4113, 4114, “and the rules of court thereunder”, providing “that depositions taken in foreign countries shall be taken by commission”, and “written interrogatories”,

47. And “the provision in sec. 4096, requiring depositions thereunder without the state to be taken in the same manner that other depositions are taken”,

48. Do not “over-ride the special provision of sec. 4096, to the effect that in taking a deposition thereunder ‘the party examining shall in all cases be allowed to examine on oral interrogatories’,”

49. And mean the taking of such adverse examinations in foreign countries “in the manner other depositions may be taken without the state as provided in sec. 4110, which is either on oral interrogatories or by commission”. *Neeves v. Gregory*, 86 W. supra.

50. “Letters rogatory were issued to ‘any judge or tribunal of the city of Geneva having civil jurisdiction’,” to issue process and compel

attendance, and it was held "within the discretion of the trial judge to order that such letters be issued". —*Hite v. Keene*, 137 W. 625, 626.

51. "The term 'adverse party' used in this section (4068) means a party whose interests are adverse to those of the party seeking to call him, and the fact that both may be named in the pleadings as plaintiffs or defendants is immaterial." *Crowns v. Forest L. Co.*, 99 W., 103.

52. "Where a party is properly called under the statute for cross-examination his counsel has no right to re-examine him at the close of such cross-examination." "Counsel can call him as his own witness at the proper time, and then examine him fully upon all the issues." ("Modified" by *Guse v. Power & M. M. Co.*, 151 W. post).

—*O'Day v. Meyers*, 147 W. 549, 557.

53. It is held that the governor of the National Home for soldiers at Milwaukee, may properly be cited to submit to an examination in county court as to the effects of a deceased inmate of the home.

54. As the governor was "obliged to comply with the order or suffer the penalties imposed for failing to do so", "he was an aggrieved party" under sec. 4031, and the order appealable. (Cases).

—*Mallory v. Wheeler*, 151 W., 136, 144.

55. Where plaintiff called defendant's employee for cross-examination under sec. 4068, "the defendant has a right to re-examine such witness immediately after the examination by plaintiff's counsel as to all matters tending to explain or qualify the testimony already given,

56. But not as to new matters not brought out by plaintiff's counsel and constituting part of the defendant's defense.

57. So he may ask the witness questions proper for the purpose of impeachment upon a statement that he does not thereafter intend to make the witness his witness.

58. The scope of such re-examination is largely in the discretion of the trial judge,

59. But it should not be so extended in any case as to interject the defense into the plaintiff's case at this stage of the hearing.

60. So far as *O'Day v. Meyers*, 147 W. supra, may be understood to the contrary, it must be deemed modified by this decision".

—*Guse v. Power & M. M. Co.*, 151 W. 400, 406.

61. Sec. 4096 is "remedial" and "to be liberally construed". (Cases). On "examination before issue joined", "it is not necessary that facts sufficient to constitute a cause of action be stated" in the affidavit.

62. It is "sufficient to show that plaintiff may be entitled to recover", and he need not "know that a cause of action exists. (Cases)".

63. A "counter affidavit" which "denies some of the allegations of the plaintiff's affidavit", "is not sufficient to defeat the examination

based upon an affidavit made by the plaintiff in compliance with the statute. (Cases).

64. True, if the affidavit of plaintiff negatived the existence of a cause of action the examination would be denied. (Cases)".

—*Sullivan v. Ashland, L. P. & St. R. Co.*, 152 W. 574, 578.

65. The principles of *Guse v. Power & M. M. Co.*, 151 W. supra, re-stated, followed, and violation thereof held reversible error.

—*Adams v. Bucyrus Co.*, 155 W. 70, 75.

66. The "examination under sec. 4096 is in the nature of a cross-examination.

67. The statute has been given a liberal construction", "so as to accomplish full disclosure".

68. "The examination of the witness" is "subject to the same rules as that of any other witness.

69. The only restriction being that he could not be compelled to disclose anything not relevant to the controversy". (Cases).

70. "Discovery under sec. 4096 is broader than in equity", and production of "physical objects" may be required. Points discussed and determined. —*Horlick's M. M. Co. v. A. Spiegel Co.*, 155 W. 201, 208.

71. While "a witness cannot invoke the privilege",—as to "his giving incriminating evidence",—"for the purpose of avoiding civil liability", (sec. 4077), he cannot be compelled to answer in a civil action where his answer might subject him to liability in a criminal action.

72. "While the opinion of the witness" as to the effect of his answer as to tending "to criminate him is not conclusive upon the trial court,

73. Yet the witness should not be compelled to answer it unless it appears reasonably clear that the answer, whatever it may be, can have no such effect. (Many cases). —*Karel v. Conlan*, 155 W. 221, 225.

74. The evidence of a defendant "examined at the instance of the" adverse party under sec. 3825, when offered by the defendants, "was properly excluded, we think, under the rule of *Maldaner v. Smith*, 102 W. 30 (See DEPOSITIONS)." —*Hilton v. Rahr*, 161 W. 619, 624.

75. In an adverse party examination under sec. 4096, it is held the party "could not be compelled to answer" questions tending to show "that he was guilty of criminal violation of the primary law".

—*State ex rel. Schumacher v. Markham*, 162 W. 55, 56.

76. "A guardian ad litem is not an agent of the minor within the meaning of" sec. 4096, and while "technically a party", "still the real party in interest is the minor";

77. And though "the guardian ad litem is the father of the minor, and the latter is of such tender years that he cannot be examined", yet it is held he is not "subject to examination under sec. 4096".

78. "A general guardian of a minor is no more his agent within the meaning of the statute than is the guardian ad litem, and cannot be examined as such, or as a party. *O'Shea v. Wilkinson*, 95 Cal. 454".

—*Rohleder v. Wright*, 162 W. 580, 581.

DISMISSAL

See DISCONTINUANCE.

DISQUALIFICATION.

See COUNTY JUDGE.

DISTRIBUTION.

See DESCENT AND DISTRIBUTION. JUDGMENTS.

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1. Divorcé cuts off dower. See DOWER.

—*Burdick v. Briggs*, 11 W. 126, 132.

2. "After the relation of coverture has ceased, the divorced wife is competent to prove a communication not private or confidential, but which, from the nature of the case, the husband must have intended should be made public".

—*Crook v. Henry*, 25 W. 569, 572.

3. "It is an undoubted general principle of the law of divorce in this country, that the courts, either of law or equity, possess no powers except such as are conferred by statute". —*Barker v. Dayton*, 28 W. 367, 379.

4. A divorced wife after the death of her husband "can only enforce payment of her judgment for alimony out of the estate of the judgment debtor, by proceeding in the manner prescribed by the statutes in that behalf".

5. (And this is probably not "by proceeding as for a claim against the decedent's estate" as indicated in the syllabus of this case, but "the case remains within the continuing jurisdiction" of the court which rendered the judgment, and the wife "has an undoubted right to revive it (the action) against the personal representatives of the deceased husband", as stated in *Guenther v. Jacobs*, 44 W. 354, 358).

—*Appeal of Ernestine Guenther*, 40 W. 115, 119.

6. An attorney cannot recover in an action against the husband, for services performed for his wife in a divorce action, there being no "express promises" to pay. * —*Clarke v. Burke*, 65 W. 359.

7. There being nothing in the judgment to the contrary, the father is primarily and the mother secondarily, liable for the support of the minor children as before the divorce.

—*Zilley v. Dunawiddie*, 98 W. 428, 433.

8. "On a final division of property between the parties to a divorce action, regardless of the character of the decree, as to whether limited or absolute, the relations of the parties as to property shall thereby be forever terminated except as recognized by the decree." Sec. 2369.

9. Independent of the statute, a decree of division of the estate, "accepted by her, operates by way of estoppel, upon her surviving the divorced husband, to lawfully bar her right of dower and all other widow's rights of property." So held, in a divorce from bed and board.

—*Gallagher v. Gallagher*, 101 W., 202, 207.

10. There was "no legal impediment to the marriage of the testator" in Wisconsin, though being divorced in Louisiana, where such marriage was prohibited. Such prohibition "has no extra-territorial force".

—*Frame v. Thormann*, 102 W. 653, 672.

11. "While" "the divorce judgment" "stands unimpeached plaintiff (the divorced wife) has no interest in the estate (of her former husband), and for that reason" "can maintain no action with reference thereto."

—*Uecker v. Thiedt*, 137 W., 634, 636.

12. Where after a divorce action started by the husband, the wife in her will gave property to him if he 'is my husband at my decease',

and she died after a judgment of divorce granted, but before the expiration of the year thereafter, under sec. 2374, stats. of 1911, it is held,

13. That "she meant that she gave her property to him if no divorce was granted", and that he "was not, at the time of" her death, "her husband within the meaning of the will".

14. It is indicated but not decided, "that it was the intention of the legislature that the entry of judgment should dissolve the marriage contract, subject to the conditions prescribed by the statute". (But, see subsequent admtd. of sec. 2374, by ch. 229, L. 1917, defining the effect.)

—*Rogers v. Hollister*, 156 W. 517, 523.

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1. Residence within the state is not necessary for application of the common law presumption of payment.

—*Sanderson v. Olmsted*, 2 Pin. 224.

2. The rule of transfer of personal property follows the law of the domicile of the owner.
—*Mowry v. Crocker*, 6 W. 326.

3. "The wife, for the purpose of bringing suit for a divorce, may acquire a residence separate from her husband".

—*Craven v. Craven*, 27 W. 418, 420.

4. While "the intention of the party often becomes material", and "is sometimes the decisive fact", yet "a person having already a fixed residence or place of abode cannot change it by intention merely".

5. "Mere mental resolution or determination, or the party's own affirmation that he has changed his residence, will not have the effect to change it, if there be no actual removal, or if the party continued the use and occupation of the same house and home with all the indicia and circumstances of continued residence therein".

—*Carter v. Sommermeyer*, 27 W. 665, 666.

6. The residence of a foreign testatrix at the time of her death must be averred in the complaint on a claim in an estate here.

—*Smith v. Peckham*, 39 W., 414, 418.

7. "We use the words 'residence' and 'domicile' interchangeably, as synonymous terms under our statute. *Hall v. Hall*, 25 W. 600. And, in the language of Shaw, C. J., (3 Gray, 493, 495), we say:

8. 'The general rule, and, for practical purposes, a fixed rule, is, that a man must have a habitation somewhere; he can have but one; and therefore, in order to lose one, he must acquire another. This is the test, the practical test;

9. One of the fixed rules on the subject is this: that a purpose to change, unaccompanied by an actual removal or change of residence, does not constitute a change of domicile'."

10. The residence of a party "for the purpose of taxation" for many years at O. "must be deemed to have continued until he had acquired a new residence elsewhere. Abandonment of O. with the intention of taking up his residence in C., and even the removal of his property therefrom, is not sufficient, so long as he did not actually acquire a new residence or domicile there. This is a just, wise rule, founded in reason and supported by authority".

—*Kellogg v. Supers. Winnebago Co.*, 42 W. 97, 107.

11. A husband can change his domicile, and change his homestead and his wife's rights therein, without her consent. See HOMESTEAD.

—*Godfrey v. Thornton*, 46 W. 677, 683.

12. "Where a person takes up his abode in a county with the present intention of remaining there, where he expects to reside, where he would exercise his political right to vote, if an elector, where his personal

property would be taxable in the county, he might justly be said to have a 'proper residence'".

13. "That is, the place where a person has voluntarily fixed his abode, not for a mere special or temporary purpose, but with the present intention of making it his home", is his 'proper residence' or 'acquired domicile'. See *Hall v. Hall*, 25 W. 600; *Dutcher v. Dutcher*, 39 W. 651.

—*State ex rel. Wood Co. v. Dodge Co.*, 56 W. 79, 86.

14. Personal estate is governed by the law of the domicile; real estate by *lex loci*. See ANCILLARY PROCEEDINGS. CONSTRUCTION OF WILLS.

—*Van Steenwyck v. Washburn*, 59 W. 483, 510.

15. "The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated,

16. And this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. (Cases)".

17. The last foregoing paragraph applies to personalty also, the validity of a bequest thereof, however, "must be governed by the law of the testator's domicile at the time of his death. (Many cases)".

18. "The same rule, as to the law of the testator's domicile, governs in the interpretation, or construction of wills. Story, *Conf. of Laws*, §§ 479a-479c; *Van Steenwyck v. Washburn*, 59 W. Supra". Quoting from Story, wills "are supposed to speak the sense of the testator according to the received laws or usages of the country where he is domiciled".

19. "The general rule is the same respecting real estate whenever the object is merely to ascertain the meaning and intent of the testator from the language employed in the will. *Ibid*".

—*Ford v. Ford*, 70 W. 19, 44.

20. Where the county court, and the circuit court and a jury therein, found that the testator was a resident of S. county, it is said: "We do not feel authorized to set aside such determination merely because the testator's property and person has been placed under guardianship in C. county" about three and one-half years before his decease, "but which guardianship, so far as his person was concerned, was practically abandoned" about fifteen months before his decease, "if not before,"

21. And as "such jurisdiction cannot be contested in any other action or proceeding, such determination must be regarded as conclusive."

—*Will of Slinger*, 72 W. 22, 26.

22. "In contemplation of law, the domicile of the husband is the domicile of the wife; his homestead is her homestead;

23. And its character is not changed because the wife, for a sufficient reason, or for no reason, has seen fit to leave it and live separate from her husband." —*Herron v. Knapp, S. & Co.*, 72 W., 553, 557.

24. On his acts as to his property, and change of residence a year and one-half or more before decease, and statements in regard thereto, the testator, a former resident of Louisiana, was held to have "acquired a domicile and residence" here.

25. The circumstances, including an opportunity to legitimize and legalize his family relations, denied him where he was, stimulated "a desire to change his residence and domicile as he did. In doing so, he was merely exercising the right of an American citizen.

26. To effect the change, it was only essential that such removal should be accompanied by an intention to thereafter make W. his permanent residence or home. State ex rel. Wood Co. v. Dodge Co., 56 W. 79; Kempster v. Milwaukee, 97 W. 343; (other cases).

27. Even if there was an intention to return at some future indefinite time, yet that would not have prevented the change from being effectual. Holmes v. Greene, 7 Gray 299; Sleeper v. Paige, 15 Gray 349; Kempster v. Milwaukee, supra; Jacobs, Domicil, §§ 159, 171."

28. "The mere fact that he went there with his family for the winter", to his former place of residence, and died there, "or that he kept a bank account there, or that" he desired to be buried there where an expensive tomb had been erected, most of his children residing there, "is not inconsistent with such change of domicile".

29. As to the effect of an unnecessary decree as to domicil in a proceeding in rem like this. See FOREIGN JUDGMENTS.

—*Frame v. Thormann*, 102 W. 653, 666.

30. "The mere act of voting at a particular place is not conclusive on the question of residence." See also HOMESTEAD.

—*Minnesota S. Co. v. McCrossen*, 110 W., 316, 324.

31. "Residence is not lost by leaving it for temporary purposes, where the intention remains to return when such purposes are accomplished". (Cases; also Kellogg v. Suprs., 42 W. supra, stated.)

32. "Residence signifies a person's permanent house and principal establishment, to which whenever he is absent he has the intention of returning. (Citation)". See also PRESUMPTION OF DEATH.

—*Miller v. Sovereign, Camp W. O. W.*, 140 W. 505, 508.

33. "The general rule is that a man must have a habitation or domicile somewhere and that he can have but one at the same time for one and the same purpose, and that in order to lose one he must acquire another. *Miller v. Sovereign, Camp W. O. W.*, 140 W. supra; Opinion of the Justices 5 Met. 587, 589.

34. Every person can fix his own residence provided he makes it reasonably permanent by intending to return thereto when a temporary job is finished. (Cases):

35. Attendance at an institution of learning for the sole purpose of

acquiring an education is not of itself sufficient to establish the student as an elector. (Cases).'' Much depends upon whether the student is ''emancipated' from his family so far as looking to them for a home or a place to which to return or for means of support. (Many cases).''

—*Seibold v. Wahl*, 164 W. 82, 85.

DOWER.

See also WIDOW.

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1. "It seems that a divorce from the bonds of matrimony cuts off the wife's right of dower". —*Burdick v. Briggs*, 11 W. 126, 132.

2. The widow is entitled to "dower in the homestead, as well as in the residue of the real estate". —*Bresee v. Stiles*, 22 W. 120, 126.

3. "The wife has an interest upon which an action may be maintained, where an attempt has been made to defeat her right by act of gross fraud" as to "an inchoate right of dower".

—*Madigan v. Walsh*, 22 W. 501, 504.

4. "The right of dower before assignment, being an inchoate right, cannot be so transferred by the widow to a stranger as to enable him to set it up as a defense to an action of ejectment by the heirs-at-law".

—*Howe v. McGivern*, 25 W. 525, 532.

5. The bringing of an action for dower "is a sufficient demand", and "the right to maintain the action does not depend upon a previous demand therefor".

6. "The only effect of the want of such previous demand" is relief "from the liability to pay damages for withholding such dower interest".

7. A sheriff's deed purporting only to convey a husband's interest, does not include the wife's "dower interest, and hence cannot be made the basis of an adverse holding of her dower interest in the premises, so as to bar her right of action to recover the same after the lapse of ten years", under the statute. —*Cowan v. Lindsay*, 30 W. 586, 588.

8. "The circumstances that Mrs. F. (the widow) receives an allowance out of the personal estate of her deceased husband pending administration, does not destroy or impair rights accruing her by virtue of her right of dower in the real estate of which he died seized."

9. "A dower interest is a continuation of the estate of the husband, and is held of him by appointment of law. 1 Pick. 189; 4 Me. 67.

10. Hence, although certain proceedings may be necessary to ascertain and fix the extent or amount of the interest, when that is done, the interest must necessarily vest, by relation or otherwise, from the death of the husband."

11. "The law greatly favors dower, and no widow should be deprived of it in lands owned by her husband during coverture, without clear authority of law.

12. The same rule applies to mesne profits which grow out of and are the incident of dower."

13. "Although a right of dower, before assignment, may be but an inchoate or imperfect right, and, strictly speaking, not an estate in the land, (*Howe v. McGivern*, 25 W. 525, *supra*), yet, the right being admitted (as it is in this case,) no good reason is perceived why the respondent (widow) should not have the mesne profits which the law gives her as incident to the right".

14. "Probably she could only recover the profits of the heirs in an action for her dower; but when they are in the hands of the administrator, no good reason occurs to us why he should not be directed to pay them over to her".
—*Farnsworth v. Cole*, 42 W. 403, 405.

15. A wife's right to defend, in a mechanic's lien suit, on account of inchoate dower and homestead rights, apparently upheld, but later criticised. See HOMESTEAD.
—*Weston v. Weston*, 46 W. 130.

16. "In an action for dower" proof of actual solemnization of a marriage is not required, but the proof must show a lawful marriage. See MARRIAGE.
—*Williams v. Williams*, 46 W. 464, 475.

17. "The husband cannot, by his own act, divest his wife's right of dower, because it is an estate". See HOMESTEAD.
—*Godfrey v. Thornton*, 46 W. 677, 683.

18. The foregoing quotation from *Godfrey v. Thornton*, *supra*, is held to be "correct in all cases where the statute purports to secure dower to the widow"; but it seems not to apply to the case of a non-resident wife.

19. "The right of dower in lands within this state, while it remains inchoate—a mere expectancy,—and until it becomes consummated by the husband's death", is under legislative control except "that there can be no distinction 'between resident aliens and citizens'," under the constitution (sec. 15, art. I), which "provides that 'no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property.'"

20. But there may be "discrimination against those who are neither citizens nor residents", and the statute (sec. 2160) providing "dower only of lands of her husband, being in this state, of which he died seized," in case of a non-resident widow, is constitutional.

21. "The non-residence intended by this statute is at the time of the death of the husband, and not at the time of the conveyance of the land." (Overruled, in *Ekegren v. Marcotte*, 159 W. post).

22. "A woman who is neither a citizen nor resident of this state, at the time of her husband's death, is not entitled to dower in lands within this state, not being a homestead, which he conveyed during their marriage without her signature". —*Bennett v. Harms*, 51 W. 251, 255.

23. Notwithstanding the deed of release during coverture, set forth in the will, the widow also is entitled to her election as to personalty, "and the testator was powerless to exclude her therefrom by the terms of his will".

24. But "if she insists upon her right to a share of the personal estate under the statute, she must account for and be charged with what she has received by the provisions made for her in the will.

25. And, for that purpose, we must hold that the \$500 mentioned in her deed of release, with the express reference to it in the will, must be construed as a provision made for her in the will". See also *Wilber v. Wilber*, 52 W. post. —*In re Mary E. Wilber*, 52 W. 295, 297.

26. "The county court has power to assign dower to a widow only in cases where her right thereto 'is not disputed, etc.' Sec. 3869. Here the plaintiff's right was disputed, and hence she was forced to proceed in the circuit court".

27. "The right of election, being secured to the wife by statute, cannot be taken away from her by deed of release to her husband during coverture, nor can such right be taken away from her by the will of her husband". —*Wilber v. Wilber*, 52 W. 298, 300.

28. It is held that the question of the validity of the widow's marriage, and to bar dower, cannot be determined in a suit of the administrator on "a bill quia timet to clear the title" to the intestate's realty, needed to pay debts; nor under Sec. 3832 as to recovery of fraudulently conveyed realty.

29. It seems that "the question as to the validity of the marriage might be raised on an application for a license to sell the real estate to pay debts", in the county court,—"to determine a disputed right to dower". —*Paige v. Fagan*, 61 W. 667, 668.

30. A widow can "claim dower in lands which she joined her husband in conveying to her daughter, but which conveyance has been set aside as fraudulent and void as to her husband's creditors": (Approved in *Huntzicker v. Crocker*, 135 W. post).

31. The question being "a new one in this court", and "as the prevailing current of authority supports the right in a case like this, we are disposed, as we have said, to yield to that authority."

32. "We think that an inchoate right of dower is not a future estate, within the meaning of Sec. 2034.

33. The wife's interest is contingent, does not become vested until the death of her husband, and cannot be conveyed or relinquished except in the manner pointed out by the statute. *Wilber v. Wilber*, 52 W. supra.

34. The wife cannot, during coverture, convey or release her inchoate right of dower to one having no interest in the land except that which he derived from her release, or to a stranger to the title. (cases)".

35. The wife is held to "recover damages for the withholding of her

dower", "from the time of making demand", "in writing that her dower be assigned to her",—the husband's interests in the lands having been sold by the assignee in bankruptcy.

36. "We think the statute (sec. 2175) does not limit the widow in recovering damages to the cases where the husband died seized."

37. Construing all the statutes together, "the intent is manifest to allow the widow to recover damages against the alienee of the husband, and against one who has become vested of the husband's title by operation of law. See *Thrasher v. Tyack*, 15 W. 256; *Cowan v. Lindsay*, 30 W. supra".

—*Munger v. Perkins*, 62 W. 499, 502.

38. Where the prospective husband on the day of, but before, his marriage, deeds his real estate to his father, from whom he first obtained it, for the purpose of preventing the vesting of his wife's inchoate dower therein, such deed after the husband's death, was held fraudulent and his wife entitled to dower in the premises from the time of filing her answer.

—*Jones v. Jones*, 64 W. 301.

39. "It seems to be the general policy of the statutes cited, not only to allow a money judgment by way of damages for withholding dower,

40. But, on the distribution of estates subject to dower, to allow, with her consent, a gross sum in lieu of dower."

41. "That a widow entitled to dower may in equity have a gross sum in lieu of dower, where the property has been actually sold and converted into money, would seem to be elementary. (Citations).

42. The same would seem to be true where the property is held in trust, and sold by the trustee, who bids in the property for his own benefit, and the widow acquiesces in such purchase.

43. It is said, in effect, in these authorities, that in certain cases a gross sum may be accepted and allowed as compensation in lieu of dower, without any sale being made".

44. And it is here held that "the plaintiff having wrongfully withheld the widow's dower," is estopped from now not "responding in damages for the value of such dower in gross thus converted".

—*Jones v. Jones*, 71 W. 513, 523-4.

45. A defendant widow had a homestead and dower interest in parts of several lots exceeding a homestead; her son C. D., the remainderman, afterward married and died intestate leaving the mother living, and the plaintiff widow his sole heir at law, having ten days before his marriage, and without his intended wife's knowledge until after his decease, given a quitclaim deed, with nominal consideration, of the property to his mother, the same having been recorded the same day; held,—

46. "The defendant held her dower interest in the property, and a life-estate by homestead in the south half or improved portion of it. She was seized of that life-estate, and therefore C. D. (the son) did not die seized of it, and the plaintiff could have no dower in it."

47. "C. D. had the same right to convey the fee before as after the marriage. It must be the expectation of present possession and enjoyment that is defeated. Her (plaintiff's) dower in the homestead was not defeated by the deed, for she could have none in it.

48. The defendant had dower in the unimproved portion of the property. That would leave to the plaintiff one one-third dower interest in two-thirds of that."

49. "The homestead descended to the defendant as a freehold estate for life, and on the death of W. D. (her husband) she became seized of it in fact and in law. Sec. 2271. (Citations.)

50. This homestead estate of the defendant excludes the possibility of the plaintiff's dower in those lots. Sec. 2159. It is an estate in possession and actual occupancy in one alone for life, inconsistent with dower in another person. *Browning v. Harris*, 99 Ill., 456; *Hafer v. Hafer*, 33 Kas., 449".

51. "It is her (plaintiff's) dower right only that she lost by this antenuptial deed, and that is all she could recover in this case, under any circumstances," recovery here being denied.

52. "The reasonable doctrine seems now to be well established that the deed is not necessarily fraudulent if not disclosed to the intended wife, but that the facts and circumstances may be taken into consideration as to whether a fraud was actually intended."

—*Dudley v. Dudley*, 76 W. 567, 575.

53. Where the widow, sole devisee, elects, "the will immediately became inoperative as to the real estate (including the homestead), the title of which at once upon such election, if not upon the testator's death, became vested in the heirs, subject to the mother's right of dower (and homestead) and the payment of the testator's debts".

54. "And she could take free of claims for unsecured debts her dower estate in the remaining real estate", aside from her homestead rights. *Melms v. Pfister*, 59 W., 186. See also *Widow*.

—*Melms v. Pabst Brewing Co.*, 93 W., 140, 146.

55. "Where a married woman joins with her husband in a lease and he dies during the term, she is entitled to be endowed of the rent. *Herbert v. Wren*, 7 Cranch., 370". So held as to a ninety-nine year lease.

—*Ludington v. Patton*, 111 W., 208, 261.

56. "An outstanding inchoate right of dower is an incumbrance on land", (*Wright v. Young*, 6 W., 127),

57. And "is such an interest in land as will enable the wife to bring an action to remove a cloud thereon", under sec. 3186. (Cases).

58. "Where a wife simply joins her husband in a deed of his land, which deed is fraudulent and void as to creditors, her right to dower is revived as against such creditors or their assigns when such deed is set aside. (Many citations)".

59. So held and applied, though the wife "became an active participant in" the fraud. —*Huntzicker v. Crocker*, 135 W., 38, 40.

60. "Our statute gives a widow dower in all lands of which her husband was 'seized of an estate of inheritance' at any time during coverture.

61. By 'seisin' is meant a fixed vested right of enjoyment of the estate either immediately or at the termination of an intermediate estate. 1 Wash. Real Prop. (6th Ed.) § 116.

62. At common law there was no dower right in a reversion or remainder after a free-hold estate, unless the free-hold estate terminated during the life of the husband;

63. But there was dower in a reversion or remainder after an estate for years. *Ib.* § 365.

64. At common law, also, there was no dower in an equitable estate. The husband must have had legal title. *Ib.* § 374.

65. In England and in many of the United States this latter rule has been changed by statute, and dower given out of equitable estates. *Ib.* § 375.

66. Our statute, however, says nothing of equitable estates, and doubtless is to be regarded as simply giving dower out of legal estates, as was the case at common law. Sec. 2159; (citation)".

67. Dower is allowed in a "vested" estate subject to a trust for years. See VESTING OF ESTATES, ETC. —*Will of Prasser*, 140 W. 92, 96.

68. Recognizing *Will of Prasser*, 140 W. supra, it is nevertheless held that "where the husband dies seized of the full equitable title and the owner of the whole beneficial interest, with only the mere legal title outstanding in a person having no duty to perform in respect to the property, as in this case, but to convey it to the equitable owner,

69. The estate is to all intents and purposes a legal estate,—an estate of inheritance, within the meaning of the statute, in which the wife is entitled to dower".

70. And the widow "with her children in possession" "may retain such possession by virtue of sec. 3872, without having such dower assigned"; and likewise by reason "of her homestead right".

71. So held, where the husband had no paper title whatever, but was in possession and had made improvements, in compliance with "all the conditions of the gift" of the grantor.

—*Harley v. Harley*, 140 W. 282, 288.

72. A married woman living separately from her husband, held estopped from claiming dower where she had acquiesced in a void marriage of the husband to another woman. See ESTOPPEL.

—*H. W. Wright L. Co. v. McCord*, 145 W. 93, 104.

73. While the dower interest cannot be reached by the deceased husband's creditors, the curtesy interest is subject to the payment of the deceased wife's debts. See also CURTESY.

—*Schmidt v. Raymond*, 148 W., 271, 273.

74. The value of the wife's inchoate dower computed and withheld on specific performance of land contract which she did not sign. See LAND CONTRACT.

—*O'Malley v. Milier*, 148 W., 393, 394.

75. In *Ligare v. Semple*, 32 Mich. 438, "the court holds that a wife who is a non-resident of the state at the time the husband makes an absolute conveyance of land, divesting himself entirely of his seizin and estate, has no right of dower under the statutes of Michigan", from which our statute, sec. 2160, "was taken".

76. "We think it clear that the doctrine laid down in *Ligare v. Semple*, supra, is the correct doctrine and rules the instant case".

77. "So far as" *Bennett v. Harms*, 51 W. supra "holds that the non-residence intended by the statute is at the time of the death of the husband the case is overruled". "We think the 'residing out of the state' mentioned in the statute refers to the time of the conveyance".

—*Ekegren v. Marcotte*, 159 W. 539, 541.

78. Where "it was neither proven nor found that" the wife "knew the improvement" "was being made or that she consented thereto", it is held "the mechanics lien statute was" not "intended to reach an inchoate dower right and cut it off" in such case.

—*W. H. Pipkorn Co. v. Tratnik*, 161 W. 91, 96.

DRUNKENNESS.

See INCOMPETENTS.

DURESS.

See UNLAWFUL CONTRACTS.

ELECTION.

See REMEDIES. WIDOW.

EMANCIPATION.

See PARENT AND CHILD.

EMINENT DOMAIN.

See CONDEMNATION.

ENDORSEMENT.

See PROMISSORY NOTES, ETC.

ENTIRE CONTRACTS.

- Absent for short time, 6.
- Continuation services, 15.
 - Both parties to act, 16.
- Defined: as to payments, 18.
 - Difficulties arising, 23.
- Election of remedies, 27.
- Excusal of performance, 2, 3, 4, 10.
 - Prevention for cause, 17.
 - Unexpectedly impossible, 23.
 - Unseasonable service, 13, 14.
 - Wrongful discharge, 25, 26.
- Future commencement, 21.
 - Statute of frauds, 21, 22.
- Payment: refusal of part, 8.
 - At stated periods, 18.
 - End of period, 9.
- Performance: general rule, 1, 17.
 - Act of God, law, party, 2, 10.
 - Recovery quantum meruit, 4.
 - Sickness or death, 3.
- Personal services, 3, 5.
 - Sickness of wife, 5.
- Quantum meruit, 4.
 - Contract being void, 22.
 - Refusal to pay part, 8.
 - Wrongful discharge, 25, 26.
- Sale contracts, severable, 28.
 - Absence of intention, 29.
- Special contract for work, 11, 12.
- Statute of Frauds, 21, 22.
- Violent storm destruction, 24.
- Void in part, 7.
 - Realty and personalty, 30.
 - Statute of Frauds, 21.
- Waiver: receiving back, 6.
 - Consent to discharge, 19.
 - Letters as evidence, 20.
 - Of remedies, 27.
- Wrongful discharge, 25, 26.

1. "The general rule doubtless is, that when a contract is entire, operating as a condition precedent, it is necessary for a party to show full performance on his part before he can maintain an action upon it."

2. "The authorities, however, recognize certain exceptions to the rule, as where the performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party".

3. "And where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it. (Cases)."

4. "In other words, sickness or death is generally regarded as an act of God in such a sense that it excuses the non-performance, and a recovery is allowed upon a quantum meruit".

5. In this case the services were to be that of a husband and wife for a year, "he upon the farm and she in the house, for \$300". Held, to be an entire contract for personal services, and that upon the wife stopping work at the end of about four months to be confined that "the sickness, or anticipated sickness, of the wife furnished no excuse for the failure to perform the contract", and that "the case does not come within the reason of the rule that sickness excuses".

—*Jennings v. Lyons*, 39 W. 553, 556.

6. Where "an employe for a fixed period", "absents himself for a short time", his employer waives the right to forfeit, where he receives the employe "back into his service without objection". See *SERVICES*.

—*Bast v. Byrne*, 51 W. 531, 535.

7. "The whole contract, being entire and indivisible, falls to the ground", the part as to oral realty sale being void. See *QUANTUM MERUIT*.

—*Clark v. Davidson*, 53 W. 317, 321.

8. Where the contract was that the plaintiff's "son was to work on the farm of the defendant six months from April 1st for \$16 per month", and "the son worked under this contract for four months only, and then left the service of the defendant solely on the ground that the defendant refused to pay him for such four months, or from month to month," this was held to be an entire contract, and plaintiff was not entitled to recover quantum meruit, or otherwise.

9. The contract "was an entirety, and no recovery could be had without proof of full performance, or performance excused, and the compensation was to be paid only at the end of the six months, on full performance by the plaintiff".

10. No recovery could be had on the contract without showing, "that the son left the service of the defendant, not because he refused to pay him from month to month, but by the fault of the defendant in some other way, or by the act of God, and by such act of God as the plaintiff could not have reasonably anticipated when he entered into the contract". (Authorities discussed). p. 470.

—*Diefenback v. Stark*, 56 W. 462, 463.

11. A special contract to work "for the period of seven months from April 8, 1881, for the sum of \$14 per month", is held to be entire.

12. "Being entire, the plaintiff could only recover upon showing full performance on his part, or some valid excuse for non-performance. *Jennings v. Lyons*, 39 W. *supra*; *Diefenback v. Stark*, 56 W. *supra*".

13. A request to perform "unseasonable service would not of itself justify the servant in quitting the employment.

14. "Nor would the refusal to perform such unseasonable service justify his discharge."

—*Koplitz v. Powell*, 56 W. 671, 672.

15. "Where one serves under a contract for an entire year, and continues his services into the next year without any new arrangement, it will be presumed that both parties consent to the continuance of the service for another year" on the same terms.

16. The contract "could not be changed by one of the parties without the consent of the other".

—*Dickinson v. Norwegian Plow Co.*, 101 W., 157.

17. "The rule that an action cannot be maintained by an employee upon an entire contract without first fully performing on his part, does not apply where such performance is prevented by the employer, though such prevention be for cause". *Diefenback v. Stark*, 56 W., *supra*; *Meehem, Agency*, 635. *Contra: In England*.

18. "The rule in England and this country is thus stated by Wood on Master & Servant, at sec. 84: 'If the contract is for a term, although the rate of compensation is at so much a day, week, or month, yet if the contract is silent as to the time of payment, it is entire and indivisible, and full performance must precede the right of recovery', in the absence of circumstances showing that the contract was not understood by the parties as entire". Cases discussed, and rules stated.

—*Hildebrand v. American F. A. Co.*, 109 W., 171, 178.

19. Where the employe was discharged before the completion of an alleged binding contract for a three-year term, and subsequently made a claim for wages for the balance of the term, but "consented to the termination of his relations with defendant (employer) when he was discharged", he is not entitled to recover.

20. Letters written subsequent to his discharge, and before the end of the term were held properly received in evidence as admissions, on the acquiescent termination of the employment.

—*Bell v. Gund*, 110 W., 271, 272.

21. An oral contract to work for a year for a definite sum, to begin at a date subsequent to the making of the contract, is void under sec. 2307, and "a part performance did not relieve the difficulty", furnishing no ground either for action or defense.

22. "In such case the parties must stand as though no express contract was made, and the plaintiff may recover upon a quantum meruit for the work done upon an implied promise of the defendants to pay what the services are reasonably worth." *Salb v. Campbell*, 65 W., 405; (other cases. See QUANTUM MERUIT)".

—*Draheim v. Evison*, 112 W., 27, 29.

23. "He who contracts to perform an entire work at an entire price can recover no compensation without completion of the work, although it becomes unexpectedly difficult, or even impossible, without fault of the other party. (Many cases)".

24. Where under an oral contract to build a barn for a given sum, the owner to furnish the materials, the barn when partly completed is destroyed "by an extraordinarily violent storm", and was rebuilt and completed, without a new contract as to price, recovery can be had only for the original sum,—the case being distinguishable from one to "merely do work upon the building belonging to the other party".

—*Vogt v. Hecker*, 118 W., 306, 308.

25. An employe under an entire contract, wrongfully discharged, can "declare the contract rescinded, and recover upon quantum meruit for any services actually rendered;

26. Or bring his action at any time before or after the expiration of the prescribed period of service fixed by the contract for the damages actually resulting to him from the breach".

27. "He was required to elect which remedy he would pursue, and whichever one he adopted was in itself a waiver of the other." (Citation).
—*Ornstein v. Yahr & L. D. Co.*, 119 W., 429, 434.

28. "Contracts for the sale of goods like the present",—"a quantity of gloves of different kinds at fixed prices",—"which are naturally severable, will not be held entire contracts,

29. In the absence of express or implied provision to that effect in the contract, or persuasive circumstances showing the intention of the parties to make it entire".

—*Nat. Knitting Co. v. Bouton & G. Co.*, 141 W. 63, 65.

30. As to part performance as to the realty of a void entire contract for the sale of realty and personalty, entitling performance of the whole. See FRAUDS, STATUTE OF. PAROL. SPECIFIC PERFORMANCE.

—*Kipp v. Laun*, 146 W. 591, 597.

EQUITABLE CONVERSION.

Date of death, back to, 3, 17.

Deprive of vested rights, 38.

Discretionary authority, 13, 22.

"As soon as practicable", 14.

General purposes, 20.

Void in part, 19.

Implied conversion, 9.

Apparent from will, 11.

Express and implied, 29.

Necessary implication, 12.

Plan or purpose fails, 16.

Treated as though done, 10.

Mandatory: not in power, 2.

Execution difficult, 24.

Express or implied, 23.

Sale intended, 2.

Money for all purposes, 17.

Though not necessary, 18.

Phrases construed:

"As soon as practicable", 14.

Distributed as money, 28.

Division after decease, 26.

Invested in fund, 21.

Phrases construed—continued.

"Pay from time to time", 30.

"Payment", use of, 25.

"Pay over and deliver", 1.

Property "put on interest", 27.

"Within five years", 15.

Void devise, 15.

Principle of doctrine, 4.

Devise with direction, 5.

Money with direction, 5.

Perpetuity statute, 7.

Taking place at death, 6.

Really a fiction, 34.

Deem done which ought, 36.

No real conversion, 35.

Not in fact become so, 37.

Realty with personalty, 8.

Trust for masses, 31.

Unnecessary to carry out, 33.

Though if necessary, 32.

Void: devise, 15.

Particular purposes, 19.

Part of general, 20.

1. A general power of sale, with the term "pay over and deliver" used as to the distribution, is held to imply an equitable conversion.

2. "When a will contains a power of sale, not mandatory in terms, but it is apparent from the general scope and tenor of the will, that the testator intended all his realty to be sold, the power of sale will be held imperative, and the doctrine of equitable conversion applied.

3. Courts of equity will deal with the estate as personal from the death of the testator. *Chandler's appeal*, 34 W. 505 (See CONSTRUCTION OF WILLS); *Dodge v. Pond*, 23 N. Y., 69; *Craig v. Leslie*, 3 Wheat. 563". See also CHARITABLE TRUSTS. CONSTRUCTION OF WILLS.

—*Dodge v. Williams*, 46 W. 70, 97.

4. "The principle on which the doctrine of (equitable) conversion rests is that whatever, in a will or other instrument, is directed or agreed to be done, is in equity considered as actually performed. (Cases).

5. A conversion may take place where, by a will, land is devised or money given to a trustee, with directions in the one case to sell the land and pay over the proceeds to the beneficiary, and in the other, to invest the fund in the purchase of land to be conveyed to him. (Citations).

6. The general rule is to date the conversion in these cases as taking place on the death of the testator, unless there is something special in the power of sale making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not.

7. But under our statute the execution of the power cannot be made to depend on any event which might possibly carry it beyond" the limitation of the statute of perpetuities. (Cases).

—*De Wolf v. Lawson*, 61 W. 469, 478.

8. Where a will authorizes executors as trustees to purchase real estate "with the proceeds of the personal property, it would seem that the real estate so purchased must be treated as real estate after it is so purchased". N. Y. cases, and *Dodge v. Williams*, 46 W. supra.

—*Scott v. West*, 63 W. 529, 558.

9. Where, except as to a few specific bequests, "the will treats the entire estate as personal property", "the direction to so pay in money gave to the executors, by necessary implication, the authority to convert all real estate not so specifically devised into money. *Dodge v. Williams*, 46 W. supra; *Scott v. West*, supra; *Going v. Emery*, 16 Pick. 107.

10. Such real estate, therefore, must be treated the same as though it were personal property, on the doctrine of equitable conversion. (Cases)". See also CHARITABLE TRUSTS.

—*Webster v. Morris*, 66 W. 366, 399.

11. While it has been held that the direction must be positive and direct, "the better opinion seems to be as in effect held in *Dodge v.*

Williams, 46 W. *supra*, that whenever a direction to convert is apparent from the whole will, whether expressed or implied, then the duty and obligation to convert is imperative, and the doctrine of equitable conversion applies. (New York cases)."

12. "But the will must, in terms or by necessary implication, disclose an intent to convert, in order to sustain the theory of equitable conversion. *Hobson v. Hale*, 95 N. Y. 605".

13. Where a discretion is given to either sell or use for other purposes, "this mere discretionary authority can in no sense operate as an equitable conversion,—certainly not until an actual conversion should in fact occur".

14. But a "direction to so convert is not prevented from being imperative by adding 'as soon as practicable after' his death, and thus giving some discretion as to the time or times of such conversion".

—*Ford v. Ford*, 70 W. 19, 47.

15. Where a will directs "the executors to dispose of the testator's real estate within five years after his death", though part of such realty is covered by a void devise, "the doctrine of equitable conversion will (therefore) apply, as laid down in *Dodge v. Williams*, 46 W. *supra*. The property will be treated as personal property from the death of the testator." —*Milwaukee Protestant Home v. Becher*, 87 W. 409, 414.

16. Equitable conversion is not implied when the particular "plan or purpose fails". See POWER. —*McHugh v. McCole*, 97 W. 166, 175.

17. A direction to convert the real estate into money for all purposes, "worked an equitable conversion" of the realty into personalty to be treated as such "in law and in effect, as of the date of the death of the testatrix."

18. "As said in *Given v. Hilton*, 95 U. S., 591, the blending of real estate and personal property in one fund for all the purposes of the will is generally regarded as evidencing intent that the whole estate shall be treated as personal property even though a necessity therefor does not exist, but such evidence is not conclusive on the question."

19. When the direction for conversion is "in aid of a particular" but void purpose, as in *McHugh v. McCole*, 97 W., *supra*, the doctrine of equitable conversion does not apply.

20. But when, as "here, the general scheme of the testatrix was to distribute her estate as personal property," and not merely for "a particular purpose named, which failed," equitable conversion will still prevail. See also CHARITABLE TRUSTS.

—*Harrington v. Pier*, 105 W., 485, 491-6.

21. Realty "to be invested in a fund" for prescribed purposes, "amounts to a direction to convert" into money. See also CHARITABLE TRUSTS.

—*Hood v. Dorer*, 107 W. 149, 152.

22. Quoting approvingly *Dodge v. Williams*, 46 W. supra, it is said: "A mere optional or discretionary purpose to convert—that is, discretionary authority as to whether to convert or not—is not sufficient.

23. There must be a mandatory direction, express or implied, to convert; but the time of the execution of the purpose may be left discretionary."

24. "When the execution of the scheme" is impossible, or unreasonably difficult without conversion, then "a direction for such conversion will be deemed imperatively expressed in the will by necessary implication, to the same effect as if expressed in words".

25. "Significant use of the word 'payment'", "has uniformly been regarded as indicating a purpose that realty shall be administered as personalty. (Cases, supra, et al)".

—*Becker v. Chester*, 115 W. 90, 117, 123.

26. Division after death of wife, and provision in case of decease of a remainderman, and no provision for sale, held an implied equitable conversion. See VESTING OF ESTATES.

—*In re Albiston's Est.*, 117 W. 272, 274.

27. Where the will provides that 'all my property shall be put on interest', and 'the interest of my property shall be paid annually',—"the doctrine of equitable conversion applies",

28. And "the testator expressly or by necessary implication directed his estate to be administered and distributed in the form of money. (Cases, supra)."

29. "Moreover", "the will could not be executed without treating the property as personalty, therefore" "such express direction is reinforced by an implied one". See also TRUSTEES.

—*Benner v. Mauer*, 133 W., 325, 329.

30. Trustees 'discretion to pay from time to time' until it 'is all paid' to the cestui que trust, held to imply and necessitate conversion for purposes of descent. See VESTING OF ESTATES, ETC.

—*Williams v. Williams*, 135 W., 60, 67.

31. As to equitable conversion applying to a trust of real estate given for masses. See CHARITABLE TRUSTS.

—*Will of Kavanaugh*, 143 W. 90, 102.

32. While "the whole estate may be regarded as equitably converted into personal property", "if the scheme of the will could not reasonably be carried out" otherwise (*Becker v. Chester*, 115 W., supra),

33. Yet, where it is not "necessary to dispose of any of this real estate in order to discharge the specific legacies, etc.," "the fiction of equitable conversion cannot be indulged in, especially in the absence of

any definite provision in the will looking in that direction". See also VESTING OF ESTATE, ETC.

—*Will of Sturk*, 149 W., 631, 654.

34. "The doctrine of equitable conversion is really a fiction by which, for certain purposes, the most frequent of which is to carry out the purpose of a testator, realty will be treated as personalty.

35. It has been well said that 'it should never be overlooked that there is no real conversion; the property remains in fact realty or personalty as it was, but for the purpose of a will, so far as it may be necessary and only so far, it is to be treated in contemplation of law as if it had been converted'. *Yerkes v. Yerkes*, 200 Pa. St., 419."

36. Where "the law would not or could not carry out" a trust in a will as to realty, but could as to personalty, "the law will, in order to effectuate the purpose of the testator, deem that done which ought to be done and treat the property devised as personalty even before its actual conversion. *Dodge v. Williams*, 46 W. (and other cases) *supra*.

37. But the real estate does not in fact become personal property until its actual sale and conversion into money".

38. "The doctrine of equitable conversion is not to be invoked to deprive persons of vested rights". See also HOMESTEAD.

—*Foote v. Foote*, 159 W. 179, 183.

EQUITABLE LIEN.

See LIEN.

EQUITY.

See also CIRCUIT COURT. CONCURRENT JURISDICTION. FRAUDULENT ORDERS. JURISDICTION. LACHES. MISTAKE. REFORMATION. SPECIFIC PERFORMANCE.

Accounting, 21.

Discovery necessary, 34.

Actions: law and equity, 5.

Equity not enlarged, 6.

Forms only abolished, 5.

Inherent differences remain, 5.

Legislature cannot affect, 7.

Adequate law remedy, 36.

Construe will: ejectionment, 39, 52.

Decide land recovery, 40.

Failure to object, 38.

Must be as efficient, 49.

Objection by answer, etc., 37.

Objection by demurrer, 43.

Objection seasonably taken, 41.

Objection waived, 42.

Time, expense, multiplicity, 50.

All-pervading principle, 55.

Amendment: law to equity, 56.

Charitable trust, 21.

Condition: subsequent, precedent, 48.

Construe wills: trust power, 51.

Not legal rights only, 39, 52.

Contract: meeting of minds, 44.

Not on terms expressed, 45.

County Court jurisdiction, 20.

Co-extensive in estates, 20.

Enforce oral bequests, 20.

Party misled by court, 35.

Set aside probate, undecided, 19, 22.

Demurrer: ore tenus, 36.

As to law remedy, 37.

Enjoin: sheriff's sale, 24.

Apply in same suit, 33.

Not in another suit, 32.

Not other equity process, 31.

- Forfeiture relief, 48.
- Gross laches, 10, 22.
- Improvements: title failure, 4.
- Jurisdiction: secure, 7.
- Trust gives construction, 51.
- Jury, when to try, 26.
- Court decides whole case, 30.
- Court may adopt, 28.
- Particular issues, 27.
- Set aside verdict, 29.
- Law judgment relief, 2.
- Lost or destroyed will, 13.
- Natural justice, 3.
- Not limited to set rules, 12.
- Rescission of deeds, 23.
- Settlement of estates, 47.
- Jurisdiction taken, when, 47.
- Title: present and future, 53.
- In being, not in being, 53.
- Tried by the court, 25.
- Court decides whole case, 30.
- Issues by jury, when, 26.
- Unadministered assets, 46.
- Unreasonable delay, 11, 22.
- Vacating judgments, 1.
- Void administrator's sale, 4.
- Purchaser's improvements, 4.
- Will construed, at law, 39.
- Will probate: setting aside, 8, 13, 15, 17.
- Any probate fraud, 18.
- County court's power, undecided, 19.
- Exclusive in county court, 9, 16, 19.
- Fraudulently obtained, 8, 9, 14.
- Unreasonable delay, 11, 22.
- "With clean hands", 54.

1. The same rules in "actions at law or in equity" are applied in the vacation of judgments. See VACATING JUDGMENT.

—*Ætna Life Ins. Co. v. McCormick*, 20 W. 265, 268.

2. The rule stated, when equity "will relieve against a judgment at law." See FRAUDULENT ORDERS. —*Stowell v. Eldred*, 26 W. 504, 507.

3. "The question is not alone, What is the natural and inherent justice of the case? but it is, are the principles and rules of equity jurisprudence, as recognized and enforced by courts of equity, sufficiently broad and comprehensive to reach the case?" Lyon, J.

4. In a void administrator's sale of realty "perhaps the leading case on the question", is *Bright v. Boyd*, 1 Story 478, where Justice Story "held the broad doctrine, that 'a bona fide purchaser for a valuable consideration, without notice of any defect in his title who makes improvements and meliorations upon the estate, has a lien or charge thereupon for the increased value which is thereby given to the estate beyond its value without them, and a court of equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser.'" See also SALE OF REALTY.

—*Blodgett v. Hitt*, 29 W. 169, 183.

5. "We observe, what all the adjudications since the enactment of the code maintain, that although the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, yet this only relates to the forms of action, and does not touch or affect their inherent qualities and differences, which, from the nature of things are unchanged and unchangeable."

6. "The change in the form of the action has not changed the nature of the action itself. It has not enlarged the jurisdiction of equity, nor abridged that of the law."

7. Under "the provisions of the constitution of the state"; "it has been repeatedly held by this court to be incompetent for the legislature to take from the original or primary jurisdiction of equity, and give to the law, or to do the reverse." —*Deery v. McClintock*, 31 W. 195, 202.

8. The court, while conceding that numerous authorities sustain the view that "a court of equity has no power to relieve against the judgment or order of the probate court admitting the will to probate, although the same was fraudulently obtained," does not decide the question.

9. It is stated also that Judge Story sustains the view given, and that "in *Gaines v. Chew*, 2 How. 619, it is said: 'In cases of fraud, equity has concurrent jurisdiction with a court of law; but in regard to a will, charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for the exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given'."

10. "A court of equity will never entertain a bill for relief, even in cases of asserted fraud, if the plaintiff has been guilty of gross laches or unreasonable delay".

11. And, it is held that the plaintiff was "guilty of unreasonable delay", having had notice of probate, and of various subsequent proceedings, and not beginning her action "until nearly five years had elapsed;" though the court finds also that the testator (plaintiff's husband) did not have testamentary capacity at the making of the will.

—*Holden v. Meadows*, 31 W. 284, 289.

12. "Equity does not limit itself by set rules nor by precise definitions, particularly in matters of fraud". See FRAUD.

—*Kuelkamp v. Hidding*, 31 W. 503, 508.

13. Equity has jurisdiction to establish a lost or destroyed will, though probably not to set aside the probate of one fraudulently obtained. See LOST WILL.

—*Hall v. Gilbert*, 31 W. 691, 694.

14. "In the present state of the authorities it is believed that no such claim can be made successfully", to-wit, "that equity has jurisdiction to set aside a will fraudulently obtained, after the same has been admitted to probate by a competent court".

15. A court of equity has no "power to set aside the probate of a will where such probate has been obtained by fraud", in which "the fraud charged consists in concealing the fact that the will was obtained fraudulently; hence, if it was not so obtained, there could have been no fraud in procuring the probate thereof".

16. "Before the court can adjudge that there was fraud in procuring the probate of the will, it must adjudge that the will was fraudulently obtained. This, as we have seen, a court of equity has no power to do, such power being exclusively in the probate court".

17. The court in referring to "*Barnsley v. Powel*, 2 Vesey, Sen., 284, decided in 1749," as the "single case" in which this was done, states that unlike that case, "we find in the present case no grounds 'distinct from the will itself' for the exercise of the jurisdiction of a court of equity".

18. The court does not decide whether equity would take jurisdiction in any case of fraud in the probate, such fraud not involving the question of the fraudulent obtaining of the will itself.

19. Nor does the court "decide that the county court has power to set aside the probate of this will" because of fraud in the probate thereof, though Dixon, C. J., in a concurring opinion acquiesces in the decision of non jurisdiction "only on the ground that the plaintiff has adequate remedy by application to the probate court to open or set aside the decree admitting the will to probate."

—*Archer v. Meadows*, 33 W. 166, 169.

20. "The jurisdiction here conferred (Sec. 2443) is co-extensive with that possessed by any court of equity or of law in a case of this description, which clearly relates to the settlement and distribution of the estate of the testator"; relating to a trust to enforce oral bequests by the testator to be paid by a residuary legatee. See also JURISDICTION. PRAYER FOR RELIEF.

—*Brook v. Chappell*, 34 W. 405, 413.

21. "Account is an ancient and familiar branch of equitable jurisdiction." Equity has jurisdiction of a charitable trust. See CHARITABLE TRUST.

—*In re Taylor Orphan Asylum*, 36 W. 534, 543.

22. In a proceeding in the probate court to set aside the probate of the will (*Holden v. Meadows*, and *Archer v. Meadows*, supra), the court does not decide "the question of power in the county court to grant the desired relief", but holds that the proceeding should have been dismissed because the petition discloses "laches fatal to this proceeding".

—*In re Est. of Holden: Meadows' Appeal*, 37 W. 98, 104, 107.

23. Equity has jurisdiction of rescission of deeds, etc., which "is the converse of a specific performance." See BOND FOR MAINTENANCE.

—*Bogie v. Bogie*, 41 W. 209, 217.

24. Equity will enjoin a sheriff's sale to prevent a cloud on the title. See TITLE.

—*Goodell v. Blumer*, 41 W. 436, 442.

25. "In all equitable actions the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence.

26. If either party desires that any issues of fact which have been made by the pleadings should be tried by a jury, and the judge deem such issues proper ones to be submitted to a jury in order to aid him

in the determination of the same, he may direct them to be so tried; or the judge may upon his own motion, direct certain issues to be so tried.

27. In every such case, the particular issues which are to be tried should be fixed and agreed upon before the jury is called. The jury then try only the issues so submitted, and not the whole case.

28. When the jury have given their verdict, the case is then to be taken up by the court; and if the court is then satisfied with the determination of the jury upon the issues submitted to them, he adopts their findings as to such issues.

29. If he is not satisfied with the findings of the jury, he may, either upon the application of a party or of his own motion, set aside such verdict and submit such issues to another jury; or, if he is satisfied that no aid will be obtained by such further submission, he may proceed to decide the issues without any further intervention of a jury."

30. After the verdict and after testimony on other issues, if any, then the court upon all the testimony, "including that given upon the trial of the issues by the jury, disposes of the whole case, and, by written findings of fact and conclusions of law, decides all the issues, and directs the clerk to enter the appropriate judgment."

—*Stahl v. Gotzenberger*, 45 W. 121, 123.

31. "One court of equity will not enjoin the process of another. One suit in equity will not lie to enjoin process issuing in another.

32. The objection is fatal, whether the second suit be brought in the same or in another court, by a party or by a stranger to the first suit.

33. The proper course by either party or stranger to the first suit, is to apply by petition for relief in that suit".

—*Endter v. Lennon*, 46 W. 299, 300.

34. "Whether the accounts between the parties are mutual or not, where a discovery is a necessary part of the accounting, as in this case, the jurisdiction of the court of equity is unquestionable" notwithstanding Sec. 4096 as to discovery.

—*Schwickerath, Admx. v. Lohen*, 48 W. 599, 601.

35. "The equitable powers of the county court to relieve a party misled by itself, seems to be ample. *Brook v. Chappell*, 34 W. supra" and other cases.

—*Gardner v. Est. of Callaghan*, 61 W. 91, 96.

36. In an equitable action, where the defendants answered to the merits, and at the trial "objected to the introduction of any testimony" because a cause of action was not stated, "the demurrer ore tenus does not go to the point that the plaintiff has an adequate remedy at law, but only raises the question, Does the complaint state a cause of action in equity? We have seen that it does.

37. It has frequently been held by this court that in matters of equitable cognizance the objection that the plaintiff has an adequate remedy at law must be taken by demurrer or answer.

38. If the defendant answers to the merits without making the objection, it ceases to be available to him. In such case the court will adjudge on the merits of the action, without regard to the fact that there is also an adequate remedy at law. (Cases)".

—*Sherry v. Smith*, 72 W. 339, 342.

39. In a suit in equity to construe a will (after settlement of the estate), where a demurrer was interposed "that the plaintiff had an adequate remedy at law", and for dismissal, the circuit court overruled the demurrer, and such ruling reversed on appeal, on the ground that the plaintiff has "a full, adequate and complete legal remedy by ejectment to recover the land which she claims".

40. Both parties claiming title under the will, and the defendants being in possession, "a court of law can determine her (plaintiff's) rights under the will, and decide whether she is entitled to recover the land, as effectually as a court of equity".

41. It is "a well-settled rule that a court of equity will not entertain or exercise jurisdiction where the party has a complete and adequate remedy at law, when the objection to such jurisdiction is seasonably taken.

42. Where equity can grant the relief to which the plaintiff is entitled, and the objection is not duly taken, it is deemed waived.

43. But where the objection is taken by demurrer, as here, that the party has a complete and adequate remedy at law, it is held that the objection must prevail. (Many cases)". See also CONSTRUCTION OF WILLS.

—*Kelley v. Kelley*, 80 W. 486, 488-9.

44. It is a "well-established rule that courts of equity will interfere and grant equitable relief where, in making the contract, 'the minds of the parties did not meet,

45. Or when in the case of a written contract they did not meet on the terms expressed in the writing, but did meet on other terms, not there appearing'." "The proposition quoted has been sanctioned by this court," in *Green Bay & M. C. Co. v. Hewitt*, 62 W., 316; *Silbar v. Ryder*, 63 W., 106, 108 (see REFORMATION). See also *Lusted v. C. & N. W. R. Co.*, 71 W., 396 (See MISTAKE); *Hagenah v. Geffert*, 73 W., 641. See also HOMESTEAD.

—*Whitmore v. Hay*, 85 W., 240, 251.

46. An administrator de bonis non may recover unadministered assets, in the case of a deceased residuary legatee executor.

47. When the circuit court will, in general, take jurisdiction in the settlement of estates. See CONCURRENT JURISDICTION.

—*Meyer v. Garthwaite*, 92 W. 571, 573.

48. As to relief from a condition subsequent or precedent, in a deed, from forfeiture. See CONSTRUCTION OF DEEDS.

—*Donnelly v. Eastes*, 94 W., 390, 393.

49. "In order to exclude the exercise of the equitable functions of the court, it is not enough that there is a remedy at law, but it must be plain and adequate, or, in other words, as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity. *Gullickson v. Madsen*, 87 W., 19.

50. Jurisdiction in equity will be sustained when time, expense, and a multiplicity of suits will be saved by it, and the rights of all concerned will be settled in one litigation."

51. "It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers, as incident to that jurisdiction, take cognizance of, and pass upon, the interpretation of wills. 1 Beach, Mod. Eq. Jur., 210.

52. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, and when only legal rights are in controversy." *Bailey v. Briggs*, 56 N. Y. 413; *Catlin v. Wheeler*, 49 W., 520; (see CONCURRENT JURISDICTION).

—*Miller v. Drane*, 100 W., 1, 4.

53. The judgment of a court of equity as to reality, acts upon the whole title, present and future, as to those in being, if parties, representing those not in being. See TRUST VARIATIONS.

—*Ruggles v. Tyson*, 104 W., 500, 506.

54. While one appealing to equity, must come in "with clean hands", yet not literally himself "without fault". See SALE OF REALTY.

55. "All" equity "rules are subsidiary to the all-pervading major principle, 'Equity opens its doors whenever necessary to prevent fraud and injustice and where the relief asked conforms to the principles of rectitude and honesty'. *Warden v. Fond du Lac Co.*, 14 W. 618, 620".

—*Keilly v. Severson*, 149 W. 251, 256.

56. An action at law may now be changed by amendment to one in equity. See PLEADINGS.

—*Jilek v. Zahl*, 162 W. 157, 161.

ERROR, WRIT OF.

See WRIT OF ERROR.

ESCROW.

See also DELIVERY.

• Agent merely of grantor, 28, 29.

Agency terminated at death, 30.

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Contained in deed, 15.

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- Consideration unnecessary, 37.
- Deed contains conditions, 15.
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 - Contingent or conditional, 3, 5, 17.
 - Effective double delivery, 32.
 - Oral direction to deliver, 36, 38.
 - Possession and control, 4, 16, 17.
 - Returned on recovery, 27.
 - Through still another, 31.
 - Title does not pass, 19.
 - Title passes, first delivery, 18.
 - To escrow after decease, 34.
 - To husband to grantee, 36.
- Directions to deliver, 36.
- Disposition of lands, 7.
 - At death: three methods, 7.
 - (1) Reservation of life estate, 8, 11.
 - (2) Delivery to third person, 9.
 - (3) Control, effected by will, 10, 11.
- Escrow: defined, 5.
 - Certain drafts, 25, 26.
 - Deed delivery, 21.
 - Note and mortgage, 20.
 - Understanding, 21.
- Friend, without consideration, 36.
 - Oral directions to husband, 36.
 - Valid against heir, 37.
- Future: certain event, 17, 18.
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- Grantee: not hold deed, 12.
- Grantee's deed from deposit, 21.
- Grantor: divest power, 1.
 - Authority and control, 2, 4.
 - Contingent or conditional, 3, 5.
 - Not beyond his control, 27, 28, 29.
 - Prevent by silence, 26.
 - Until future condition, 3.
- Husband to wife, 22.
 - Homestead consideration, 23.
 - Subsequent destruction, 24.
- Note and mortgage, 20.
- Oral: agreement to sell, 15.
 - Deed and mortgage, 16.
 - Directions to deliver, 36, 38.
- Subject to recall, 6, 14.
- Subsequent destruction, 24.
- Through executor, 33.
- Title passes: first delivery, 18.
 - Does not pass, 19.
 - Escrow to executor, 34.
 - Grantees deed from deposit, 21.
 - Grantor's present deed, 34.
 - Subsequent destruction, 24.
- Trustee of grantee, 21.

1. "To constitute delivery good for any purpose the grantor must divest himself of all power and dominion over the deed.

2. To do this he must part with the possession of the deed and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself or some person for him, which is called an absolute delivery;

3. Or otherwise he must part with all present or temporary right of possession and control, until the happening of some future event or the performance of some future condition, upon the happening or not happening or performance or nonperformance of which, his right of possession may return and his dominion and power over the deed be restored, in which case the delivery is said to be contingent or conditional". Dixon, C. J.

4. "An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is, that there must be a parting with the possession, and of the power and control over the deed by the grantor for the benefit of the grantee at the time of delivery".

5. "A conditional deed, that is, one delivered conditionally, is not a deed, but an escrow, a mere writing having the form of a deed, but the effect of which depends wholly upon the happening of the conditions or events upon which it is to be delivered to the grantee. If these come to pass it becomes a deed, otherwise it is a mere nullity".

6. If as in this case, "the deed is subject to be recalled by the grantor,

before delivery to the grantee, it is no delivery on the part of the grantor", and conveys no title.

7. "As observed in *Cook v. Brown* (34 N. H. 460), the owner of land desiring to make disposition of it at his death, has three courses open to him, either of which he may adopt according to circumstances and as will best suit his convenience and intentions;

8. (1) 'If he desires to convey the same, but not to have his deed take effect until his decease, he can make a reservation of a life estate in the deed,

9. (2) Or it may be done by the absolute delivery of the deed to a third person, to be passed to the grantee upon the decease of the grantor; the holder in such case being a trustee for the grantee.

10. (3) But if he wishes to retain the power of changing the disposition of the property at his pleasure, that can only be properly effected by a will.

11. So long as he retains the instrument, whether in the form of a deed or will, in his power, the property is his'."

—*Prutsman v. Baker*, 30 W. 644, 646.

12. "If the grantor does not intend that his deed shall take effect until some condition is performed, he should keep it or leave it with a stranger"; he cannot deliver it to the grantee "to remain in escrow".

—*Lowber v. Connit*, 36 W. 176, 184.

13. In case of a deed deposited as "an escrow, we have no doubt the conditions upon which the same was to be delivered" to "the grantee named therein, might lawfully rest in parol and be proved by parol".

14. If the grantor of the deed, "notwithstanding the deposit, retained control of it, it was not" an escrow, "and he might lawfully reclaim it or prevent a delivery to the plaintiff (grantee). See *Prutsman v. Baker*, supra."

15. "If a person who has made a parol agreement to sell land sign an instrument in the form of a conveyance of such land, to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement, including the consideration, it is a sufficient compliance with the requirements of the statute of frauds".

16. Where the parties "agreed verbally" to the sale and purchase "on certain terms, which included the execution of a mortgage on the land, by the plaintiff (grantee), to secure the payment of a portion of the purchase money", and the deed was placed in the hands of a third party H. to be delivered to the vendee two days later upon compliance with certain conditions including the giving of the mortgage, and rescinded by the grantor's directions, and a tender back of the money already paid to the grantor, at the appointed time of completion, it is held, "that there was no valid contract", "for the purchase and sale of the land; that the deed deposited with H. was not an escrow, but remained under the control of" the grantor; "and that H. properly

refused to deliver it to the plaintiff (grantee), after such delivery had been forbidden”.

17. “Where the deed has been delivered by the grantor to a third person with instructions to deliver the same to the grantee on the happening of a future certain event—as the death of the grantor or of some other person—, and such conditional delivery is assented to by the grantee; in such a case, if the grantor reserves no control over the deed, he cannot after such delivery recall it, but the grantee is entitled to it upon the happening of the event, although there is no valid executory contract to support it.

18. The reason of this is, that the first delivery of the deed passes to the grantee the title to the land, and thus relieves him of the obligation to make title through any contract other than that expressed in the deed itself”. p. 449.

19. “But by all of the authorities a deed so deposited with a third person to be delivered to the grantee on the happening of some event in the future which may or may not happen, does not pass title to the land described in it to the grantee until such event occurs, and then only from that time, or perhaps from the actual delivery of the deed to the grantee after the event has occurred.”

—*Campbell v. Thomas*, 42 W. 437, 440.

20. Where a note and mortgage were delivered by defendant to A, “he to keep them until the plaintiff should execute and tender to him her release for damages, and then deliver them to her,” is held to be delivered as in escrow, following *Trutsman v. Baker*, 30 W., supra, quoted.

—*Schmidt v. Deegan*, 69 W. 300, 305.

21. “Where a deed is duly executed and delivered by the grantor to a depositary in the presence of the grantee, and without any reservation of control, with the intention and understanding that such depositary is to retain the custody thereof until the grantor’s death, and then deliver the same to the grantee, it is such grantor’s deed in presenti from the time of such deposit, and such depositary thereby becomes the trustee of the grantee. *Foster v. Mansfield*, 3 Met. 412; (other cases)”. *Prutsman v. Baker*, 30 W., *Campbell v. Thomas*, 42 W., supra. (Approvingly quoted in *Wells v. Wells*, 132 W. post.)

22. In this case, of a deed from husband to wife, it “is admitted to be good and enforceable in equity, under the decisions of this court, when based upon a valuable consideration. *Putnam v. Bicknell*, 18 W. 333; *Hannan v. Oxley*, 23 W. 519 (cited under HUSBAND AND WIFE).”

23. And this being a homestead, there being no children, “not made to defeat or defraud any one,” it is held that the wife’s “right to the homestead, in the case at bar, furnished, in our judgment, a meritorious consideration for the settlement of the same upon her by way of the deed to her from her husband, and by him delivered to the depositary as stated”.

24. The subsequent destruction of the deed by the husband "did not divest the title which" the wife thus acquired, and her reluctant acquiescence in this case "must be regarded as having been procured by undue influence, if not by coercion". —*Albright v. Albright*, 70 W. 528, 533.

25. "To make a good delivery in escrow, the maker must part with the possession and divest himself of all power and dominion over them (certain drafts); otherwise there can be no escrow. *Prutsman v. Baker*, 30 W. supra".

26. Where there were certain drafts deposited with H, an employe of a garnishee, to hold "until he was ordered by the garnishee to turn them over to the defendant, there was no delivery in escrow, because the garnishee retained absolute control over them, and could, by keeping silent, prevent their delivery for all time".

—*Lehigh C. & I. Co. v. West Superior I. & S. Co.*, 91 W. 221, 225.

27. Where a decedent, while ill, made a will giving a life estate in realty to her mother, and the remainder to her brother, and afterward, "to save the expense of the probate of said will", executed and gave deeds of like estate to a third person to be delivered by him to the grantees "after I am dead", but she also saying, "if I recover, I want them back again", it is held, as to the deeds, following *Prutsman v. Baker*, 30 W. supra, and other cases, that,—“no legal delivery thereof has or can be made”.

28. "The principle emphasized is that the delivery of the deed not being absolute, or conditional so as to be beyond the grantor's control, and the depositary being a mere agent, the instrument is revocable at any time before the grantor's death, and is therefore a nullity".

—*Williams v. Daubner*, 103 W. 521, 523.

29. Where deeds and bills of sale made in apprehension of death, were left with a depositary, to be delivered after the death of the grantor, but he retaining the right to recover them, the papers are held merely as agents.

30. "Such agency is terminated by the grantor's death, and delivery thereafter to the grantee is unauthorized and of no effect. (Cases, supra)".

—*Ward v. Russell*, 121 W., 77, 79.

31. Deeds delivered to the wife with the direction by the grantor to 'keep them in your possession as long as you live, and then give them or deliver them to the boys', "without the knowledge" of the grantees, were, after the death of the grantor eighteen days later, with the knowledge of the grantees, deposited by the wife "with the cashier of a bank, with directions to deliver them to the named grantees upon her death", and were so delivered five months later; held,—

32. A valid and effective delivery conveying title, and that such delivery to the depositary is effective "as against the grantor, although

some condition is imposed, precedent to final delivery to the grantee, which may serve to prevent vesting actual title in him meanwhile, certainly if such precedent event is one sure to happen". (Cases, *supra*, and others).
—*Kittoe v. Willey*, 121 W. 548, 552.

33. Following *Albright v. Albright*, 70 W., and other cases, *supra*, it is held that the delivery by the grantor W. of his deed, "annexed to a written memorandum or direction signed by" him, "to the effect that the same should, five days after his death, be delivered by the executor L. to his son T., or his heirs at law, and that he have possession of the property described therein", and on the envelope "was written at the direction of said W: 'In escrow to L., with directions to deliver as within stated'," and "then in pursuance of his written directions he (L.) delivered the same to the" grantee "as mentioned",—

34. Held, "that upon such delivery to L. the deed became the present deed of W., and that upon the delivery thereof by L. to" the grantee, "the title to all of the real estate therein described became vested in him absolutely and in fee".
—*Wells v. Wells*, 132 W. 73, 79.

35. "Directions to deliver the deed to Z. when his wife had executed the bond," does not "constitute a valid delivery in escrow." See also **DELIVERY**.
—*Zoerb v. Paetz*, 137 W., 59, 65.

36. Where "there was neither fraud or undue influence", a deed of her realty, executed on the day of her death by the grantor M., to a friend D., unrelated, with oral directions to the grantor's husband, "to deliver" "at once after the death of" the grantor, and the delivery was so made and the deed recorded, after the decease, it was held valid, and "that the deed was in fact delivered", "within the rule of *Wells v. Wells*, 132 W., *supra*."

37. "The real estate in question belonging to M., she might, as against the plaintiff, her heir at law, convey it by deed to D. or to any person as a gift without consideration. (Cases)". See also **TRUSTS**.
—*Schumacher v. Draeger*, 137 W., 618, 622.

38. The delivery of a deed to a third person with oral directions to deliver it to the grantee upon the death of the grantor, is a valid delivery, there being 'no reservation or right to recall'. *Bates v. Winters*, 138 W., 673, (See **DELIVERY**).
—*Klabunde v. Casper*, 139 W., 491, 493.

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1. "It would be most unreasonable to exclude a party from showing his title, because of his participation, without fraud or deception, in a transaction notoriously void, from which it was well known no legal or equitable right could arise". —*Edwards v. Evans*, 16 W. 181, 185.

2. "One essential element in every equitable estoppel, by which a man is to be precluded from claiming what is his own, is that the purchaser and party claiming the benefit of such estoppel should have been ignorant of the true state of the title".

3. "Ignorance of the true state of the title on the part of the purchaser must concur with wilful misrepresentation or concealment on that of the owner".

4. "It must appear that the party to be estopped was acquainted with his title and wilfully concealed or misstated it, or that he was guilty of such gross negligence and indifference to the rights of others as, under the circumstances, to be equivalent to actual and premeditated fraud".

—*Gove v. White*, 20 W. 425, 430.

5. A party is not estopped from recovering more than the amount of a bill presented to his debtor, if he later demands and proves more. See ACCOUNTS.

—*Nauman v. Zoerhlaut*, 21 W. 466, 469.

6. Wards after arriving at age are not "estopped by the unlawful acts of the guardian" in making a void sale of real estate.

—*Wilkinson v. Filby*, 24 W. 441, 445.

7. "The doctrine of equitable estoppel may be recognized, and its principles enforced, as well by the county court, as by the court of chancery." See JURISDICTION.

—*Brook v. Chappell*, 34 W. 405, 412.

8. "Where an owner of property stands by and sees a third party sell it as his own, without asserting his own title or giving the purchaser any notice of it, he is estopped, as against such purchaser, from asserting it afterwards". *Vilas v. Mason*, 25 W. 310.

—*McLean v. Dow*, 42 W. 610, 614.

9. Where the executors named, being also heirs, took administration under a defective notice of probate, made sales, received proceeds, "and made final settlement with the county court", it having been "their duty to give the requisite notice" of probate, it is held that they "cannot now be allowed to say that the proceedings were void". See JURISDICTION.

10. "And even if they claim that they acted under the direction and undue influence of their attorney R., they subsequently, with full knowledge of the facts, voluntarily, fully and finally confirmed and ratified all the proceedings, and are now estopped from questioning them".

—*O'Dell v. Rogers*, 44 W. 136, 173.

11. "Whatever may be the rule concerning the formalities needed to bind married women, there is no doubt but that they may be estopped by their deliberate conduct as well as any one else". *Norton v. Nichols*, 35 Mich. 148." (Approved in *Wright v. McCord*, 145 W. post.)

—*Godfrey v. Thornton*, 46 W. 677, 690.

12. "In order to make it the duty of the owner to break silence and assert his title when another makes claim to it, he must know, or have good reason to believe, that some third person is about to act upon the claim made by such other in a way that he would not be likely to act if he knew the real state of the title.

13. In such case, if the third person acts upon such claim of title so that he will be prejudiced if the party having the title be permitted to assert it, an estoppel may be claimed against the real owner. Certainly no evidence short of this can sustain an estoppel as to title in any case."

14. "In *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, The supreme court of the United States use the following language:

'It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be

estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury.

15. 'In all this class of cases', says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud; and therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief.'

16. This court has adopted the foregoing rule as to estoppel in pais, substantially, in *Norton v. Kearney*, 10 W. 443, 453; *Vilas v. Mason*, 25 W. 310, 323, and *McLean v. Dow*, 42 W. 610."

17. Another rule stated in the *Brant* case, *supra*, is the following:

"'It is also essential for its application with respect to the title of real property, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge.

18. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.'"

19. "The cases in the supreme court of Pennsylvania which are cited by the supreme court of the United States as sustaining this rule, hold that when the plaintiff's title appears of record in the proper office, mere silence on his part, when another makes claim of title to the same with a view to have a third person act upon such claim of title, will not estop the plaintiff from asserting his title against the person acting upon such claim of title to his prejudice." *Knouff v. Thompson*, 16 Pa. St. 357.

20. "When, however, the owner is directly apprised of the ignorance of the buyer and of his purpose to act in such ignorance, he cannot claim the benefit of this principle, because good faith then requires him to speak.

21. This last rule was held in *Markham v. O'Connor*, 52 Ga. 183, and is, perhaps, a qualification of the rule stated in cases cited from the supreme court of the United States and of Pennsylvania, and is more strictly in accord with the decisions of this court also above cited".

—*Kingman v. Graham*, 51 W. 232, 241.

22. "It appears well settled by the decisions of this court, that an estoppel must be pleaded in order to enable the defendant to avail himself of it on the trial. (Cases)". —*Warder v. Baldwin*, 51 W. 450, 459.

23. "It is an essential principle of estoppel that the conduct of a person has been influenced by the statements or conduct of another, and because so influenced he shall be protected and the other estopped".

24. "The principle is elementary that estoppel must rest upon one of these requisites": That "estoppel by admissions in judicial proceedings" rests "upon the requisites that others are party or privy

thereto, or influenced thereby, and estoppel by other admissions, upon the latter requisite alone". —*Dahlgren v. Foster*, 55 W. 382, 385.

25. Though "no estoppel was set up in the answer", where the evidence "tending to establish that defense was admitted without objection", it is too late to insist that it "was not admissible under the answer. *Mowry v. Mosher*, 16 W. 48."

26. "It is essential, to create an estoppel, to show that the defendant was induced by the admission of payment to do something to his prejudice if that admission should be withdrawn or contradicted".

27. "The law of equitable estoppel is familiar, and is said to rest on the principles of natural justice and equity.

28. Where a person does or says something to influence the conduct of another, and that other person acts upon the faith of such act or representations, the former is precluded from denying its truth to the injury of the latter". —*Guichard v. Brande*, 57 W. 534, 537.

29. A principal is bound by the act of an unauthorized agent, where he fails to affirm or disaffirm within a reasonable time after notice. See PRINCIPAL AND AGENT. —*McWhinnie v. Martin*, 77 W., 182, 197.

30. Where T. contracted to give by will certain estate to his brother on certain performed conditions, and then devised and bequeathed a different estate, such will being probated with the acquiescence of the brother who accepted the conditions for twelve years, and then brought a suit in equity on the contract, he was then under these and other facts stated, held estopped from recovery.

31. "The case is governed by the well-established rule in equity that 'a person who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the same, and he will not be permitted to set up any right or claim of his own, however legal or well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will'." Bigelow Estop. (5th ed.) 674. —*Towle v. Towle*, 79 W. 596, 601.

32. "The rule of law is, we think, that an infant, incapable for want of age to enter into a valid contract of marriage, is incapable also to estop himself by a fraudulent declaration of his age to assert the invalidity of the marriage in an action for the annulment thereof". So held. —*Eliot v. Eliot*, 81 W., 295, 299.

33. The oral surrender of an interest in a land contract being in question, it is said, that "It is essential to such estoppel that the party to whom such surrender by act in pais or operation of law is made shall have acted upon the faith of it in some material respect. (Cases)". Here there was no possession to give, nor a written release given.

34. The statement by the vendee that he did not want the land and

had 'got to lose' the \$100 paid, thereon, and the statement of the vendor that he 'must see about it', made two years before without other action, "was at most a mere offer to relinquish the lot, which was not seasonably accepted," and could thereafter be retracted when attempted to be accepted.

—*O'Donnell v. Brand*, 85 W., 97, 101.

35. Failure of interested parties to immediately object to the inventory, though present when it was made, for refusal of the executrix to inventory a mortgage, though claimed to be a part of the estate, is held not to estop them, "as against the sureties on" the executrix's "bond from claiming this money to be a part of the estate", and "no act or omission to act on their part is shown to have been induced by the acts of the residuary legatees".

—*Murray v. Kluck*, 87 W. 566, 571.

36. A married woman is held not estopped, by obtaining the fruits of a mortgage on the homestead, made by the husband under power to sell and her direction to sign her name thereto. See DEEDS.

—*Minnesota S. Co. v. McCrossen*, 110 W., 316, 320.

37. Equitable estoppel applied as against trustees and heirs, for failure to inform a widow of her legal rights, on contracting with her for a less share. See TRUSTEES.

—*Ludington v. Patton*, 111 W., 208, 229.

38. There is no privity between the same person as executor and as guardian. See INSURANCE.

—*Stoll v. Mutual B. L. I. Co.*, 115 W., 558, 565.

39. Where an heir appears and participated in the settlement of the estate, "she is estopped by the court's decrees from raising the question of the irregularity of the proceedings in the county court which are involved in" a collateral foreclosure litigation. (Cases).

—*Wis. Trust Co. v. Chapman*, 121 W. 479, 489.

40. Where a married woman living separately from her husband, and "knowing that her husband had publicly married another woman, was proclaiming her as his wife, was transacting business every day with people who supposed the second marriage was legal and valid, she allowed this state of affairs to continue without a word of protest", The "principles of estoppel must be held to apply" upon her claim, subsequent to his decease, of dower in lands conveyed by him and his supposed wife to innocent parties.

—*H. W. Wright L. Co. v. McCord*, 145 W. 93, 104.

41. A remainderman accepting her share of proceeds of conveyance of the fee by the life tenant, is held estopped to question such deed. See also LIFE ESTATES.

—*Hovely v. Herrick*, 152 W. 11, 17.

42. "A change of position by one in reliance upon the conduct of another is essential to create an estoppel in pais. *Somers v. Germania Nat. Bank*, 152 W., 210, 219 (See *WAIVER*); (other cases)".

—*Zwietusch v. Luehring*, 156 W., 96, 113.

43. "Estoppel in pais is where a party is not allowed to assert an otherwise conceded right because by words or conduct he has misled the other party with respect to the existence or assertion of that right in such a manner and to such a degree that the position of the parties cannot be equitably restored".

—*Jungdorf v. Little Rice*, 156 W. 466, 469.

44. Makers of a note were held "estopped from asserting the defense of lack of consideration" therefor. See *SETTLEMENT*.

45. "One cannot deny a representation which he has made, when by such denial injury would result to another who, having the right so to do, has relied on the representation and based his own conduct thereon".

—*Schoenwetter v. Schoenwetter*, 164 W. 131, 135.

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See also *ADMISSIONS*. *CROSS-EXAMINATION*. *DEPOSITIONS*. *DISCOVERY*. *EXAMINATION OF WITNESSES*. *EXECUTION OF WILLS*. *EXPERT TESTIMONY*. *HANDWRITING*. *HUSBAND AND WIFE*. *IMPEACHMENT OF WITNESSES*. *LEADING QUESTIONS*. *OBJECTIONS*. *PAROL*. *PRIVILEGED COMMUNICATIONS*. *REBUTTAL*. *RES GESTAE*. *TESTAMENTARY CAPACITY*. *TRANSACTIONS WITH DECEASED PERSONS*. *UNDUE INFLUENCE*. *WRITINGS*.

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1. "As a general principle of law * husband and wife cannot be witnesses for or against each other". One exception "is that a wife may be a witness against her husband in cases of personal violence to her, and that from necessity".

2. Marriage may be proved by witnesses present at the marriage supper.
—*Mills v. U. S.*, 1 Pin. 73, 74.

3. "It is not necessary for a party to disclose his whole defense, in order to entitle him to the admission of evidence having a tendency to prove it".
—*Defrance v. Hazen*, 2 Pin. 228, 230.

4. Account books verified by oath of party are prima facie evidence of their contents, and such witness cannot be impeached.

—*Winne v. Nickerson*, 1 W. 1.

5. Certified copies should be received though the opposite party has the originals in court at the time.
—*Fouke v. Ray*, 1 W. 104, 108.

6. "The party offering evidence, must render the same competent, in the order in which, and at the time when, it is tendered".

—*Jones v. Lake*, 2 W. 210, 214.

7. "The true question" for value of services is "not what A or B would charge for like services," "but, what were those services really worth.

8. The value of service requiring the exercise of professional or artistic skill, may be proved by common usage" but "not what one or another" "would charge, but what is the usual or customary rule of compensation".
—*Pfeil v. Kemper*, 3 W. 315, 317.

9. "The general rule doubtless is that after" the defendant rests, "the plaintiff will be confined to rebutting evidence. But the rule is not inflexible. It is in the discretion of the judge whether the plaintiff may or may not produce original or direct evidence on his part".

10. Parol proof given should be excluded where it develops the party has proof in writing.
—*Campbell v. Moore*, 3 W. 767, 771.

11. Evidence of a prior transaction where a settlement of mutual accounts between parties was had, is inadmissible, except on impeachment for mistake or fraud.
—*Martin v. Beckwith*, 4 W. 219.

12. Sheriff's return is "generally conclusive evidence". See SERVICE.
—*Knowlton v. Ray*, 4 W. 288, 291.

13. Cross examination is proper as to enmity or friendship of parties, and is in the discretion of the judge as to its limits. See CROSS EXAMINATION.
—*Kellogg v. Nelson*, 5 W. 125, 131.

14. Evidence of usage is not favored but it must be clear and explicit, uniform and notorious.
—*Power v. Kane*, 5 W. 265, 268.

15. Communications between parties concerning and at the time of the transaction are, in general, admissible as part of the *res gestae*.
—*Eastman v. Bennett*, 6 W. 232, 239.

16. The certificate of the clerk and not that of the judge must have the seal attached to entitle document to admission as a record.
—*Kirschner v. State*, 9 W. 140, 145.

17. Burden of proof to establish a lucid interval is on the party claiming it. See INSANE PERSONS.
—*Ripley v. Babcock*, 13 W., 425, 429.

18. "Notice to produce the original (writing) was only given at the trial"; and "is undoubtedly insufficient to justify the admission of secondary evidence, where it appears that the party notified has not the paper in his possession at the trial".
—*Barker v. Barker*, 14 W. 131, 150.

19. May be received to show condition of parties and surrounding circumstances, in interpreting written contracts, but not to vary or contradict their terms. See CONTRACTS.
—*Sigerson v. Cushing*, 14 W. 527, 548.

20. Parol evidence may be received to show consideration and the "whole transactions where the conveyances constitute only a part". See PAROL.
—*Frey v. Vanderhoof*, 15 W. 397, 401.

21. Evidence of "wife acting as the agent of her husband should" be received. See HUSBAND AND WIFE.

—*Birdsall v. Dunn*, 16 W. 235, 241.

22. Evidence may be received to explain mistake in name over entries of accounts.

23. Defective accounts may be used as memoranda to assist memory. See also ACCOUNT BOOKS.

—*Schettler v. Jones*, 20 W. 412.

24. "The rule of law is, that the positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or at most to collateral circumstances merely persuasive in their character. 3 Greenl. on Ev., § 375".

—*Ralph v. C. & N. W. Ry.*, 32 W. 177, 182.

25. Certified copies of letters and bond, held sufficient, prima facie at least, to prove representative capacity of an executor. See EXTRS. & ADMRS.

—*Wittmann v. Watry*, 45 W. 491, 493.

26. Declarations of an agent, when part of the *res gestae* and made within the scope of his authority, may be admitted against the principal. See also ADMISSIONS.

27. "The introduction by the defendant of evidence which would render the objectionable testimony (theretofore erroneously received) competent, had it been afterwards offered", "cures the error" of improper admission.

—*Rounsavell v. Pease*, 45 W. 506, 510.

28. "Circumstantial evidence is defined to be, where the proof applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy. *Eberhardt v. Sanger*, 51 W. 78".

—*Bouck v. Enos*, 61 W. 660, 663.

29. It is on occasion discretionary with the trial courts as to the allowance of original evidence of plaintiff to be admitted, after the close of defendant's case. See REBUTTAL.

—*Hagerty v. White*, 69 W. 317, 323.

30. Final judgment is held "competent evidence to prove" advancements; and the fact of a written acknowledgment of advancements may be testified to orally. See ADVANCEMENTS.

—*Liginger v. Field*, 78 W. 367, 374.

31. "Proof of a fact may tend to show the existence of another fact, indeed may preponderate over all testimony to the contrary, and yet be entirely insufficient to prove such other fact. *Gores v. Graff*, 77 W., 174; *Dunbar v. McGill*, 64 Mich., 676."

—*Heath v. Paul*, 81 W., 532, 537.

32. "A remarkable and exceptional state of facts may be satisfactorily proven, and if so proven a court cannot refuse belief simply because it is out of the usual course of events". See also *HUSBAND AND WIFE*.

—*Marston v. Dresen*, 85 W., 530, 540.

33. As to memorandum of a contract in a book of account. See *WRITINGS*.

—*Hazer v. Streich*, 92 W. 505, 508.

34. Evidence "not specifically contradicted," held properly disregarded as "inherently improbable." See *CLAIMS*.

—*Daniels v. Smith*, 95 W., 639.

35. Where "the second trial is between those who represented the parties at the first trial by privity, in blood, in law, or in estate," the executors representing the deceased plaintiff, then the justice's minutes of the deceased's testimony were not "competent evidence", though the justice "was a competent witness" to prove his testimony, "and he might use or refer to the minutes of such testimony taken by himself to refresh his recollection."

—*McGeoch v. Carlson*, 96 W., 138, 140.

36. Plaintiff's attorney testified as to an assignment, that the defendant "had, in his deposition taken under sec. 4096 (adverse party examination), testified that no consideration had been paid. The court thereupon held that the whole deposition had become admissible by introduction of part of it in evidence by the plaintiff, and it was all received in evidence";

37. Such testimony related to a transaction with a deceased person, presumably otherwise inadmissible. Without determining the question, it is said, that "In re Hess' Estate, 57 Minn. 282, and Jones Ev. § 792, and cases cited in the notes, seem to support this ruling".

—*McNally v. McAndrew*, 98 W. 62, 65.

38. As to evidence "inherently improbable", and not directly contradicted. See *IMPEACHMENT, ETC.*

—*Zimmerman v. Bannon*, 101 W. 407, 412.

39. "The rule is that evidence given under oath in a judicial proceeding is admissible in a subsequent action, or a subsequent proceeding in the same action, where it is shown that the witness is dead, and the parties and the issue are in substance the same. Jones Ev. §§ 339, 340; *McGeoch v. Carlson*, 96 W. supra". Evidence given before a county board committee, "does not come within the rule", to admit it in a subsequent action.

—*Dunck v. Milwaukee Co.*, 103 W. 371, 372.

40. As to circumstantial establishment of an express contract. See *PROMISSORY NOTES, ETC.*

—*McDonald v. Provident S. L. A. Soc.*, 108 W., 213, 218.

41. Photographs "of any private part of the body of any party, male or female," as evidence at a trial are "grossly improper", and should not be tolerated.

—*Guhl v. Whitcomb*, 109 W., 69, 76.

42. "There is a wide range between mere preponderance of evidence and that preponderance necessary to overcome the decision of a trial judge on controverted questions of fact."

—*Endress v. Shove*, 110 W., 141, 149.

43. "The undisputed reasonable evidence of one witness, though a party interested, should be given controlling weight in determining a question of fact. *Burnham v. Norton*, 100 W. 8".

—*Harrigan v. Gilchrist*, 121 W., 127, 383.

44. "The rule is well established that in a case tried by the court, as here, the improper admission of evidence is not available as error upon appeal. (Citation). If the evidence properly admitted supports the findings, it is sufficient".

—*Currie v. Michie*, 123 W. 120, 127.

45. As to falsifying officer's certificate, burden, and inference, of proof, in fraud cases. See *UNDUE INFLUENCE*.

—*Winn v. Itzel*, 125 W. 19, 25.

46. Testimony—"taken on the first trial was improperly admitted",—though the reporter testified that it was a correct copy of the minutes, etc.,—because it "was not certified to by such reporter, as required by this statute (sec. 4141), nor was proof made of the facts required to be so certified".

—*Wells v. Chase*, 126 W. 202, 207.

47. Held that "photographs were properly admitted in evidence", they having been sufficiently identified.

—*Hupfer v. Nat. D. Co.*, 127 W. 306, 311.

48. When evidence of reasonable value is admissible as bearing on the contract price. See *CONTRACTS*.

—*Anderson v. Arpin, H. L. Co.*, 131 W. 34, 48.

49. "It is neither opinion evidence nor 'guess-work' for a witness to give an estimate of what proportion of a given sum was derived from one source rather than another." So held, where the question asking for such answer was,—not 'exact, but we want your opinion, your judgment on the matter'.

—*Berge v. Kittleson*, 133 W., 664, 666.

50. "Where there is any credible evidence from which a reasonable inference can be drawn in support of the claim of either party the question is for the jury. (Cases).

51. A material fact in a civil or criminal case may be established by

circumstantial evidence, when the circumstances are such as to lead fairly and reasonably to the conclusion sought to be established”.

—*Sanborn v. Walters*, 145 W. 84, 86.

52. It is held immaterial as to the time of taking photographs introduced in evidence, it being shown “that they are correct representations of the premises at the time of the injury”.

—*Mahar v. Montello G. Co.*, 146 W. 46, 52.

53. “Testimony can be said to be truly negative only when it tends to prove the nonexistence of the facts by reason of a mere failure to observe or remember its existence.

54. If it asserts an observation as to its existence and a recollection of what that observation was, a denial of its existence based thereon is as much affirmative evidence as is an assertion that it did exist. (Cases).”

—*Coel v. Green B. T. Co.*, 147 W. 229, 234.

55. “The uncontradicted, positive, consistent evidence of one witness, who personally knows whereof he testifies, even though a party, is controlling,

56. If not affected by any inherent weakness materially impairing its credibility, and not purely opinion evidence in the field of common knowledge,

57. Or the special field which the judge, presumably, has the special knowledge of an expert.”

—*Geuder, P. & F. Co. v. Milwaukee*, 147 W., 491, 495.

58. The “exclusion” of “evidence in chief” “to show what price had been paid for individual parcels of other lands” on the question of “market value of the land” in question, is held “not error. (Cases).

59. The court also properly excluded the record of transfers purporting to show the price for which other lands in the same town as that in question were sold. (Cases)”. —*O'Day v. Meyers*, 147 W., 549, 553.

60. As to “conclusions of fact”, and “leading questions” as to appearance of persons or things, being “not always inadmissible”. See EXAMINATION OF WITNESSES.

—*Schultz v. Frankfort M. A. & P. G. Ins. Co.*, 151 W. 537, 550.

61. Where witnesses have testified to hearing statements, and other witnesses “each testified that he was near”, “and that in his opinion he was near enough to plaintiff to have heard them had they been made”, and “did not hear” them, it is held that the instruction was proper that “the positive testimony, if otherwise credible, is usually entitled to more weight than negative testimony”.

—*Dixon v. Russell*, 156 W. 161, 171.

62. The burden of proof does not shift from plaintiff, on making a prima facie case, but "it remains with him to the end" of the trial. See also PROMISSORY NOTES, ETC.

—*Murphy v. Est. of Skinner*, 160 W. 554, 564.

63. 'The testimony of any deceased witness, or any witness who is absent from the state, taken in an action' under sec. 4141a, is held admissible only at the "retrial of the same action or 'other actions or proceedings' invoking the same issues and between the same parties". (But see, this point overruled, in *Illinois S. Co. v. Muza*, 164 W. post).

64. Evidence as to a witness' "personal animosity against" a party is "admissible for purposes of impeachment only", in the regular manner. See also IMPEACHMENT OF WITNESSES, ETC.

—*Pfeiffer v. C. & M. E. R. Co.*, 163 W. 317, 320.

65. "Improver evidence taken in a court case under objection, is to be presumed not to have been given weight unless the contrary clearly appears. *Harrigan v. Gilchrist*, 121 W. 127, 312, 314."

—*Johnson v. Bank of Wis.*, 163 W. 369, 373.

66. "We are now convinced that we erred in construing this statute (sec. 4141a) in" *Pfeiffer v. C. & M. E. R. Co.*, 163 W. supra, and "that the terms 'retrial, other action, or proceeding' were intended to include actions and proceedings by any person against the same party wherein the issues were substantially the same as in the action or proceeding in which the testimony was given" by a deceased or absent witness, "and in so far as the *Pfeiffer* Case conflicts with the views here expressed it is overruled".

—*Illinois Steel Co. v. Muza*, 164 W. 247, 252.

67. "Whether" a witness "was out of the state or not, so as to render admissible his evidence taken upon the first trial, was a question of fact for the court to decide". If in fact out of the state, such evidence was competent. See 4141a.

68. "It requires a pretty strong case to warrant overturning the ruling of the trial court on a mere question of competency. *Emery v. State*, 101 W. 627, 648".

69. A "baptismal certificate" is held inadmissible "to prove the date of birth". See also BIRTH, ETC.

—*Lambrecht v. Holsaple*, 164 W. 465, 466.

EVIDENCE AGAINST DECEDENTS.

See TRANSACTIONS WITH DECEASED PERSONS.

EXAMINATION OF WITNESSES.

See also CROSS-EXAMINATION. EVIDENCE. IMPEACHMENT, ETC.
LEADING QUESTIONS. OBJECTIONS. WITNESSES.

Conclusions of fact, 8.
Criminate witness: rule, 2.
Court, as to effect, 3.
Objection; not attorney, 2.
Witness as judge, 3.
Hostile or adverse witness, 7.
Discretion of court, 7.
Interruption: without, 1.
Interest; written, 1.

Leading questions, 9.
Appeared "frightened," etc., 10.
Permissible, when, 9.
Trial judge, examine, 4.
Betray bias or prejudice, 5.
Limits indicated, 6.

1. A party as a general rule has a right to examine his witness without interruption. He may be interrupted as to "interest of the witness" or "inquiry as to written evidence" on the same subject.

—*Howlands v. Jenks*, 7 W. 57, 58.

2. "The correct practice", where he wishes to protect himself from answers which could criminate him, "is for the witness to say on his oath he believes the answer would tend to criminate him; and if he says that he does, his answer is generally taken as conclusive." It is not sufficient for the attorney to make such objection for him.

3. "Although the witness is the judge of the effect of his answer, and is not bound to disclose any facts or circumstances to show how the answer would affect him, * yet the court is to determine * whether such is the tendency of the question put to him, and whether he shall be required to answer." Dixon, C. J.

—*Kirschner v. State*, 9 W. 140, 143.

4. "The right of a trial judge, in the exercise of a sound discretion, to examine or cross-examine a witness cannot be doubted.

5. It is a right that is sometimes most valuable in the administration of justice, but it should be most carefully exercised, and the questions put should not betray bias or prejudice, nor carry to the jury the impression that the judge has made up his mind as to the facts.

6. The questions should be framed to make clear that which was not clear. Within these limits there can be no just fault found with the fact that the trial judge asks some questions of the witness. (Cases)''

—*Komp v. State*, 129 W. 20, 24.

7. A party has the "right to examine a hostile or adverse witness independent of the statute, and the form of questions in such a case is largely within the discretion of the court".

—*Ryan v. Oshkosh G. L. Co.*, 138 W., 466, 473.

8. "Conclusions of fact are not always inadmissible, and so far as they relate to collateral facts not directly in issue save much delay and circumlocution.

9. The same is true of leading questions. Ordinary conversations and ordinary writings abound in conclusions of fact. Most of these are permissible in testimony.

10. To refuse to permit a witness to testify that one appeared 'frightened' or 'insolent' or 'overbearing' or 'enraged' has the effect merely of shutting out the testimony of all eyewitnesses of these conditions who had not extraordinary powers of description. Cross-examination will in all such cases sufficiently disclose what bases the witness has for his conclusion".

—*Schultz v. Frankfort M. A. & P. G. Ins. Co.*, 151 W. 537, 550.

EXECUTION.

Deceased judgment debtor:

Heirs and administrators, 1.

Prerequisites to issuance, 2.

Suspension of judgment, 3.

Estate settlement; county court, 4.

Not execution issue, 4.

Under claim statute, 4.

1. After the expiration of one year from the death of a judgment debtor, under the statute (substantially as sec. 2978,) the motion being in the supreme court on a judgment therein, held, "no execution should be awarded until the heirs and administrator have an opportunity afforded them to pay the judgment without execution";

2. And that "if they fail to do so on proper demand, it should still be made to appear before leave to issue execution be granted, that the respondent (decedent) died seized of property which has come to the hands of his heirs or administrator, and which is chargeable by law with the payment of the debts of the deceased"; so held, though the statute does not seem to specifically prescribe either condition.

—*Eaton v. Youngs*, 41 W. 507, 508.

3. Under secs. 2978 and 2902, "if the entry" on the judgment docket, of suspension of the judgment by reason of the decease of the judgment debtor, "be not made the running of the statute is not interrupted."

4. "Except for the purpose of enforcing an existing lien", "our statutes do not contemplate the issuance of an execution against the property of a deceased judgment debtor, but rather that the whole estate should" "be administered under the direction of the county court, upon proper presentation of claims to that effect". Sec. 2978; *Eaton v. Youngs*, 41 W. *supra*.

—*Delle v. Boss*, 164 W. 392, 394.

EXECUTION OF WILLS.

See also PRIVILEGED COMMUNICATIONS. PROBATE OF WILLS. TESTAMENTARY CAPACITY. UNDUE INFLUENCE. WILLS.

Attestation; subscribing, 6.

Acts, physical, mental, 51.

Attesting is what, 9.

Different things, or not, 7, 52.

Distinctions given 8.

Nature of instrument, 11, 40, 52.

Presumptive evidence, 31, 81, 82.

Of all essential acts, 78, 82.

Proof of signatures, 32, 77.

Subscribing is what, 9.

Without certificate, 33.

Certificate:

Against witnesses, 85, 88.

All the essential facts, 77, 81, 82.

Convincing proof against, 35, 64, 73, 85.

Insufficient proof, 73, 74, 83, 90.

Vague testimony, 65, 66.

One wit. dead: two against, 58, 83.

Will sustained, 90.

Presumption therefrom, 23, 56, 63, 77, 81, 85.

Proof without certificate, 32, 33.

Testator, mark signature, 82, 84.

Want of recollection, 25, 26, 42, 83.

Witnesses all dead, 24, 77, 79.

Codicil: no valid will, 49.

English statute adopted, 1.

Exception as to blind, 3.

Testator's conscious presence, 2.

Weight of authority, 4.

Joint will, 83.

Not lightly set aside, 87.

Presumption: of regularity, 34, 81, 82.

Both witnesses dead, 77, 79.

Convincing proof, 35, 63, 72.

Vague impressions, 65, 66, 74.

Memory of scrivener, 70.

Memory of witnesses, 42, 83.

Uncertain guide, 88.

Signing before testator, 37, 39.

Privileged communications, 46, 67, 75.

Publication:

By signing only, 18.

Nature of instrument, 11, 40, 61, 62.

Silent declaration, 19, 62.

Testator fully apprised, 20.

Requisites: valid will, 53.

Scrivener as witness, 46, 67.

Absence of memory, 70.

Signing of testator:

Affixing mark, 12.

Manner of making, 84, 89.

Name in adjoining room, 76.

Testimony of one witness, 55.

Witnesses deceased, 79.

Direction to another, 12.

Follows certificate, 91.

Not in witness' presence, 50, 60.

Obliterated signature, 92.

Testamentary writings, 47, 49.

Both form a codicil, 49.

First adopted in second, 48.

Second witnessed: first not, 47.

Two instruments, 47.

Testimony:

Contest; one witness, 55.

Courts below disagree, 15, 44, 84.

Foreign language used, 45, 72, 79.

Many years later, 83.

Uncertain guide, 88.

Physician attending, 67, 75.

Mental competency, 71.

Proponent, beneficiary, 43.

Read and explained, 44.

Closer scrutiny, 45.

Testator German, 44.

Witnesses disagree, 44.

Rules: non-contested cases, 56.

Contested cases, 56.

General evidence, 80.

Signatures proved, 32, 33, 77.

Signing before testator, 35, 36, 37, 39, 59.

Upheld against one or both, 16, 17, 41, 59, 84.

Will itself strong, 66.

Not lightly set aside, 87.

Witnesses disagree, 13, 14, 44, 59, 83.

Witnesses:

Adjoining room, 5, 28.

Attorney and scrivener, 46, 67, 75.

Attending physician, 67, 75.

Scrivener merely, 69.

Waiver of competency, 46, 68.

Blind testator exception, 3.

Each other's presence, 38.

English statute, 1.

Hear and see read, 21.

Nature of instrument, 11, 40, 52, 61.

Present want of memory, 22, 25, 83.

Witnesses—continued

Proponent, beneficiary, present, 43.

Incompetent as party, 43.

Interpreter at making, 44.

See if he chose, 2, 5, 29, 30, 74, 76.

Signing before testator, 35, 39, 59.

Special request: unnecessary, 27.

Implied from circumstances, 53, 74.

Witnesses—continued

Testator's conscious presence, 2, 74, 76.

Weight of authority, 4.

Wife of executor, 54.

Written in lead pencil, 76.

1. "The provision of our statute (sec. 2282) which makes it essential to the validity of a will that it shall be attested and subscribed by witnesses in the presence of the testator, is taken from the English statute of 29 Car. II, c. 3, § 5, which has also been adopted without material change (except as to the number of witnesses required) in most of the states of the union". (By amendment, ch. 120 L. of 1895, the witnesses must also sign "in the presence of each other").

2. "The English courts have uniformly held that unless the instrument be subscribed by the attesting witnesses in the conscious presence of the testator—that is, unless he may, if he choose, see the act of subscribing,—it is not a subscribing in his presence within the meaning of the statute.

3. An exception to this rule is made of necessity in case the testator is blind; but in such case it is held that the subscribing must be where the testator could see the act if he were not blind".

4. "We find an overwhelming weight of authority in favor of the English rule", and "we must hold, therefore, that the instrument propounded as the last will and testament of the deceased was not subscribed in his presence by the two witnesses whose names are appended to it, but only by one of them; and hence, that the same should not be admitted to probate".

5. The defaulting witness "affixed his name to the instrument in the room adjoining that in which the deceased was, and the latter could not see that act of signing from the bed on which he was lying", though he "then went into the other room, sat on the bed of the deceased, with the instrument in his hand, and said to the deceased that he had signed it, as he supposed, in accordance with his wishes; and deceased replied that it was all right". (Statement of facts.)

6. "The distinction between attestation and subscribing is well stated in *Swift v. Wiley*, 1 B. Mon. (Ky.), 114, as follows:

7. "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends.

8. Attestation is the act of the senses, subscription is the act of the hand; the one is mental and the other mechanical;

9. And to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication;

10. But to subscribe a paper published as a will, is only to write on the same paper the name of the witness, for the sole purpose of identification'."

11. One of the witnesses being ignorant of the nature of the instrument, "without deciding the point, we are inclined to think the law is, that there must be some word spoken, or some act done, by the testator in the presence of the witnesses, showing that the instrument was intended by him to be his will—something to show the nature of the instrument,—or there can be no valid attestation". (But, see *Allen v. Griffin*, 69 W., and *Skinner v. American B. Soc'y*, 92 W. post).

—*In re Downie's Will*, 42 W. 66, 72.

12. As to the signing of the will, "it is sufficient to say that, under our statute of wills (sec. 2282), it was a valid signing by the testatrix if R. wrote her name thereto in her presence and by her express direction, or if she affixed her mark thereto".

13. One of the witnesses "testified to a state of facts, which, if not negatived by other proofs, shows beyond a reasonable doubt", the proper execution and mental capacity, "within the rule laid down by this court in *Holden v. Meadows*, 31 W. 294". (See TESTAMENTARY CAPACITY), "corroborated by other evidence";

14. And, "the other attesting witness, testified to a state of facts which, if true, shows that the instrument was not legally executed", and that the testatrix did not have mental capacity, which "testimony is also corroborated"; and,

15. The county court upheld the will and the circuit court did not, the cause being "remanded for a new trial".

16. Held that it was error to refuse probate "because the two attesting witnesses did not concur in testifying to an execution and attestation of the instrument in the manner required by the statute".

17. "The law is well settled, that a will may be supported against the testimony of some, or even of all, of the subscribing witnesses thereto, if their testimony is overborne by other evidence. *Tarrant v. Ware*, 25 N. Y. 425, and cases cited". —*Will of Susan Jenkins*, 43 W. 610, 611.

18. Where the scrivener testified that, after drafting the will according to instructions, in an adjoining room, he called the witnesses "to come into the presence of the deceased for the purpose of witnessing the will", "read the will of the deceased in the presence of the witnesses, and asked him if he was satisfied with it, and if he could sign it; and that the deceased immediately took the pen and signed his name to the paper in the presence of the witnesses, who afterwards subscribed their names thereto as witnesses", it is held a sufficient publication.

19. "If it be necessary that the deceased should declare that the writing so signed was his last will and testament at the time of his signature, in the presence of the attesting witnesses, the circumstances as shown accompanying the signature are a sufficient declaration of that fact. (*Jarman and Redfield* cited)."

20. "It is a sufficient publication if it be made to appear by competent evidence that the testator was, at the time of the execution of the

instrument, fully apprised of its contents, that he knew it to be his will, and intended it as such.' *Swett v. Boardman*, 1 Mass. 258; *Cilley v. Cilley*, 34 Me. 162."

21. Where both witnesses and the scrivener swear to being in sight and hearing when the will was read to the deceased, and could have heard and seen what was done, and being there for that express purpose, "it is a fair presumption that they did, both hear and see".

22. "Their present want of memory as to what then took place in their sight and hearing does not negative the conclusion which is to be legitimately drawn from the facts admitted to exist at the time; especially as this conclusion is fully supported by the evidence of" the scrivener and another witness.

23. Where the witnesses signed a certificate, it is held, as to statements therein, that "their subscription of this certificate raises a presumption that the testator did declare at the time that the paper so subscribed by him was his will and testament, and that they signed the same at his request and in his presence."

24. "In case of the death of all the witnesses, this presumption would be sufficient to prove the valid execution of the will, upon simple proof of the signature of the testator and of the witnesses".

25. "The want of recollection of the witnesses as to these facts, when called upon to prove the execution of the will, would not, standing alone, be such evidence of a non-compliance with the requirements of the statute as to justify the court in refusing the probate of the will;

26. Much less would such want of recollection defeat the will when there was other evidence showing that all the acts necessary to a proper execution of the will were in fact performed. (Cases);"

27. "No special request by the testator to the witnesses to sign the will as witnesses thereto, is necessary. If they sign in his presence, and without objection on his part, he knowing the fact that they are signing as witnesses, it is sufficient. (Cases)".

28. "The fact that the witnesses subscribed in an adjoining room, and not in the room where the testator was, is wholly immaterial, so that it appears it was done in his view".

29. "It is not necessary that the evidence should show that the testator in fact saw the witnesses subscribe their names; it is sufficient if he could have seen them from the place where he was sitting".

30. "In other words, if the testator being in a position where, by the mere act of volition, and without materially changing his position, he can witness the attestation, it is sufficient. 1 *Redfield on Wills*, 247, note, and cases there cited".
—*Will of John Meurer*, 44 W. 392, 396.

31. "The instrument is attested as a will in due and usual form. Such attestation is of itself not only *prima facie* evidence that the instrument was properly executed, but it raises a strong presumption that it was so executed.

32. Had the witnesses deceased before the probate of the instrument

mere proof that the attesting signatures were their handwriting would have established the will.

33. And the rule would be the same although the signatures of the witnesses were not preceded by any attesting clause or certificate.

34. To defeat probate, the strong presumption of regularity thus appearing upon the face of the instrument must be overcome by proof. *Remsen v. Brinckerhoff*, 26 Wend. 325; *Ela v. Edwards*, 16 Gray, 91; 1 Greenl. on Ev. 126; *Burling v. Paterson*, 9 Car. & P. 570". (See also approval in *W. of Hawkinson*, 143 W. post).

35. "In the present case, if the fact that the witnesses subscribed the instrument before the testator defeats the probate thereof as the will of the testator, the fact should not be found, against the presumption of regularity, without very clear and convincing proof".

36. Where the scrivener "twice testified positively that the testator signed first", and later was "not positive now", and one subscribing witness' testimony inferred, without "any direct statement that they (the witnesses) did sign first", and the other witness "alone swears positively that the witnesses signed first", no other witnesses testifying as to the order of signing, it is held,—

37. "That the positive testimony of B. (the scrivener) that the testator signed first (notwithstanding his subsequent inability to recollect the fact), outweighs the adverse testimony of" the two witnesses, and "that the presumption that the will was legally executed is not overcome by the oral evidence".
—*In re Michael Lewis's Will*, 51 W. 101, 113.

38. It is held that it is not essential that the witnesses subscribe "in the presence of each other". (Changed by amendment of ch. 120, L. 1895, to sec. 2282, requiring such signing after Jan. 1, 1896).

—*Will of J. B. Smith*, 52 W. 543, 547.

39. "We think, in the absence of clear proof that the witness or witnesses signed before the signing of the testator, it should be presumed that the testator signed first. This would be the usual order of signature. This view of the case seems to be sustained by the authorities".

40. The authorities (many cases) so hold, and "the reason for holding that, under a statute like ours, the witnesses need not know the nature of the instrument (will) to which they attach their names as witnesses to the signature of the person who has subscribed the same, is entirely satisfactory to us".
—*Allen v. Griffin*, 69 W. 529, 533.

41. Both attesting witnesses were examined, and "the substance of the testimony of each of them is contained in that of the witness S., as follows: 'I have no recollection of signing that instrument; not the least. I don't remember signing it. All I know is that it is my signature.'"

42. Held, after citing with approval. cases *supra*, that "the presumption arising from the attestation and the attesting clause to the effect that it was subscribed by the witness in the presence of the tes-

tator, is not overcome by proof. Hence, the instrument was properly probated". (Followed in *Will of Hawkinson*, 143 W. post).

—*Will. of O'Hagan*, 73 W. 78, 80.

43. Where the proponent, principal beneficiary, and also a residuary legatee, was present and "acted or participated in the matter of making the will", was present at the execution and "confessedly he was with his father to aid in the making of the will", he was held incompetent under sec. 4069, as to being a party in interest in a transaction with a deceased person, from testifying "on the point that the will was read and explained to the testator before he signed it", and "from testifying as to what took place" at the making and execution.

44. The testator was German and did not understand English, the scrivener, one of the two witnesses, understood German perfectly, the other witness disagreed with the scrivener that the will was read and explained to the testator, and the proponent acted as interpreter at the making of the will. The county court admitted the will to probate, the circuit court and the jury found that the testator did not understand its contents, and the judgment disallowing the will was sustained.

45. An instruction that "it calls upon you to investigate the whole transaction with more scrutiny, closer than you would if the transaction had been in the English language, which all the parties understood," was held unobjectionable and proper.

—*Goerke v. Goerke*, 80 W. 516, 519.

46. Where the testatrix requested her attorney, the scrivener "to sign the will which was the result of the communication between them, as a subscribing witness", "this must be held to be a waiver of objection to his competency (under section 4076), so as to leave the witness free to perform the duties of the position, and to testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation, including the mental condition of the testatrix at the time. In re *Will of Coleman*, 111 N. Y. 220; *Alberti v. N. Y. L. E. & W. R. Co.*, 118 N. Y., 85. (Cited and approved in *Boyle v. Robinson*, 129 W., 567, 579).

—*McMaster v. Scriven*, 85 W., 162, 168.

47. An instrument, of a testamentary nature, creating a trust, but not stated to be a will, was signed by L., with one witness signing, and dated. Nine years after, a second instrument, dated, and of like nature, was written on the same sheet, referred to the first, and was signed by L., witnessed by two witnesses. The county and circuit courts disallowed them, as wanting testamentary character, and for defective execution; held,—

48. That, though the first "was never so executed as to become a will", yet, the second was, and "has so adopted and incorporated into itself the former writing as that it had become a part of the latter instrument.

49. Both are testamentary in character, and both together form a codicil to the last will and testament of L. Baker's Appeal, 107 Pa. St. 381; Brown v. Clark, 77 N. Y. 369; Vogel v. Lehritter, 139 N. Y. 223, 235; Cassoday, Wills, 601-5". Directed to be admitted "as a codicil to the last will and testament of L."

50. "It was not necessary that she (the testatrix) should have affixed her signature in the presence of the witnesses. Cassoday, Wills. It was subscribed by two competent witnesses, in the presence of the testatrix", as well as of each other.

51. As to attestation and subscription, "no physical act is required in the one which is not also required in the other, and it is not clear what mental act or fact appropriate to the one is absent from the other".

52. "Since it is well settled in this state that it is not necessary to the validity of a will that the witnesses, at the time they attest it, shall know the nature of the instrument they are attesting (Allen v. Griffin, 69 W. supra), it is not clear what, if anything, attestation is intended to add to the mere fact of subscription.

53. However that may be, it is well settled that an instrument in writing, signed by the testator, and subscribed in his presence and at his request, which may be implied from circumstances, by two competent witnesses, is prima facie, and so far as formality of execution goes, a valid will. Anything further, in mere form, is not contemplated, and would be mere supererogation". (Of course, since January 1st, 1896, the witnesses must also sign "in the presence of each other". Sec. 2282).

—*Skinner v. American B. Soc'y*, 92 W. 209, 212-3.

54. Where the wife of the executor was a witness to a will, it is said, "the executor was not beneficially interested so as to affect the competency of the wife to testify either by common law or by statute. (Citations). She was competent to testify to the facts at the time the will was executed, and that satisfies the universal test. (Citations)".

—*In re Will of Lyon*, 96 W. 339, 340.

55. "We hold that where a person executes his will by signing by his mark, and it is otherwise properly executed, it may be established, even when contested, by the evidence of one subscribing witness and the testimony that the other actually signed as such, together with corroborating evidence sufficient to satisfy the court of all the statutory requisites, if the absence of the witness not produced is satisfactorily accounted for".

56. "Our statute (sec. 3788) only provides a rule that the court may be governed by in non-contested cases, leaving all others as governed by the established practice on the subject". "The New York statute" is different.

—*Jones v. Roberts*, 96 W. 427, 432.

57. Where three witnesses, two being lawyers one of whom is deceased, signed the attestation clause which states that the witnesses signed in

the presence of the testator, while such statement "raises a strong presumption that they did so sign, and such presumption should prevail unless overcome by clear and satisfactory evidence",

58. And while the fact that the deceased witness "was a lawyer of large experience in his profession is a strong circumstance in support of the truth of the attesting clause signed by him",—yet, on the testimony of the two surviving witnesses, that one of them and the deceased witness did not sign in the presence of the testator, and the fact so found by the county court, and by a jury and the circuit court,—the supreme court "are unable to come to the conclusion that the fact" "was found wrong".
—*Adams v. Rodman*, 102 W. 456, 460.

59. Where "one of the subscribing witnesses testified that he signed before the testator", "but the other subscribing witness testified that he drew" the will, and as to the regularity of the signatures, the will and other testimony corroborating such regularity, probate was sustained. (Cases, supra).

60. "It is not essential that the testator sign in the presence of the witnesses, if he has in fact signed prior to the time they do. (Cases.)"
—*Flood v. Kerwin*, 113 W., 673, 679.

61. "This court has decided that it is not necessary to the validity of a will that the witnesses thereto should know the nature of the instrument they are signing;

62. Nor is it necessary to the probate thereof that they should testify that the testator declared it to be his will. (Cases, supra)".

—*In re Noon's Will*, 115 W., 299, 303.

63. "The rule of law is thoroughly well established in this state that the subscription and attestation of a will by witnesses who declare, over their signatures, acts essential to the due execution of the instrument, raise a strong presumption in favor of the fact,

64. And that such presumption can be overcome only by clear and convincing proof to the contrary, and that mere indefiniteness of recollection will not suffice. (Cases, supra)".

65. On "vague impressions of acts or omissions inconsistent" with the attestation clause, in "the testimony of the only surviving witness", eleven years thereafter, indicating uncertainty whether the testator signed first or "in the presence of the two witnesses", and saying, "what the exact facts are, I am not now prepared to say",—

66. "We cannot hold that such testimony constitutes a clear or overwhelming preponderance of evidence against that offered by the instrument itself.
—*In re Gillmor's Will*, 117 W., 302, 303.

67. With reference to the testimony of an attorney, as scrivener and a subscribing witness, the other witness being the attending physician, it is said: "This court has held, in effect, that a subscribing witness

to a will is necessarily expected to give testimony as to the execution of the same. *Alberti v. N. Y., etc., R. Co.*, 118 N. Y. 77; *McMaster v. Scriven*, 85 W., *supra*”.

68. “All the authorities, including the two recent adjudications from this court, agree that the section of the statute in question (4076) is nothing more than a reenactment of the common law. *Koeber v. Somers*, 108 W., 504 (See PRIVILEGED COMMUNICATIONS); (other cases).”

69. But it is here held that the attorney “neither gave nor attempted to give him any advice—much less, ‘in the course of his professional employment’,” and “in drawing the written instrument in controversy he acted in the capacity of a mere scrivener, and his testimony was clearly admissible. (Cases).” See also TESTAMENTARY CAPACITY.

—*In re Downing's Will*, 118 W., 581, 591.

70. As to absence of memory by a scrivener and presumption of attestation clause. See TESTAMENTARY CAPACITY.

—*Hanley v. Kraftczyk*, 119 W., 352, 360.

71. As to “exclusion of attending physician’s testimony” on mental competency. See PRIVILEGED COMMUNICATIONS.

—*Will of Hunt*, 122 W. 460, 465.

72. As to will in language the testator did not understand, being admissible,

73. And presumption of attestation clause to be overcome by affirmative testimony. See PROBATE OF WILLS.

74. Where a witness after signing, “said to the other witness within hearing of testator, ‘H. you sign this’, which she did in the same room”, this does not “overcome the presumption” of the attestation clause as to signing, “as witnesses at his request and in his presence”, though “the testator’s eyesight was so dim that he did not actually see the act of writing”.

—*Will of Arneson*, 128 W. 112, 116.

75. As to testimony of attorney and physician, witnesses to a will. See TESTAMENTARY CAPACITY.

—*Boyle v. Robinson*, 129 W. 567, 579.

76. Where a will “was drawn in lead pencil, executed by testator (in bed) by his mark”, and his name and witnesses’ signatures written on “a table in an adjoining room”, “within the observation of the testator”, it was, on the evidence, sustained.

—*Donovan v. Hyde*, 141 W. 41.

77. “Upon proof of the authenticity of the signatures of deceased or necessarily absent attesting witnesses, there is a legitimate inference or presumption of fact that those acts which they purport to attest did occur.

78. Those acts include the signing or acknowledgment by the testator in the presence of the witnesses, his declaration of his purpose, his

request to the witnesses to attest, and their signing for that purpose in his presence and in presence of each other."

79. So held, there being "a full attestation clause", the will being signed by mark, both witnesses being dead; and the "testator could not read or write the English language", but was "of average intelligence," and "had lived in this country thirty years".

80. "The decisions in New York (contra) are, by reason of their statute, of little or no weight in Wisconsin, where we have no statute to modify general rules of evidence in case of contested wills, sec. 3788 having no application. *Jones v. Roberts*, 96 W. supra".

81. "As to wills", "the attestation itself is prima facie proof of all facts essential to due execution, to which attesting witnesses should depose if present,

82. Including the authenticity of testator's signature, whether autographic, by mark, or in hand writing of another, also his volition in signing and his mental capacity and understanding of his act. (Many cases)".
—*Will of Hawkinson*, 143 W. 136, 139.

83. A joint will of C. G. and M. his wife, executed in 1887, was shortly thereafter probated as to C. G., M. being executrix and she making no change in the will prior to her death in 1909. At this time the scrivener of "considerable experience" and one of the three witnesses was dead; the 2nd. W. was eighty and apparently "had no recollection of the transaction", said "he never signed" and later "did not know whether" the "signature was his or not", and was positive "that he had never been in" the house where the will was signed; the 3rd witness D. testified that he signed, "but that neither C. G. nor his wife signed the will in his presence", nor the scrivener B., nor was the witness W. "in the house while he remained there".

84. An expert T. testified that "the will, the name of M., her mark, and the name of B. as witness appeared to have been written with the same pen and the same ink and at the same time and by the same person". Will disallowed by the circuit, but allowed by county and supreme courts.

85. "The recitals in the attestation clause show due execution of the will, and there is a strong presumption of the truth of these recitals, which must prevail unless overcome by clear and satisfactory evidence. (Cases, supra).

86. The correctness of the trial court's decision must be tested by this rule and not by the one ordinarily applicable to findings of fact.

87. Wills should not be lightly set aside where there is no question of mental incompetency or undue influence, and where, as here, there is no doubt whatever that Mrs. G. intended to make and supposed that she had made a valid will.

88. The testimony of witnesses as to the details of the transaction such as witnessing a document that took place twenty years before, is a

very uncertain guide, where it directly contradicts their written statement made when they signed the instrument”.

89. “It is the common and usual practice for the scrivener to make the mark, the party merely touching the pen while it is being made”.

90. “As we read and interpret the evidence, instead of impeaching the attestation clause in a clear and satisfactory manner, it hardly raises a suspicion that the will was not properly executed”.

—*Will of Grant*, 149 W. 330, 333.

91. “If otherwise properly executed, published, and declared, the fact that the signature (of testator) is followed instead of preceded the attestation clause would not invalidate the will.

92. And where we have an obliterated signature (at the usual place, here) which was not witnessed and an admittedly genuine one (at the end of the attestation clause, here) not tampered with which was duly witnessed, the obliterated signature does not prove revocation. In re Wood’s Will, 11 N. Y. Supp. 157”. Such will allowed.

—*Gale v. Freeman*, 153 W. 337, 340.

EXECUTORS AND ADMINISTRATORS.

See also ACCOUNTS OF EXTRS. & ADMRS. ADMINISTRATION. ADMR. DE BONIS NON. ADMR. WITH WILL ANNEXED. COMPENSATION OF ADMR., ETC. FOREIGN EXTR. & ADMR. LIABILITY. PARTIES. PUBLIC ADMR. REMOVAL. REPRESENTATIVE CAPACITY. SPECIAL ADMR. TRUSTEES. TRUST FUNDS.

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1. An executor, it is held, cannot be removed for non-residence, without notice.
 —*Humes v. Cox*, 1 Pin. 551, 554.

2. The judge having erroneously "directed the administrators" to appraise a claim "as assets" and the administrator having paid out funds on the strength thereof and the court having thereafter corrected the error on discovery as was its duty, the administrators would not be held with "that culpability which naturally attaches to the idea of a devastavit," and "would be entitled to the fullest indulgence of the law."
 —*Bowen v. Burnett*, 1 Pin. 658, 662.

3. "A judgment by default against executors or administrators is not an admission of assets."
 —*Chouteau v. Hooe*, 1 Pin. 663, 665.

4. Administration granted to stranger within thirty days of decease "was in the highest degree, irregular, though not perhaps entirely void." The court could correct and annul the administration and it was its duty so to do.
 —*Brunson v. Burnett*, 2 Pin. 185, 188.

5. Executors are held entitled to the possession and control of property specifically devised or bequeathed, as against the devisee or legatee, until the estate is settled and delivery ordered.
 —*Philips v. Sleusher*, 3 Pin. 457.

6. Administrator's duty is to pay not to purchase claims. See PAYMENT.
 —*Gillett v. Gillett*, 9 Wis. 194, 197.

7. Administrator may be required to account after a year, on the court's own motion.
 —*In re Hugh Campbell*, 12 W. 369.

8. Administrator may, at his own risk assign as an advance to heir, a note and mortgage. See *PERSONALTY*.

—*Williams v. Ely*, 13 W. 1, 6.

9. An administrator is held not the "trustee of the heir," of real estate not necessary to be sold for the payment of debts, and may purchase such estate in his own right from the heirs.

—*Barker v. Barker*, 14 W. 131, 149.

10. May sue as individual or representative for conversion of his intestate's goods after the decease and before administration granted.

11. Whether the administrator is liable for costs individually or as representative "depends on the question whether he has been guilty of mismanagement or bad faith in bringing the action."

—*Knox v. Bigelow*, 15 W. 415, 420.

12. Administrator may sell notes and mortgages without previous order.

—*Cleveland v. Harrison*, 15 W. 670, 674.

13. "Until the estate was settled or delivered over by order of the county court to the heirs, the administrator * * was entitled to the possession and the rents, issues and profits of the premises in dispute, as against the heirs and their vendees."

—*Edwards v. Evans*, 16 W. 181, 184.

14. Administrator is liable to an action by the heir for the latter's share of the estate. Action on the bond is a cumulative remedy. See *LIABILITY*.

—*Williams v. Davis*, 18 W. 115.

15. "Assuming the entire correctness of the plaintiff's (administrator) claim that he is, as a matter of technical legal right, still entitled under the statute to the possession of the estate, on the ground that he has not been discharged nor the estate assigned to the heirs," "equity will not restrain a party (heir) in possession from disposing of the crops which he had raised, in favor of one who has only a technical legal right to the possession, without any beneficial interest, this being wholly in the party sought to be restrained."

—*Converse v. Ketchum*, 18 W. 202, 206.

16. "The law is perfectly well settled, that a person appointed executor cannot be compelled to act, but may refuse to qualify, or make a valid renunciation * before he has done any act which indicates the intention to accept the trust," though, "it is said," that he "cannot resign".

17. "Assuming the general rule of law to be that if a creditor appoints his debtor his executor and the debtor does not renounce the trust, then such appointment operates as an extinguishment or release of the debt," yet "whenever from the whole will, it appears that it was not

the intention of the testator to discharge the debt by making his debtor his executor, then such appointment will not have that effect."

—*Finch v. Houghton*, 19 W. 149, 156.

18. "The satisfaction of the mortgage by the deceased (co) executor S., is prima facie valid—* it may be voidable, but is not void. It was competent for S. to release the mortgage without the assent or signature of" his co-executor.

19. "However it may be at law, it seems to be now well established in equity, that, generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of, his own debt; on the principle that the transaction itself gives the purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty".

—*Weir v. Mosher*, 19 W. 311, 316.

20. "Generally speaking, whenever an administrator sells, mortgages or pledges any of the personal property of which the intestate died seized or possessed, in payment of or as security for his own individual debt, he is guilty of a breach of trust".

21. "And every person who receives any part of the personal assets in payment of or as security for his private debt, is a party to such breach of trust and is responsible therefor, (Story's Eq., 581; *Colt v. Larkin*, 9 Cow. 320),"—to the creditors and distributees, but the administrator or administrator de bonis non, cannot avoid such sale or pledge.

—*Stronach v. Stronach*, 20 W. 129, 133.

22. "Upon a cause of action which arose in the lifetime of the testator or intestate and upon which he had a complete right of action, the executor or administrator must sue in his representative capacity".

23. "But upon a cause of action accruing to the executor or administrator after the death of the testator or intestate, the executor or administrator may sue, either in his own name, or as executor or administrator".

—*Lawrence v. Vilas*, 20 W. 381, 385.

24. "Under our statute, the executor must do something more than interfere with the effects of the deceased, to show that he accepts the appointment; he must signify to the county court his acceptance of the trust and give the bond required. Before he does this he cannot be said to have qualified", and suit to enforce a trust will not be entertained.

25. The executor after qualifying, will be required by "an order from the county court" to "pay over" funds to support the mother of the deceased whose support is chargeable to the estate under the will.

26. "And of course the administrator of the mother can obtain the same relief from the county court, if it appears that his intestate left

any debts which should be paid by this provision made for the mother in the will".
—*Batcheldor v. Batcheldor*, 20 W. 452, 453.

27. "If an administrator takes possession of the property of a stranger, claiming it as belonging to his intestate, if he detains it from the true owner after a demand, he would be liable to an action to recover it".
—*Lill's C. B. Co. v. Russell*, 22 W. 178, 182.

28. "'Sole executor', 'executor aforesaid', or 'hereinafter named', are regarded as descriptive of the person of the trustee, and not as implying that the testator intended to annex to the office of executor, any powers or duties which by law do not belong to it".
—*In re Besley*, 18 W. 451, 456.

29. "It seems to be well settled that an administrator, whether foreign or domestic, may sue in his own name upon a note payable to bearer, although such note was transferred to his intestate in the lifetime of the latter. (Cases cited)".
—*Sanford v. McCreedy*, 28 W. 103, 106.

30. As a general rule, it is the duty of the executor to convert the whole of the residue of personal estate charged with a life estate into money and invest it in permanent securities. See CONSTRUCTION OF WILLS. LIFE ESTATES.
—*Golder v. Littlejohn*, 30 W. 344, 351.

31. An administrator's deed is presumptive evidence of his due appointment and authority to convey as set forth therein. See DEEDS.
—*Chase v. Whiting*, 30 W. 544, 548.

32. "If the estate is settled", whether "through the instrumentality of formal proceedings", or otherwise, "the executor or administrator has no longer any right to the possession of the real estate". See REAL ESTATE. SETTLEMENT.

33. "It is no part of the legal functions of an executor or administrator to vindicate the title of devisees to lands devised by the testator, especially if such title has been clouded or complicated by acts which occurred long after the same vested in the devisee under the will, and to subject the estate to the expenses thereof, as he necessarily must if he does so".
—*Flood v. Pilgrim*, 32 W. 376, 380.

34. Where the will "was not proved and allowed as the last will and testament of the deceased, it seems clear that the court had no power to appoint" either an administrator de bonis non or administrator with the will annexed.
—*Chase v. Ross*, 36 W. 267, 272.

35. Where publication or posting of notices is defective, either of them would "invalidate the administrator's deed." See SALE OF REALTY.

36. A conveyance to the administrator personally through a third

party who bid off the premises, would also "invalidate the administrator's deed".
—*McCrubb v. Bray*, 36 W. 333, 340.

37. A person loaning money, on a note, of an estate of which she afterward became administratrix, may elect to have the note enure to the estate, and beginning an action thereon as administratrix "sufficiently shows that she adopted the note as administratrix".

—*Kalckhoff, Admxc. v. Zoehrlaut*, 40 W. 427, 430.

38. It is not the duty of the administrator to take possession of the real estate, if not "needed in the settlement of the estate," and he, "is only chargeable with (such) rents and profits while the land remains in his possession".

39. If the proceeds of the land are not needed and are not chargeable to him, he cannot maintain an action for use and occupation. See REAL ESTATE.

—*Filbey, Admrs. v. Carrier*, 45 W. 469, 471.

40. In an action by an executrix, where, to prove representative capacity, certified copies of the letters testamentary and of the bond were submitted, and it was claimed there should also have been "introduced in evidence the will and the probate thereof", it is said, "We think the proof sufficient (prima facie at least) to show her right to maintain the action".

—*Wittmann, Extrx. v. Watry*, 45 W. 491, 493.

41. "It is true that courts have held that the words 'administrators, etc.' placed after the name of a person in a contract, may be treated as descriptio personae, and that, notwithstanding such words, an action upon such contract may be maintained by or against the party in his individual name;

42. But this rule would not apply to a bond required by statute to be given to them in their representative capacity in a judicial proceeding. The circumstances under which the bond was given would, in such case, give it a different construction;"

43. "The administrators as such could maintain an action thereon. The meaning of the bond is quite as clear as though the word 'as' had been inserted between their names and their title, 'administrators, etc.' "

—*Kasson v. Est. of Brocker*, 47 W. 79, 86.

44. The letters and the order granting "are prima facie evidence of the authority to make the appointment." See ADMR. DE BONIS NON.

—*Oakes v. Est. of Buckley*, 49 W. 592, 599.

45. The right of an executor to possession of lands, after six years administration, was denied. See LIMITATION OF ACTIONS.

—*In Est. of Pierce*, 56 W. 560, 564.

46. The administrator is presumed not personally chargeable with the costs, and the judgment should specifically make the estate chargeable. See JUDGMENT.
—*Ladd, Admr. v. Anderson*, 58 W. 591, 593.

47. As to rights of parties in appointment of administrator. See ADMINISTRATION.
—*Est. of Sargent*, 62 W. 130.

48. Where the letters are "under the seal of the court" and "tested in the name of the judge thereof, and signed by him officially, and is in due form", the objection that this document was "nothing more than the act of the judge", "is unfounded in fact", and it "was properly received" as proof. —*Parish, Admr. v. T. of Eden*, 62 W. 272, 281.

49. "The office of an executor is in its nature a trust, in the discharge of which he acts as trustee". He takes title "subject to the trust and duties imposed by law". See also VESTING OF ESTATES.
—*Scott, Extr. v. West*, 63 W. 529, 555.

50. As to executor's release from payment of his own debt, inventoried. See INVENTORY AND APPRAISAL.
—*Lynch v. Divan, Extr.*, 66 W. 490, 492.

51. After election by the widow, the executor "became her trustee as to her share of the personal estate, and must be held to an honest discharge of his duties as such trustee". See also ADMINISTRATION. WIDOW.
—*Beem v. Kimberly*, 72 W. 343, 368.

52. Where two of three executors have contracted to sell realty under a power in a will, the third executor refusing, equity will not compel a specific performance, and the conveyance required the action of all. See POWER.
—*Crowley v. Hicks*, 72 W. 539, 541.

53. Executors or administrators cannot become purchasers personally from themselves in sales of realty. See SALE OF REALTY.
—*O'Dell v. Rogers*, 44 W., 136, 177.

54. "When a creditor makes his debtor the executor of his will, the right of action for the debt is said to be discharged, for the reason that the executor cannot sue himself.

55. But, while this is so, the debt itself cannot be said to be discharged in any case where creditors of the estate will be prejudiced, nor where the will shows an intention that the debtor is not to be discharged.

56. In all such cases, it is settled in Massachusetts and here, "that the note or security becomes assets in the hands of the executor, for which he must account", and "to be treated as money in his hands. (Mass. cases); *Finch v. Houghton*, 19 W. supra.

57. Nor can the executor escape this liability by failing to charge himself with the debt in his inventory. *Tarbell v. Jewett*, 129 Mass. 457. 2 Wms. Extrs. (7th Am. Ed.) 624". *Lynch v. Divan*, 66 W. supra, so distinguished (See INVENTORY AND APPRAISAL).

—*Est. of Robinson v. Hodgkin Exr.*, 99 W. 327, 330.

58. An executor may pledge estate assets on his personal loan, and the pledge be valid if the pledgee is innocent of the conversion. See COLLATERAL SECURITY. —*Hemmy v. Hawkins*, 102 W. 56, 60.

59. "The almost complete common-law powers of one named executor before probate have been greatly curtailed both by the letter and the policy of the modern statutes vesting in certain courts control over estates of testators".

60. Our statutes "provide (sec. 3794) that he shall give bond 'before he shall enter upon the execution of his trust'. In *Batchelder v. Batchelder*, 20 W. supra, it is held he is not exercising any trust until that has been done".

61. In the statutes, before letters are issued, he is referred to as "the person named as executor", and in substantially all cases where the word 'executor' is used its obvious significance is an executor confirmed by appointment and fully installed in his office".

62. And it is held that the circuit court did not obtain jurisdiction, on an appeal by the proponent and executor named in a will, denied probate in the county court, on his failure to file an undertaking under sec. 4032.

63. "The reason that such officers (executors, etc.) are exempted from bond or undertaking is that they are already under bonds,—*Stinson v. Leary*, 69 W. 269 (see APPEAL)".

—*Will of Somervail*, 104 W. 72, 75.

64. An executor named is not an executor until regularly appointed. See COSTS AND FEES. —*Fox v. Martin*, 108 W. 99, 101.

65. As to joint executors, in general, being required to act together, but that one, in certain cases, may properly appeal. See TRUSTEES.

—*In re Luscombe's Will*, 109 W., 186, 195.

66. While in general "an administrator will not be permitted to speculate with the funds of his decedent's estate",

67. Yet where a "claim against defendant was sold and assigned to plaintiff (as administrator) for a valuable consideration", and "defendant had no interest in the estate represented by plaintiff", the transfer being valid, "defendant had no interest to inquire further. *Chase v. Dodge*, 111 W., 70; *Sheridan v. New York*, 68 N. Y., 30." Demurrer overruled. —*Brossard, Admr. v. Williams*, 114 W., 89, 90.

68. Executor acting as trustee for many years, is accountable as executor and his bondsmen liable for default. See TRUSTEES.

—*Wallber v. Wilmanns*, 116 W., 246, 249.

68a. Executors cannot “be controlled by a court other than that from which they derive their authority”. See CREDITORS’ ACTIONS.

—*Williams v. Smith*, 117 W. 142, 144.

69. Where an executor named in the will was “legally competent”, objections “that he abused his stepmother, was obnoxious to the objecting heirs (the widow and ten children), and that his character was not such as to inspire confidence and trust”,—“go to his temper, his disposition, his habits, and his moral character, rather than to his capacity to do business”, and are held insufficient, and that he “was legally competent” under sec. 3792,

70. As the “statute was mandatory and required the county court to give effect to the expressed wish of the testator by appointing him as such executor”.

—*Saxe v. Saxe*, 119 W., 557, 560.

71. “In all essential respects” “an executor or administrator” “is regarded in courts of equity as a trustee. (Citations)”. See also TRUSTEES.

72. A settlement by a sole heir and beneficiary, as to an estate claim, is held binding on the administrator afterward appointed. See also SETTLEMENT.

—*McKeigue v. C. & N. W. R. Co.*, 130 W. 543, 546.

73. As to invalidity, laches, good faith, remedies, accounting, etc., on sale of realty by an administrator to himself through another. See TRUSTEES.

—*McCleaer v. Root*, 147 W. 60, 63.

74. Where the executors “completed their duties as such and were, in due form, discharged by the county court”, “pending the appeal” in a special proceeding to revive an action,

75. “The personal representatives at the time of the appeal, are still such as regards the matter here”.

—*Harris v. Welch*, 148 W., 441, 445.

76. As to an executor’s, and a co-executor’s right to appeal from an order allowing the final account. See APPEAL.

—*Will of Hyde*, 157 W. 462, 464.

77. “The title to personal property of the testator vests in his personal representatives”, and the executors and their sureties are liable as such, for trust property, on failure to qualify as nominated trustees. See also TRUSTEES.

—*Karel v. Pereles*, 161 W. 598, 604.

EXEMPLIFICATION.

See AUTHENTICATION.

EXEMPTIONS.

See also HOMESTEAD.

Animals; year's food, 5.
 Annexation: homestead, 2.
 Debtor and family, 10.
 Earnings; also team, 11.
 Farm implement, 12.
 Not farming, 20.
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 Gift of exempt property, 13, 14.
 Government securities, 15.
 Laws not vested, 3.
 Liberally construed, 9.
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Pension money: taxes, 16.
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 "Span of horses," 1.
 Stock in trade; use, 22.
 Intention to engage, 23.
 Trade or business, 8.
 Tradesman; merchant, 17.
 Undivided interest, 6.
 Personalty; homestead, 7.
 Wagon: hearse, 20.
 Waiver of selection, 18.
 Year provision support, 10.

1. "A span of horses" is two animals which may be connected together or united for the purpose of a team" and as such is within the exemption laws and a young colt cannot be one of a span.

—*Ames v. Martin*, 6 W. 361.

2. An exemption of a homestead is changed from "agricultural lands" to a city exemption, after legal annexation against the owner's consent.

3. Exemption laws are not vested, and the legislature may change them though not wholly abrogate them.

—*Bull v. Conroe*, 13 W. 233.

4. "Nor do we think, as was contended, that a person, by multiplying his employments, can claim the exemption for such. It was designed for the benefit of persons engaged in either occupation or business singly".

—*Bevitt v. Crandall*, 19 W. 581, 583.

5. Under the statute exempting from levy certain animals and a year's food for them, the debtor is not entitled to the food exemption for animals he did not possess, unless "He had the present bona fide intention and purpose of at once acquiring them so as to need the food for their support".

—*Cowan v. Main*, 24 W. 569, 572.

6. It "seems to be the principle underlying the exemption laws", "that the exempt property is necessary for the support of the debtor and his family". "But it is obviously impracticable to apply that principle to an undivided interest in a horse or buggy, which the debtor cannot claim to hold to the exclusion of his co-tenants".

7. It seems that the principle of no exemption to individual tenants in an undivided interest in homestead real estate, is "applicable to an undivided interest in personal property," not in its nature severable.

—*Wright v. Pratt*, 31 W. 99, 104.

8. "Upon full consideration we are of the opinion, and so hold, that the term 'trade or business,' as used in the" exemption statute, "must be construed to mean some lawful trade or business, and that no person who is engaged in any business which is prohibited by law, is entitled to any exemption of his tools, implements or stock in trade used and kept for the purpose of carrying on the same", unless specially exempted.
—*Walsch v. Call*, 32 W. 159, 161.

9. Exemption statutes "are to be liberally construed."

10. "The debtor and his family", is held to include a son over twenty-one years of age as "head of the family", of "his mother, brothers and sisters" dependent on such son for support, so as to allow as exemptions, provisions "necessary for one year's support".

—*Connaughton v. Sands*, 32 W. 387, 391.

11. "The earnings" of a laborer are construed to include "the earnings of his team" which was also exempt, as such statutes are to be liberally construed.

—*Kuntz v. Kinney*, 33 W. 510, 513.

12. It is held that one, "who is not a farmer, and who, when the levy was made, was not engaged in any business requiring the use of a mower", was nevertheless entitled to the exemption under the statute.

—*Humphrey v. Taylor*, 45 W. 251, 254.

13. The owner of exempt property may make a sale or gift of the same, and when completed by a manual delivery of the property, it may be held as against the creditors of the vendor or donor;

14. But where, after such sale or gift, through change of circumstances the property would no longer be exempt property, Ryan, C. J., holds that the transfer must be bona fides.

—*Carhart v. Harshaw*, 45 W. 340, 349.

15. "Congress has exempted from local taxation the securities of the government, held by its creditors, and now no one questions the power to do so.

16. The power to exempt pension money from seizure from debt rests on the same principle; and if it exists in one case, it must necessarily exist in the other."

—*Folschow v. Werner*, 51 W. 85, 89.

17. "A tradesman or merchant who is not a mechanic is within the protection of the statute", and is entitled to \$200 worth of exemption of his goods as "stock in trade".

18. While the general rule is that the exemption must be claimed at the time of the seizure by the officer, yet if "the officer refuses to give the debtor an opportunity," or "denies his right to any exemption whatever, the actual selection is waived or excused, and the want of it will not be a waiver of the debtor's right".

—*Wicker v. Comstock*, 52 W. 315, 317.

19. Where an insolvent debtor sold notes, not exempt property, and has purchased with the proceeds "other property" "with the intention of holding the property so purchased as exempt, and thus preventing his creditors from collecting their debts out of his property", he can hold such exempt property. See also FRAUD.

—*Comstock v. Bechtel*, 63 W. 656, 660.

20. "The privilege of claiming a wagon as exempt is not confined to persons engaged in agricultural pursuits, nor any particular class of business", and a hearse is held exempt as a wagon.

—*Spikes v. Burgess*, 65 W. 428, 430.

21. Following *McIntosh v. Aubrey*, 185 U. S., 122, pension money is held not exempt 'when converted into other property', but presumably only 'when due or to become due', and *Folschow v. Werner*, 51 W. supra, if "followed at all it should not be extended".

—*Joyce v. Russell*, 140 W. 583, 588.

22. The exemption of subd. 8 of sec. 2982, "does not extend to cases where the stock in trade is not actually used or kept for the purpose of carrying on the business in which the party has been engaged. (Cases)".

23. While "some authorities hold that the right to the exemption is not lost by a mere temporary suspension of the business", it is held that where the owner, "retail liquor dealer", after his license expired "was offering and endeavoring to sell his stock in bulk and in fact had sold some of it", this negatived "the contention that these goods were used or kept for the purpose of carrying on the business", and were therefore not exempt.

—*Hettinger v. Wells*, 161 W. 640, 642.

EXPERT TESTIMONY.

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When necessary, 57.

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- Value of services, 43.
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1. "The general rule that the opinions of witnesses are confined to men of science, art or skill in some particular branch of business, is well settled". (But, see *Zarnik v. C. Reiss Coal Co.*, 133 W. post).

2. An expert's opinion on the evidence as heard by him, is not proper. "The facts, as given in evidence, might have been stated to the witness, and then his opinion upon them would have been competent; or he might have given his opinion upon a similar case, hypothetically stated".
—*Luining v. State*, 2 Pin. 215, 219.

3. "The decided weight of authority seems to be in favor of the rule" for the "admissibility of questions" to the expert "upon the evidence given on the trial, if he heard it, viewing it as a case stated". In this case approved as to a single witness' testimony heard, the court

saying as to this rule,—“for ourselves, we can see no reasonable objection to it”.

4. “The sole object of all rules upon the subject is, that the questions shall be so framed as not to require the expert to give an opinion upon the credibility of the testimony and truth of the facts, which are purely questions for the jury”.

5. “The case stated—‘supposing K.’s statement to be truthful’—was purely hypothetical, and in this respect seems to us to be fully in harmony with what should be the legal rule in such cases. And so we understand”, the case of *Luning v. State*, 2 Pin. supra, (quoting the extract there given).
—*Wright v. Hardy*, 22 W. 348, 354.

6. Held that an objection “on the ground that the witness should not base his answer on the testimony of” another witness whom he heard testify, had “been properly overruled”.

—*Buttrick v. Gilman*, 22 W. 356, 358.

7. “The unsatisfactory nature of such evidence (expert) is well known. The facility with which great numbers of witnesses may be marshalled on both sides of such a question (handwriting), all calling themselves experts, and each anxious to display his skill and ingenuity in detecting the false or pointing out the true, and equally honest and confident that his own theory or opinion is the only correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received”. Dixon, C. J.

—*Daniels v. Foster*, 26 W. 686, 693.

8. “The state of the weather, as to heat or cold” is “a matter of such common experience, that any witness of ordinary intelligence and having knowledge on the subject”, is “competent to give his opinion as to whether the weather was so cold on a day remembered” that vegetables would be likely to freeze under certain conditions.

9. “In the examination of such witnesses (experts), considerable latitude of inquiry and interrogation must necessarily be indulged, and counsel are not to be limited by any narrow or stringent rules either in obtaining the opinion of the witness upon all the facts disclosed, or in ascertaining his skill and competency, or the want of them, to give such opinion”.

—*Leopold v. VanKirk*, 29 W. 548, 554.

10. The widow, being his attendant during his illness, and giving reasons, was allowed “to express her opinion as to whether her husband comprehended the facts”, his sanity being in question. See *INSANE PERSONS*.

—*Burnham, Admr. v. Mitchell*, 34 W. 117, 134.

11. “In regard to this class of facts”—“in respect to the value of property or damage done to it, or the identity of a chattel or person,

or facts of that nature"—“a witness can only testify by using language which amounts to little more than giving his opinion about them.

12. But this kind of evidence is admitted in that class of cases from necessity, because it is impossible, by any mere words of description, to give the jury a proper understanding of the facts.

13. But, of course, the general rule is that a witness cannot testify as to his opinion, but is limited to stating facts”.

14. Where an expert gives an opinion, founded upon examination, and “testified from his own knowledge and experience, it was not proper to read from medical books to contradict him”.

—*Knoll v. State*, 55 W. 249, 254.

15. “As to the propriety of allowing expert witnesses to give an opinion upon a hypothetical case stated, the practice has frequently been approved by this and other courts. (Cases, *supra*, et al).

16. And it is clearly a more appropriate way than to allow the expert witness who may have heard the evidence in the case to give his opinion upon his understanding of the evidence so given.

17. The reason for permitting hypothetical questions”, instead of giving an “opinion from hearing the evidence”, is stated in *Bennett v. State*, 57 W. 85, and it is there also said:

18. “If it be proper, in any case, to permit an expert who has heard the testimony of a particular witness or of all the witnesses to give his opinion upon such evidence, and there be any conflict of evidence or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established by such testimony”.

19. The rule “must be that, in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove,

20. And the court ought not to reject the question on the ground that, in his opinion, such facts are not established by the preponderance of the evidence.”

21. “The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts”.

—*Quinn v. Higgins*, 63 W. 664, 669.

22. “An expert must give an opinion upon facts. He may be asked whether certain things are properly or skilfully done,

23. But not whether the defendant was guilty of want of ordinary care or of negligence in the doing of such things.

24. When scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved. 1 Greenl. Ev. § 440.

25. It would be improper to ask an expert witness whether a certain act was an act of insanity. *Rex v. Wright*, Russ. & R. 456.”

—*Seliger v. Bastian*, 66 W. 521, 523.

26. The question was raised as to "the propriety of asking an expert witness to give his opinion upon the evidence of another witness who has testified in the case, and whose testimony was heard by the expert witness whose opinion is called for. That it is proper to propound such a question to the expert witness, and have him answer the same, was decided by this court. *Wright v. Hardy*, 22 W., supra.

27. This case has not been overruled by any subsequent decision of this court," and while the rule does not apply "in *Bennett v. State*, 57 W., 82, where" "the evidence bearing upon the question of insanity was very voluminous, elicited by the examination of a large number of witnesses", "the rule in *Wright v. Hardy*" was not overruled; and was also subsequently approved in *Gates v. Fleischer*, 67 W., 504.

—*Abbot v. Dwinnell*, 74 W., 514, 520.

28. "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent of itself as primary evidence.

29. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." *Whitney v. Thacher*, 117 Mass., 523".

30. "The safest course is to permit the examination of all having experience in or acquainted with the thing to be valued, leaving their authority to be tested on their cross-examination". In this case a banker having general knowledge of the value of municipal bonds, was permitted to testify as to Atlanta City bonds, in which he had never dealt "and had no special knowledge as to their market value", and it was held no error.

—*Murray v. Norwood*, 77 W., 405, 410.

31. "The honesty or dishonesty of a sale and purchase of goods", attacked as fraudulent "is in no way a question for experts, and cannot be established by the opinion of witnesses who were present and assisted in making the sale".

—*Rindskopf v. Myers*, 77 W. 649, 651.

32. It was held "certainly not improper" to allow witnesses to give an opinion as to the value of "lands and the damages thereto on hypothetical statements of the testimony, as if they were experts". "The opinion of witnesses as to values may be given without any previous examination as to the grounds of it or their competency to give it.

33. Then, on cross examination, they may be asked their reasons or as to their knowledge of the property; or their competency to give an opinion may be first shown.

34. They are not experts having special skill and experience in a particular trade, business, or profession. They are common witnesses. The value of their opinions must depend upon their knowledge of the subject".

—*Moore v. C. M. & St. P. Ry. Co.*, 78 W. 120, 124.

35. "Ordinarily a witness cannot give his conclusions from facts", "but an opinion can be given in evidence by a non-expert as to matters with which he is specially acquainted but which cannot be specifically described.

36. In speaking of the admissibility of such opinions as evidence, Judge Redfield says: 'Opinions of witnesses derived from observation are admissible in evidence where, from the nature of the subject under investigation, no better evidence can be obtained.' " Redf. Wills, 136.

37. "Opinions concerning matters of daily occurrence and open to common observation are received from necessity (Comm. v. Sturtivant, 117 Mass., 122.);

38. And the ground upon which they are admitted in such cases is that from the very nature of the subject in issue it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it (DeWitt v. Barly, 17 N. Y. 340; Snyder v. W. U. R. Co., 25 W., 66)".

39. "It is always competent to prove value by the opinion of witnesses who have requisite knowledge, whether the subject be real estate or personal property. Clark v. Baird, 9 N. Y. 183; Kellogg v. Krauser, 14 Serg. & R. 142.

40. The witnesses were not asked to state what damages the plaintiff had sustained by cutting down and taking away the trees. They were asked, only, what was the value of the trees to the lot owner for certain purposes", "as a shelter and a windbrake, etc." Held proper and cases discussed, citing and quoting approvingly also Moore v. C. M. & St. P. Ry. Co., 78 W., supra. —*Andrews v. Youmans*, 82 W. 81, 83.

41. A physician who examines a party solely for the purpose of testifying as an expert, cannot testify as to statements made by the party, nor give an opinion based on such statements. Such testimony is "simply 'hearsay evidence', never admissible by any rule, except as a part of the *res gestae*, or *ex necessitate*".

42. "The facts embraced in a hypothetical statement upon which an opinion of a medical witness is asked must be in evidence and sworn to be true, in the case, either before or afterwards. (Cases)".

—*Abbot v. Heath*, 84 W., 314, 319.

43. Held not "absolutely binding on the court", as to value of executor's services and extra compensation. See COMPENSATION OF ADMR., ETC.

—*Ford v. Ford*, 88 W. 122, 130

44. "Opinions of experts on the value of services" are not conclusive, but "such opinions are advisory only". See also SERVICES.

—*Moore v. Ellis*, 89 W. 108, 111.

45. Where the doctor's relation to the plaintiff was simply "as a medical adviser and not for the purpose of being a witness," it is said

that "so far as the knowledge of plaintiff's condition was derived from the plaintiff's statements to him as a medical man for the purpose of receiving advice and treatment, the testimony was not incompetent", as hearsay. *Quaife v. C. & N. W. R. Co.*, 48 W. 513; *Davidson v. Cornell*, 132 N. Y. 228. It "is not within the principle of *Stewart v. Everts*, 76 W. 35, and *Abbot v. Heath*, 84 W. supra".

—*Block v. Milwaukee St. R. Co.*, 89 W. 371, 375.

46. Evidence by a witness that he worked "a few days, cutting ice" a month before his death, with the deceased, who "became quarrelsome and got mad at the witness because, as he said, witness did not drive a horse straight while he (deceased) was holding the ice plow", was held insufficient "facts upon which to predicate an opinion as to insanity" of the deceased "at the time".

47. "It is the province of the court, in the exercise of a wise, legal discretion, to decide whether the facts on which a non-expert's opinion as to a person's sanity is based entitle him to express his opinion to the jury. *Denning v. Butcher*, (Ia.), 59 N. W. Rep. 69". See also *INSANE PERSONS*. (Approvingly cited in *Bucher v. Wis. Cent. R. Co.*, 139 W. post.).

—*Boorman v. N. W. M. R. Ass'n.*, 90 W. 144, 150.

48. Testimony of "non-experts, and some by experts" held properly disregarded as of "little or no weight". See *TESTAMENTARY CAPACITY*.

—*Jones v. Roberts*, 96 W. 427, 430.

49. "Where evidentiary facts, upon which the fact in issue depends, are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case. (Cases, supra.)

50. The rule is that experts are not to decide issues of fact, hence all questions calling for opinion evidence must be so framed as not to pass upon the credibility of any other evidence in the case, else it will usurp the province of the jury or the court. *Jones Ev.*, 374".

—*Maitland v. Gilbert P. Co.*, 97 W., 476, 484.

51. "Where the only point as to which opinion evidence is directed is properly a matter of scientific investigation, an expert in that line may testify directly thereto on personal investigation." (Marshall, J., Syl.)

—*Green v. Ashland Water Co.*, 101 W., 258, 271.

52. The opinion of a nonexpert witness "may properly be given as evidence on the subject of mental unsoundness, but only upon the witness first qualifying himself by stating facts within his personal knowledge and means of personal observation, such as to satisfy the court of his ability to give an intelligent opinion liable to be of some assistance to the jury in coming to a correct conclusion.

53. Such evidence is an exception to the general rule which confines a nonexpert witness to a statement of facts only. The exception applies

solely when the qualification of the witness is first satisfactorily shown in the manner indicated. *Burnham v. Mitchell*, 34 W., supra; *Jones Ev.*, 366; *Rogers, Expert Tes.*, 6".

—*Crawford v. Christian*, 102 W., 51, 53.

54. "It is well settled in this state that 'the opinions of witnesses which do not relate to matters of science, art, or skill in some particular matter or department of business, are not admissible in evidence'". *Luning v. State*, 2 Pin. supra; (other cases). So the converse "seems to be well settled. (Cases)".

55. "Of course, such opinions must be based upon proper questions; but they are not objectionable merely because they cover one of the ultimate facts to be determined by the jury, as stated by Mr. Justice Marshall in" *Maitland v. Gilbert P. Co.*, 97 W. supra.

—*Daly v. City of Milwaukee*, 103 W. 588, 590.

56. "From a careful comparison of the decisions of this court, the following rule may be formulated:

Where the evidence given is not conflicting, and not so complicated or voluminous as to make a difference of understanding of material facts probable, an expert witness who has heard it all may be asked to predicate his opinion thereon, on the assumption of its truth, without rehearsing it in a hypothetical question;

57. And that, unless such conditions exist, a question should be put, embodying the facts on which he is asked to base his opinion".

—*Cornell v. State*, 104 W. 527, 537.

58. As to leading questions to "physicians testifying as experts," it is said "the evidence of such witnesses is so liable to be biased and to promote injustice, that courts should confine questions put to them within the rules with considerable strictness."

—*Nicoud v. Wagner*, 106 W. 67, 76.

59. Non-expert testimony not complying with the rule of *Crawford v. Christian*, 102 W., supra, as founded only on "proof of acquaintance and familiarity", was held properly disallowed, on the question of competency;

60. But one question, "a witness having related a lengthy conversation",—"Q. Did you, from your conversation with him, based upon that, form an opinion as to whether he was competent, and had been, to do business?",—"might well have been allowed;

61. But its exclusion was not such error as to necessitate reversal. The admission of such opinions is largely discretionary with the trial court. *Boorman v. N. W. M. R. Assn.*, 90 W. supra". See also INCOMPETENTS.

—*In re Gdnsp. of Welch*, 108 W., 387, 394.

62. "The question of the value of professional services is one as to which opinion evidence is not conclusive, especially when the tribunals which try such questions consist of lawyers, themselves presumably capable of exercising judgment and forming opinion as to value of the various facts and circumstances established. (Cases)".

—*Remington v. Eastern R. Co.*, 109 W., 154, 162.

63. "Non-experts may give their opinions as to the soundness of a person's mind," after showing satisfactory "personal intercourse," (cases supra), but when "the acts and conversation" "show merely mental eccentricities, as distinguished from weakness of mind or delusions affecting testamentary capacity,

64. It is very evident that the opinion of the witness that the person in question is or was incapable of making a will must have very little probative force".

—*In re Butler's Will*, 110 W., 70, 76.

65. Physicians may testify as to being licensed to qualify them as experts, but whether the statute, sec. 1436, "in terms prohibiting practicing physicians from testifying as experts unless their qualifications be established by diploma or license as therein defined", is purposed "to confine all expert testimony upon medical subjects to persons having the statutory qualifications", is not determined,—

66. The question being as to expert testimony of a trained nurse, and there being numerous physicians supplied "much more likely to be safe guides". "In that situation" the court's ruling refusing "to permit this witness to testify further on the subject" is held not error.

—*Allen v. Voje*, 114 W., 1, 13.

67. "The objection" that in a hypothetical question, "all material facts in evidence bearing upon the subject of the inquiry must be propounded to the expert", "is not well founded under the rules governing opinion testimony".

68. "The rule is that each party to the action may frame hypothetical questions embracing sufficient facts for the expert to form an intelligent opinion concerning the inquiry, upon the theory that there is credible evidence for the jury to pass upon in support of the assumption.

69. The observations upon the subject in the opinion of *Zoldoske v. State*, 82 W. 580, explain the grounds of this practice: "The rule in relation to hypothetical questions is that, if the facts upon which the hypothesis is based fall, the answer falls also (citation);

70. That an expert cannot be asked as to an hypothesis having no foundation in the evidence in the case, but may be asked his opinion of a similar case hypothetically stated;

71. And it seems that counsel may assume the facts as they claim them to exist, if within the possible or probable range of the evidence". (Citing)".

—*Schissler v. State*, 122 W. 365, 374.

72. Opinion evidence "may have no appreciable connection whatever with 'science, art, or skill', in a technical sense, and yet be admissible just as clearly as if it possessed such connection.

73. All opinion evidence is not expert evidence in the technical sense, but all expert evidence is opinion evidence in any view of the matter, and all admissible opinion evidence is expert evidence in the general—the legal—sense of the term.

74. The term 'skill', as used in the quoted expression, must be regarded in its broadest signification, not applied necessarily only to mechanical or professional knowledge. It includes every subject susceptible of special and peculiar knowledge derived from experience".

75. "This court" "has distinctly said that any subject wherein a person may become specially learned is within the broad field of expert evidence,

76. The question as to the subject and the special qualification in each instance to be solved by the trial court in passing on the competency of the witness, in which field, within all reasonable limitations, its judgment is to be respected. (Cases)".

—*Schwantes v. State*, 127 W. 160, 186.

77. Because of the difficulty of non-experts describing detailed acts, as to sanity or insanity, "the rule has grown that the ordinary observer may so state his impression of his interview" with the subject.

78. "And a declaration of opinion generally that the person was sane or insane, and a direct inquiry as to such opinion is now sanctioned by the weight of authority, with which the expressions in our own decisions agree.

79. The subject received lucid treatment at the pen of Harlan, J., in *Conn. Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, which case presents ideal illustration of the best manner of propounding the proper question to the witness.

After a conversation had been narrated, the manner described as agitated, face flushed and expressionless, the question was propounded, substantially,

'What impression was made upon your mind by the conduct, actions, manner, expressions, and conversation which you observed?' This was fully approved.

80. We do not mean that there would be error in the direct inquiry as to the witness's opinion as to the person's sanity, based, of course, on what he saw and heard;

But the form quoted above is much more likely to prevent confusion in the mind of the witness and to impress the jury with the significance of the testimony".

—*Duthey v. State*, 131 W. 178, 187.

81. "The scope of expert evidence is not restricted to matters of science, art, or skill, but extends to any subject in respect to which one

may derive by experience special and peculiar knowledge. *Hamann v. Milwaukee B. Co.*, 127 W., 550.

82. 'Opinion evidence may properly be given as to the very point the jury are to decide', when such point is within the field of expert evidence, when the questions are based upon undisputed facts or assumed facts warranted by the record. (Cases)''.

—*Zarnick v. C. Reiss Coal Co.*, 133 W., 290, 301.

83. As to expert evidence being "weak and inconclusive", on incompetency to care for property. See INCOMPETENTS.

—*In re Deleglise*, 134 W., 41, 51.

84. As to expert witness being entitled to only ordinary witness fees for testifying.

85. As to preparation for testifying, other private compensation may be implied or contracted for. See WITNESSES.

—*Philler v. Waukesha Co.*, 139 W., 211, 213.

86. "The testimony of experts is proverbially unreliable at best, even when the experts are learned and competent, because bias is almost unavoidable on account of our mode of selecting experts, and bias requires small basis upon which to ground an opinion.

87. But where this unreliability is accentuated by a showing that the expert has little or no data upon which to base the opinion (*Strong v. Stevens*, 62 W. 255),

And the subject upon which he expresses an opinion is" "of great doubt and difficulty,

88. Or where the alleged expert demonstrates his lack of knowledge by his testimony, such testimony will not be sufficient to support a verdict which to this court seems unjust or excessive. (Case)''.

—*Bucher v. Wis. Cent. R. Co.*, 139 W. 597, 611.

89. "The true field of opinion from the non-expert" witness is "to testify as to specific interviews and the impression left upon his mind as to" "mental peculiarities exhibited in such interviews", when testifying as to "mental capacity", and "there was no error in excluding the opinion" of such witness. —*Robinson v. State*, 143 W. 205, 208.

90. "It has been held that expert evidence which covers the ultimate facts to be decided by the jury and which is not based on a hypothetical case is not competent. (Cases).

91. It has also been held that opinion evidence as to the ultimate fact may be given by experts in regard to matters of science, art, or skill in some particular calling, when based on a hypothetical question made up of facts that are not in dispute. *Maitland v. Gilbert P. Co.*, 97 W. supra; (other cases).

92. We do not understand that these cases have been overruled by

what is said in *Lyon v. Grand Rapids*, 121 W. 609. (In the latter case, it is said, p. 620, that holding an expert's testimony "not necessarily objectionable because the tendency of the answer is to pass upon some ultimate question",—"is somewhat dangerous ground.

The safer way is to go no further than to show by the opinion evidence that the particular circumstances proved or assumed are a sufficient producing cause for the effects complained of").

93. Held "that no error was committed" in allowing experts "to read the letters and then say whether they contain a charge of a 'precise fact'," rather than "calling for the same kind of an answer to a hypothetical question which embodied the facts stated in the letters",—the question of libel by the letters being at issue.

—*Hite v. Keene*, 149 W. 207, 212.

94. "This question",—as to whether sec. 4075 as to not permitting attending physicians to testify as to information obtained professionally, has any "application to criminal prosecutions",—"was mooted but left undecided in *Smits v. State*, 145 W., 601. We leave the question still open and undecided".

95. It is held "in the instant case" that "the provisions of" sec. 4078d "take away, in prosecution for abortion, the privilege conferred by sec. 4075".

—*State v. Law*, 150 W., 313, 325.

96. Where "plaintiff introduced opinion evidence as to its value", of "a second-hand" feed mill lost in transit, it "was error" to exclude defendant's evidence "that the mill was bought about the time of shipment for \$15," "the property not having a specific market value". (Cases).

97. Such opinion "evidence is not conclusive" and the jury "were at liberty under it to find a lower or higher value than the undisputed evidence showed". *Moore v. Ellis*, 89 W., supra; (U. S. Cases)".

—*Maas v. Chicago & N. W. R. Co.*, 156 W., 44, 45.

EXPRESS TRUSTS.

See also TRUSTS. TRUSTEES.

Lands, in writing, 1.
Statute of frauds, 2.
Limitation statute, 4.

Ostensible partners, 5.
Penal bond for proceeds, 3.

1. Express trusts in lands, or such as are created by agreement of the parties, must be evidenced by writing, and parol proof is not admissible to establish them.

—*Pratt v. Ayer*, 3 Pin. 236.

2. Express trusts "come within the intention and words of the statute (of frauds) which requires that all such agreements shall be in writing," but implied trusts "are not affected by the statute".

—*Whiting v. Gould*, 2 W. 552, 585.

3. A penal bond given to account for proceeds and sale of lots, is held to be an express trust, and it is said: "As the object of the trust here was that D. should sell the lots in which he and Mrs. B. had an equal interest, and was to account for one-half the proceeds to her, to that extent at least he was a trustee, and she was the cestui que trust".

4. "The statute of limitations has no application" to express trusts not denied. —*Bostwick, Admr. v. Est. of Dickson*, 65 W. 593, 597.

5. Ostensible partners are trustees of an express trust as to dormant partners. See SURVIVING PARTNER.

—*Platt v. Iron Exchange Bank*, 83 W., 358, 360.

FACTOR.

Definition, 1, 6.

Factor, or auctioneer, 9, 10.

Interest in proceeds, 11.

Paying before receiving, 12.

Principal paid in advance, 13, 15.

Lien upon goods, 4.

Possession until paid, 5.

Sell in own name, 3.

Sell on credit, 2.

Specific property in goods, 4.

Sue for purchase price, 7, 14.

Factor control, when, 14.

Principal control suit, 8.

Sole interested party, 15.

Trustee of express trust, 7.

1. "An agent employed to sell personal property entrusted to his possession by or for his principal, for a compensation commonly called factorage or commission, is a factor.

2. As such he may sell on credit unless contrary to his instructions or custom.

3. He may sell for his principal in his own name, and then sue in his own name for the price.

4. He is entrusted with the possession, management, control, and disposal of the goods to be sold, and has a special property in them and a lien upon them.

5. He may retain possession until his advances, expenses, and commissions are paid. (Citations)". —*Edgerton v. Michels*, 66 W. 124, 130.

6. "A factor is said to be 'an agent employed to sell or to purchase, and sell goods or other personal property intrusted to his possession, for a' " commission.

7. "He is", "as to the principal, deemed to be a trustee of an express trust under the provisions of the statute (Section 2607; other citations),

and as such is authorized to sue for the purchase price by the exception to sec. 2605”.

8. “The principal can control the litigation if he sees fit, subject to the due protection of the factor’s special interest.” (Questions discussed).
—*Beardsley v. Schmidt*, 120 W., 405, 408.

9. “The general rule is that the person employed to sell another’s property at auction,

10. Or a factor to whom property has been consigned, for sale,

11. Has an interest, upon a sale being made, in the proceeds, entitling him to sue and recover the same in his own name and,

12. In case of his paying the net proceeds and delivering the property before receiving payment from the buyer, as in this case,

13. And the principal accepts and retains the money, the agent is entitled to recover of such buyer for his own use”.

14. While “a factor, the same as an auctioneer, is entitled to sue for the sale price in his own name and control the litigation if the principal does not prohibit it, (*Beardsley v. Schmidt*, 120 W. *supra*),

15. In case of the principal receiving full payment from the agent in advance of the latter obtaining payment from the purchaser, the agent is the sole party in interest”, and “the principal has no concern in the matter between such agent and purchaser”.

—*Progress B. R. F. v. Chicago H. S. Co.*, 153 W. 249, 251.

FEES.

See COSTS AND FEES.

FEME COVERT.

See MARRIED WOMAN.

FINAL JUDGMENT.

See JUDGMENTS.

FINAL SETTLEMENT.

See ACCOUNTS OF EXTRS. & ADMRS. DESCENT AND DISTRIBUTION.
JUDGMENTS. SETTLEMENT.

FIXTURES.

- Agreement of all parties, 9.
- Consider personality, 9.
- Chattel mortgage, 2, 22.
- Fence: permanent, 15.
- Other's land, by mistake, 17.
- Rails along: intended for, 1.
- Rails laid as fence, 16.
- Intention: improvements, 12.
- Machinery, fastened, 14, 18.
- Primary importance, 13, 19, 24, 30.
- Grantor and grantee, 24.
- Landlord and tenant, 25.
- Mortgagor and mortgagee, 24.
- Vendor of personality, 24.
- Landlord and tenant, 3.
- Attached at entry, 26.
- Counters, screens, furnace, 25.
- Icehouse, lessee built, 28.
- Landlord, etc.—continued
- Surrender before removal, 27, 28.
- Lease: lessor no title, 4.
- Foundation immaterial, 5.
- Hostile to true owner, 7.
- Mortgage: fixture vendor, 2.
- Chattel mortgage, 22.
- Machinery placed, 2, 23.
- Subsequent accessions, 21.
- Pass with realty, 8.
- Physical annexation, 13.
- Of little importance, 18, 29.
- Removed without injury, 20.
- Solid foundation, personality, 31.
- Trespasser affixes, 7.
- True fixture rules, 6, 10, 20.
- Intention, main test, 13, 24.
- Three elements, 11.

1. "Where rails have been placed along the line of an intended fence, for the purpose of being made into the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land".

—*Conklin v. Parsons*, 2 Pin. 264, 267.

2. If a mortgagor or his tenant place a fixture, stationary steam engine, upon the mortgaged premises with the consent of the fixture vendor, who retains title by chattel mortgage, the fixture cannot be removed as against the prior mortgage, by the mortgagor, tenant or vendor, it becoming a part of the freehold.

3. Ordinarily "as between landlord and tenant (the fixture) would be subject to removal by the latter during his term, if annexed by him".

—*Frankland v. Moulton*, 5 W. 1, 5.

4. One who enters upon land, under a lease from another having no title, erects a dwelling house thereon used as a part of his adverse enjoyment of the land, has no right to such building, or to remove the same, as against the land owner, though the same rest only on wooden posts upon the surface and not let into the soil.

5. The notion that such a building must be "built upon a brick, or stone or other foundation let into the ground," or that "any such physical attachment is necessary in order to constitute a fixture, which once prevailed, has been almost entirely abandoned".

6. "The true rule now for determining whether a thing is to be regarded as a fixture or not, is said to be, to consider the character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intention of those concerned in the act. *Meigs' Appeal*, 62 Pa. St. 28."

7. "A mere trespasser," hostile to the true owner, erecting a building "for his permanent use and enjoyment", though with an "intention at some future period to remove it, or his agreement with a stranger that he might do so", has no right as against the true owner to remove the building, it being a fixture.

—*Huebschmann v. McHenry*, 29 W. 655, 661.

8. "That which is in its nature otherwise personal, when physically attached to the soil, or constructively attached by its use or intended use with the soil, will pass with the title of the realty. (Citations); *Conklin v. Parsons*, 2 Pin., supra".

—*Jenkins v. McCurdy*, 48 W. 628, 629.

9. "When all the parties, as in this case, the owner and the mortgagees, have seen fit to treat what might otherwise be fixtures (machinery in a mill) and part of the realty as personal property, by their agreements, and thus sever them from the freehold and license their removal, the law will consider such fixtures, as between the parties, personal property to all intents and purposes. (Cases)".

—*Smith v. Waggoner*, *Admx.* 50 W. 155, 162.

10. "These rules are unquestionably correct, and form the true criterion for determining in all cases whether the constructions in question are fixtures:"

11. "(1) Actual physical annexation to the realty; (2) application or adaptation to the use or purpose to which the realty is devoted; (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold". (Quoted with approval in *Baringer v. Evenson*, 127 W. 36, 40).

12. "The verbal promise of the defendant C. before the written contract (of real estate purchased) was entered into, and as an inducement thereto, that he would build" a shop and put machinery therein for manufacturing purposes, their character and the use of the improvements, "clearly evince an intention to make such improvements, including such machinery, permanent fixtures and a part of the realty.

13. This matter of intention is coming to be the main test in such cases, and the matter of physical annexation of comparatively little importance. *Huebschmann v. McHenry*, 29 W. supra".

14. In this case "a steam boiler and engine", "on a stone foundation let into the ground" and also "the line shafting" adapted to the building and "connected with the engine by a band from the main wheel" bolted and fastened by hangers, "a circular saw and frame and jig saw and frame", "a mortising machine, a planer, a borer and header, and a turning lathe, all securely fastened to the building", "became a part and parcel of the establishment for the manufacture of wooden articles", and are held to be fixtures.

—*Taylor v. Collins*, 51 W. 123, 127.

15. "The building of a fence upon land as a permanent structure, in the absence of any" agreement to the contrary with the owner of the land, "would necessarily convert the material of which it was built from personal property to realty. (Cases).

16. Rails laid into a fence upon land are a part of the freehold, even though not otherwise attached to the land than by their weight. (Cases).

17. The mere fact that the fence in question was built by the plaintiff upon lands not his own, by mistake, did not prevent its becoming a fixture to the real estate as soon as it became attached to the soil. *Seymour v. Watson*, 4 Blackf. (Ind.) 555". (Modified by ch. 202, L. 1883, as to such a fence built before a boundary line has been established by the county surveyor. See *Scholl v. Kinitzer*, 83 W. 308,).

—*Kimball v. Adams*, 52 W. 554, 556.

18. Quoting the rules of *Taylor v. Collins*, 51 W. supra, and referring to *Second National Bank v. O. E. Merrill Co.*, 69 W., 501, where it was held that "all the machinery" in a foundry building, "over and beyond the water-wheel, much of which was attached to the building", and held to be "not permanent fixtures, but personal property, which the tenant who placed the machinery there had a right to remove", it is said that "the mere fact of attachment to the freehold is" of little importance, "so long as the identity of the property remains, and its capacity to be removed and used elsewhere.

19. The principal consideration in such cases is the intention of the party putting in the machinery".

—*Walker v. G. R. Flouring Mill Co.*, 70 W. 92, 97.

20. The rules of *Taylor v. Collins*, 51 W. supra, are followed, and machinery was held realty "although it was capable of being removed without injury to the building. (Cases)."

21. The lien of plaintiff's realty mortgage covered all, including subsequent accessions, "unless, by a valid agreement to which it was a party, the character of personal estate was impressed thereon. *McFadden v. Allen*, 134 N. Y., 489.

22. The contemporaneous execution to the plaintiff of the chattel mortgage to secure the same debt did not per se operate to impress upon such property the character of personal estate."

—*Homestead Land Co. v. Becker*, 96 W., 206, 211.

23. Following and citing with approval, *Frankland v. Moulton*, 5 W., and *Homestead Land Co. v. Becker*, 96 W., supra, and N. Y. cases, a dynamo exciter and belts placed in a building of an electric light company, as between the purchaser at a realty mortgage foreclosure sale and the vendor of the machinery, are held to have become fixtures, though at the time of purchase, later "the company intended to purchase a larger dynamo."

—*Gunderson v. Swarthout*, 104 W., 186, 192.

24. Following the principles of cases *supra*, and quoting Taylor v. Collins, 51 W. *supra*, it is said,—“Intention is to be regarded of primary importance as between grantor and grantee, mortgagor and mortgagee”, and “as between the owner of the realty and the vendor of personal property who sells the same with the intention of having it permanently annexed to the freehold and it is so annexed”.

25. As “between landlord and tenant” here, as to certain articles of shelving, counters, screen doors, and furnace, removed by the tenant,—held, the question whether fixtures, should have been submitted to the jury.

26. Such articles as were attached when the tenant entered, in the absence of evidence to the contrary, are the property of the landlord.

—*Baringer v. Evenson*, 127 W. 36, 41.

27. “If a lessee surrenders possession of the premises before removal of a fixture, without express reservation of the right of removal, he loses all right to remove it. (Cases).”

28. An ice house built by the lessee, “located and attached to the ground as icehouses usually are built”, having “characteristics of permanency”, is held a fixture, “and that the lumber composing it did not retain its former status of personalty”, and not removable after the term.

—*Phelps v. Ayers*, 142 W., 442, 445.

29. “While physical annexation is an important consideration in determining whether an article or building is a fixture,

30. The intention of the parties is the controlling consideration in determining the question. (Cases).”

31. Building “built on a solid stone foundation embedded in soil”, on the evidence, is held personalty.

—*Brobst v. Marty*, 162 W. 296, 300.

FORECLOSURE.

See MORTGAGES.

FOREIGN EXECUTORS AND ADMINISTRATORS.

Action by: in our courts, 1.

Advantage by abatement, 5.

Assets, immaterial, 12.

Demurrer or abatement, 9.

Filing foreign letters, 4, 12.

Mortgage: foreclosure, 8.

Power of sale in mortgage, 10.

Not want of title, 3.

Zimmerman—29

Action by—continued

Same footing as domestic, 12.

Subsequent filing, 6.

Waiver of filing, when, 7.

When, may sue, 2, 12.

Wrongful death here, 13.

Appeal under sec. 4031, 14.

Non-resident administrator, 11.

1. "Foreign administrator cannot maintain an action in our courts" without the statute.

2. (Foreign administrator or executor may sue and otherwise act upon filing authentication if "none shall have been appointed in this state." Sec. 3267).
—*Johnson v. Wilson*, 1 Pin. 65, 67.

3. "Whatever difficulty there may be in the question elsewhere (Story's Confl. 507-529), there appears to be no doubt here that the disability of a foreign executor or administrator to sue in the courts of this state, is mere disability and not want of title."

4. "The filing of the foreign letters (Sec. 3267) here is purely ministerial, requiring no action of the court here, and giving it no jurisdiction."

5. "Even before the record (of filing), the disability can be taken advantage of only by way of abatement."

6. The foreign authentication, on a claim contest in county court not having been filed until just before issue was rejoined in the circuit court, and the question there "first raised by the demurrer," was held a sufficient filing.
—*Smith v. Peckham*, 39 W. 414, 417.

7. "The dictum in *Moir v. Dodson*, 14 W. 279", "that the capacity of a foreign executor to sue in this state must be taken advantage of by demurrer, or the question will be waived, must be held to apply only to cases in which such legal incapacity appears on the face of the complaint, which is the language of the statute". See FOREIGN GUARDIAN.

—*Vincent, an Inf. by Gdn. v. Starks*, 45 W. 458, 462.

8. "We think the authorities are clear that an executor of the will of a mortgagee resident in another state, and to whom letters testamentary have been granted by a court of competent jurisdiction in another state, may proceed to foreclose a mortgage by advertisement in the state where the mortgaged property is situated". See also MORTGAGES.

9. "The title of the foreign administrator or executor to the money due and personal estate of a person resident in and dying in another state depends upon his appointment in that state", and an action to recover the same "in this state", "may regularly proceed to judgment without filing any certified copies of his appointment in this state, unless objection to his proceeding in the action be taken either by demurrer or plea in abatement.

10. If a foreign executor may foreclose a mortgage by action in this state, we see no reason why he may not execute the power of sale given to him by contract in the mortgage". p. 518.

—*Hayes v. Frey*, 54 W. 503, 514.

11. "It is the manifest policy of the statute not to favor the appointment of a non-resident as administrator". See ADMINISTRATION.

—*Est. of Sargent*, 62 W. 130, 133.

12. When the "original appointment, or a copy thereof duly authenticated," under section 3267, "is duly filed in any county court, the foreign administrator or executor is placed upon the same footing as a domestic administrator or executor, so far as capacity to sue in our courts is concerned", and it is immaterial "where there are assets or where the suit is to be brought".

—*Murray v. Norwood*, 77 W., 405, 408.

13. An administrator appointed in another state may bring an action in this state for wrongful death here, under secs. 4255-56, the deceased and interested parties being residents of such foreign state.

—*Robertson v. C. St. P. M. & O. R. Co.*, 122 W. 66.

14. Whether a foreign administrator can appeal under sec. 4031, "may admit of doubt". See APPEAL.

—*Will of Durkee*, 164 W. 41, 43.

FOREIGN GUARDIANS.

Action by:

- Appointment authority, 2.
- Demurrer or abatement, 1.
- No guardian in state, 3.

Action by—continued

- Not jurisdictional, 1.
- Title: sell lands here, 4.
- Statutory authority, 5.

1. "The incapacity or disability of a foreign guardian to sue in this state can only be taken advantage of by way of abatement, and is not jurisdictional; and if such disability appear upon the face of the complaint, such question in abatement of the suit may be raised by demurrer. *Smith v. Peckham*, Extr., 39 W. 414" (See FOREIGN EXTRS. AND ADMRS.)

2. "Where suit is brought by a foreign guardian by authority only of his appointment in another state, the disability to sue in this state is apparent on the face of the complaint, and the omission to allege the filing of an authenticated copy of such appointment not only shows that such guardian has no right to sue in this state, but it is a violation of the statute requiring such allegation". (Sec. 2, ch. 265, L. 1875, apparently since omitted as to guardians.)

3. "But the condition in question, that no guardian has been appointed in this state, is a negative condition", not to be set up in the complaint, but "should be shown by way of plea or answer in abatement".

—*Vincent v. Starks*, 45 W. 458, 460.

4. A foreign guardian cannot "pass the title to lands of his ward situated in this state without first obtaining authority so to do from the courts here."

5. "Sec. 4281 gives to foreign guardians, under the conditions stated therein, the same power to sell the real property of their wards situated

in this state as guardians appointed by the state court possess", "by procuring special authority", "as provided in ch. 151, stats. 1898".

—*Adkins v. Loucks*, 107 W. 587, 596.

FOREIGN JUDGMENTS.

Administrators, against, 5.
 Independent; different states, 6.
 Principal; ancillary, 7.
 Appellate jurisdiction, 34.
 Claim: barred; other state, 13.
 Allowed; Mich. judgment, 24.
 Disallowed in Minn., 14.
 Effect in other states, 17.
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 Residence; other facts, 23.
 Full faith and credit, 1, 9, 15, 31.
 According to law of state, 2.
 Effect in such state, 3.
 Highest evidence of credit, 32.
 Proceeding in rem, 16.
 Jurisdiction, 1.
 Administration proceedings, 19.
 Actual locus of property, 20, 21.
 Domicil finding unnecessary, 21.

Jurisdiction—continued
 Administration, etc.—continued
 Proceedings in rem, 22.
 Property in own state, 19.
 Face of record, 11.
 Foreign country, 12.
 Necessary facts to give, 10.
 Proceedings in rem, 11, 16.
 Supreme court of Iowa, 33.
 Power to review, 34.
 Mortgage on Iowa lands, 25.
 Judgment on note here, 25.
 Substituted service, 25.
 Service in other state, 8.
 Substituted service, 25.
 Special jurisdiction court, 26.
 Authenticated transcript, 27.
 Force here and Minn., 30.
 No proof of Minn. Statutes, 29.
 Prima facie jurisdiction, 28.
 Vacating judgment on, 4.

1. "Judgments of other states to which full faith and credit are required to be given, * are only those in which the courts rendering them had jurisdiction of the suits and parties; and such jurisdiction has been allowed to be questioned by the party against whom such judgments are set up".

2. "The constitution and act of Congress require the effect and credit of judgments to be determined according to the law of the state where rendered".

—*Rape v. Heaton*, 9 W. 328, 332.

3. Judge Story's rule, "if a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere; if re-examinable there it is open to the same inquiries in every other state", approved.

—*Brown v. Parker*, 28 W. 21, 25.

4. A domestic judgment, based on a foreign judgment afterward reversed, was vacated. See VACATING JUDGMENT.

—*Aetna Ins. Co. v. Aldrich*, 38 W. 107, 111.

5. "The rule seems to be universal, that, where there are several administrations of an intestate, in different jurisdictions, a judgment against one administrator does not bind another".

6. "Where administrations are granted to different persons in different states, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator." Story's Conflict, Sec. 522".

7. Where each of two administrations in different states, assumes to be the principal one, "the court cannot hold the judgment in Indiana as even prima facie evidence against the administrator in Wisconsin".

—*Price v. Mace*, 47 W. 23, 26.

8. "The authorities are very uniform that a personal judgment, founded alone upon service of process in another state or foreign country, is void".

—*Smith v. Grady*, 68 W. 215, 218.

9. "In this country it is prescribed by constitutional compact that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state;

10. And yet it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction,

11. And if want of jurisdiction appear upon the face of the record, or is shown either as to the subject matter or the person or, in proceedings in rem, as to the thing, the record will be regarded as a nullity. *Thompson v. Whitman*, 18 Wall., 457; (many other cases); *Renier v. Hurlbut*, 81 W., 24.

12. The rule is certainly as strong if not stronger, when applied to a judgment rendered in a court of a foreign country, toward which no such duty is enjoined, and especially where the jurisprudence of such foreign country is in no sense based upon the common law." Here a divorce granted as to a resident of this state is held a nullity.

—*St. Sure v. Lindsfelt*, 82 W., 346, 349.

13. A claim was disallowed in a probate court of Minnesota, and such disallowance affirmed on appeal in the district court of that state, because "barred by the statutes of limitation of Minnesota." Thereafter the claimant petitioned for administration on realty of the decedent, in a county court of Wisconsin, and such application was denied "principally on the ground that said judgment of the probate court" of Minnesota, as there affirmed, "is conclusive upon the rights of the plaintiff, and forever estopped him from asserting any claim on said judgment against said estate". While reversed in the circuit court, such judgment of the county court was affirmed.

14. The judgment of disallowance of the Minnesota court has "the same force and effect in this state that it has in that state." U. S. Const. sec. 1, Art. 4; *Marshall, C. J.*, in *Hampton v. McConnel*, 3 Wheat. 235; Judge Story's rule, *supra*; (other cases).

—*Sanborn v. Perry*, 86 W., 361, 365.

15. "It has been and is the settled purpose of this court to give full faith and credit to the public acts, records, and judicial proceedings of other states". Const. of U. S. art. 4, sec. 1. *Sanborn v. Perry*, 86 W. supra; (other cases).

16. "But to entitle a judgment of a court in another state to such full faith and credit in an action or proceeding in rem, like the case at bar, it must appear from the record thereof that the court rendering the same had jurisdiction of the subject matter of the action or proceeding. *Rose v. Himely*, 4 Cranch; 241; (other U. S. cases).

17. Thus it is held in one of the cases cited that; 'Records and judicial proceedings of each state affecting property or estate within it have in every other state the force and effect which they possess in the state of their origin;

18. But, as to similar property or estate situated in another state, they have no greater or other force than similar records or proceedings in the courts of that state'. *Robertson v. Pickrell*, 109 U. S. 608".

19. While in administration proceedings in Louisiana, "that court, it may be conceded, had jurisdiction as to any tangible property actually located in that state", yet "there was no attempt in that court to adjudicate as to property situated in Wisconsin, nor as to the domicile of the deceased",

20. And "certainly there was no adjudication in the Louisiana court which precluded the county court of Waukesha County from taking jurisdiction and admitting the will to probate and administering so much of the estate as was actually located in Wisconsin, and this included the bonds, mortgages, and evidences of debt" there deposited.

21. (This case is affirmed in *Thormann v. Frame*, 176 U. S. 350, s. c. 44 L. ed. 500, it being said of the Louisiana administrator appointment, that "as a judgment in rem it merely determines the right to administer the property within the jurisdiction"; that in this instance a finding as to domicil was "unnecessary to jurisdiction, and is not to be presumed"; and that there was no such finding.

22. And it is approvingly said, by Chief Justice Fuller: "In *De Mora v. Concha*, L. R. 29, Ch. Div. 268, it was held that the decree of a probate court was not conclusive in rem as to domicil, although the fact was found therein, because it did not appear that the decree was necessarily based on that finding"). See also *DOMICIL*.

—*Frame v. Thormann*, 102 W. 653, 670.

23. "The record of the proceedings in the Minnesota court" as to naturalization and citizenship, was held admissible and conclusive to show a year's residence there prior to the application, "by the rule that a judgment is binding upon parties and privies as to the final result pronounced and the facts established or assumed upon which it is based".

—*State, ex rel. Atkinson v. McDonald*, 108 W. 8, 13.

24. The owners of a foreign judgment obtained against the deceased, as represented by his sureties in a replevin act, according to Michigan law, "were entitled to have the claim allowed against the estate because the matter was *res adjudicata*".

—*Button v. Cole*, 109 W. 247, 253.

25. As to an Iowa judgment on a note here and mortgage on lands there, with substituted service, being effective as to the mortgage but not as to the note. See FOREIGN JURISDICTION.

—*Fitch v. Huntington*, 125 W. 204, 207.

26. "In an action brought upon a judgment of the municipal court of S., Minnesota," "the complaint averred that" such 'judgment was duly given and made by said court in favor of the plaintiff and against the defendant', on the date given, and is unsatisfied, valid, and subsisting, with "no other averment" respecting jurisdiction. The answer contained a general denial, and allegations of fraud in obtaining. Under the statute, sec. 2673, as to courts of "special jurisdiction," it is held:

27. That "when the plaintiff put in evidence the duly authenticated transcript of the judgment roll, (under title 13, ch. 17, sec. 905, R. S. of U. S.), including the judgment showing that this court of M. was a court having a judge, a clerk, a seal, and records, and that the defendant appeared in the action,

28. The plaintiff lifted the burden of proof thus thrown upon him and established *prima facie* that the Minnesota court had jurisdiction of the person of the defendant and of the subject matter of the action. (Many cases)".

29. Though it does not appear that proof of the Minnesota statutes as to the jurisdiction of such courts, was properly made,

30. Yet, as "no evidence was offered" "sufficient to impeach the judgment" so proven if it "had been a judgment of a court of the state of Wisconsin (*Uecker v. Thiedt*, 133 W., 148), hence no evidence sufficient to impeach the Minnesota judgment (Const. U. S. art. 4, sec. 1; *Maxwell v. Stewart*, 22 Wall. 27).

It follows that the court below erred in directing a verdict for defendant."

—*Christiansen v. Kriesel*, 133 W., 508, 510.

31. "We are required to give the judgment (of an Iowa lower court) sued upon such faith and credit as it has by law or usage in the courts of Iowa. Sec. 905, ch. 17, R. S. of U. S.

32. The highest evidence of what faith and credit a judgment has in the state of its origin is the decisions of the court of last resort of that state. *Laing v. Rigney*, 160 U. S. 531.

33. We may readily acquiesce in the generality that if the court of Iowa which pronounced the judgment of reversal had no jurisdiction, that judgment would be ineffectual and void and the judgment sued on would be in force."

34. "Not deciding that we have power to review a judgment of the

supreme court of Iowa upon a question of its appellate jurisdiction, still", on the record, "we assume that the faith and credit this reversed judgment had in Iowa was zero." Will of Madden, 104 W. 61 (See APPEAL)". See also JURISDICTION.

—*Free v. Western U. T. Co.*, 158 W. 36, 38.

FOREIGN JURISDICTION.

See also FOREIGN JUDGMENTS.

Administration:

Domicil immaterial, 7.

Property in each state, 7.

Debt, foreign legatee, 13.

Enforce: foreign laws, 8.

Liberal, proper cases, 9.

Protect our people, 9.

Foreign inferior court, 14.

Guardianship: letters, 2.

Appointed for nonresidents, 4.

Fair on its face, 3.

Mortgage on Iowa lands, 10.

Action in rem, 11.

Mortgage, etc.—continued

Discharge of debt in Iowa, 10.

Ineffective as to note, 12.

Note, estate assets here, 10.

Service in nonresident state, 1.

Stockholders liability, 8.

Statutory right:

Coupled with remedy, 8.

Enforceable where created, 8.

Substituted service, 12.

Title to lands; other state, 5.

Conversion of such lands, 6.

Will and residence here, 5.

1. "If a citizen of one state goes into another, and is there served with its process, he is bound by the judgment, though he did not reside there".

—*Rape v. Heaton*, 9 W. 328, 343.

2. "The burden of showing that the foreign letters of guardianship were void, rested upon the parties attacking the validity of the sale (of local real estate by guardian) on that ground."

3. "The foreign guardianship record, if fair on its face and disclosing no facts showing a want of jurisdiction, must be taken as prima facie authoritative and valid".

4. Guardians may be appointed for resident non-citizens, or non-resident owners of estate here. See GUARDIAN AND WARD.

—*Parrington v. Wilson*, 29 W. 383, 399.

5. Under a will made here, the testator also being a resident, the court disclaims "jurisdiction to determine the title to any of the lands outside of Wisconsin, or the legality of accumulations of rents and profits therefrom".

6. Also as to the "validity of the proposed conversion of lands in other states". See also DOMICIL.

—*Ford v. Ford*, 70 W. 19, 68.

7. As to jurisdiction of courts of different states to administer the property, of a deceased, therein located, and domicil being immaterial to such jurisdiction. See FOREIGN JUDGMENTS.

—*Frame v. Thormann*, 102 W. 653, 670.

8. In the matter of individual liability of stockholders of a bank, where the Minnesota law, similar to ours, was refused application to a Wisconsin resident, in our courts,—it is stated that “the ultimate question under consideration”, “was definitely passed upon in *May v. Black*, 77 W. 101, where it was said that a statutory right, coupled with a remedy to make it effective, is enforceable only within the jurisdiction of its creation; and the statutory remedy is exclusive”. *Pollard v. Bailey*, 20 Wall. 520; (other cases).

9. “A liberal course in the enforcement of the laws of other states in proper cases should be the rule, but the paramount duty of our judicial system is to safeguard our own state policy and prevent injustice to our own people within reasonable limits. (Cases)”.

—*Finney v. Guy*, 106 W. 256, 266, 277.

10. Where a Wisconsin executor held as assets a note payable to his testatrix from a legatee in Iowa, which note was secured by a mortgage on Iowa lands of the legatee's husband,—and in an action brought in an Iowa court by such legatee's husband, the executor being served by publication and making no defense, judgment was there entered discharging and satisfying such note and mortgage “as a gift by the testatrix, in her lifetime”,—in the estate proceeding, it is held,—

11. That, being “an action in rem”, and the land being “within the jurisdiction of the Iowa court”, “the effect of the judgment is to relieve the land of the lien” of the mortgage;

12. But, as the Iowa court “has no jurisdiction for mere purposes of personal adjudication against a non-resident upon substituted service alone”, the judgment “had no effect upon the personal liability or the note”;

13. And judgment charging the amount of the note against the legatee's share of the estate was upheld.

—*Fitch v. Huntington*, 125 W. 204, 207.

14. As to proof necessary to show jurisdiction of a foreign inferior court. See FOREIGN JUDGMENTS.

—*Christianson v. Kriesel*, 133 W., 508, 510.

FOREIGN LAWS.

Enforce: statutory rights, 6.
Judicial notice not taken, 2, 3.
Must be proved, 7.
Decisions also, 7, 9.
Method of proof, 7.
Stipulation of parties, 8.
Presumed the same, 1, 2.
Common law states only, 4.
In absence of proof, 2, 3.

Presumed, etc.—continued
Not of penal nature, 5.
Similar statute, 9.
Question of fact, 10.
Oral proof, for jury, 12, 13.
Statute, for court, 11.
Swiss limitation statute, 14.
Should be pleaded, 15.
Similar statute; decisions, 9.

1. "Whenever it becomes necessary for the court of a country to determine any question according to the laws of another, in the absence of any proof to the contrary, those laws are presumed to be the same as its own".
—*Rape v. Heaton*, 9 W. 328, 338.

2. "We have held that we will not take judicial notice of the laws of other states, but will presume them to be in accordance with our own until the contrary appears". So held where the decision of the other state was submitted to the supreme court showing the difference, but proof thereof was not made in the lower court.

—*Walsh v. Dart*, 12 W. 635, 638.

3. In a suit on a replevin bond, executed in an action in Minnesota in which a judgment was rendered which has not been paid, it is decided, on the authority of *Rape v. Heaton*, 9 W., supra, and other cases cited, "that the trial court was not bound to take judicial notice of the law of Minnesota regulating the action of replevin, but in the absence of all proof on the subject the presumption would be that it was the same as the law of this state." (Followed in *Elmergreen v. Weimer*, 138 W., 112, 117).

—*Osborn v. Blackburn*, 78 W., 209, 213.

4. "Presumptions as to foreign laws are generally confined to those states and countries in which the common law is the law of the land, as in the several states of this country and Great Britain;

5. And even then they do not extend to such statutory enactments as are penal in their nature. *Hull v. Augustine*, 23 W., 383; *Murphy v. Collins*, 121 Mass., 6; (other cases)".

—*St. Sure v. Lindsfelt*, 82 W., 346, 351.

6. As to non-enforcement of foreign statutory rights, coupled with a remedy, against residents. See FOREIGN JURISDICTION.

—*Finney v. Guy*, 106 W. 256, 266.

7. "The statutes of another state and the decisions of its courts as well can only be considered by the courts of this state, when material to prove some fact essential to a cause of action or defense, when put in evidence in the way pointed out by our statutory rules of evidence (secs. 4136, 4138),

8. Unless some other method is adopted by stipulation of the parties".

9. In the absence of proof of foreign (Ky.) decisions, as to a foreign statute (proved), "we must presume that our own law on the same subject, and such foreign law, similarly worded, have the same meaning. *Slaughter v. Bernards*, 88 W., 111". See also SUNDAY.

—*Howe v. Ballard*, 113 W., 375, 378.

10. "The question of what a foreign law is, is always a question of fact.

11. Where the only proof of a foreign law is some statute which has been offered in evidence, a number of courts hold that its construction is for the court.

12. But where, as here, oral testimony is taken in which there is a sharp conflict and where the case must practically be decided upon this oral testimony,

13. The authorities are well nigh harmonious to the effect that the disputed question of fact presents a jury question in a case triable by a jury, and not one that can be taken from the jury and be decided by the court." So held.

14. "Here, there is conflicting parol testimony as to what the effect of the Swiss limitation statute is", and as "no satisfactory inference can be drawn from the statute itself",—it is held to be a question for the jury.
—*Hite v. Keene*, 149 W., 207, 215.

15. "Strictly speaking, foreign law should doubtless be pleaded before evidence thereof is admissible. (Cases)".

—*Dean v. Dean*, 162 W. 303, 306.

FOREIGN WILLS.

Action to compel probate, 8.
Admitted: without letters, 1.
Passes title to realty, 2.
Authenticated copy, 25.
Authority of executor, 5, 25.
Certificate defective, 18.
"Compared with original," 20.
Defined judicially, 21.
Federal statute, 22.
Executor with sale power, 25.
Informality of probate, 17.
Jurisdiction must appear, 19.
Not proof of death, 5.
Decree of Nevada, 7.
Realty located here, 7.
Enforcement of trust, 10.
Circuit court, 12, 13.
Partial relief, county court, 12.
Evidence of no debts, 2.

Foreign law essentials, 24.
Not validity here, 24.
Guardian ad litem, failure, 23.
Independent proceedings, 14.
Authority given, sec. 2295, 15.
Authority required, sec. 3267, 16.
Probate required, sec. 3789, et al., 18, 23.
Letters, where no debts, 11.
Probate necessary, 18, 23.
Probate or recording, 6.
Probate unnecessary:
Lands devised in trust, 9.
Power of sale in will, 25.
Recording passes title, 3, 9, 14.
Title effect on realty, 4, 9.
Sec. 3267, in county court, 16.
Sec. 2295, register's office, 15.

1. A duly authenticated foreign will, admitted to probate here, without issuing letters, passes the title to real estate. See **TITLE**.

2. The settlement of such an estate at the place of domicile, is prima facie evidence "that there were no debts remaining". See also **DEBTS**.

—*Markwell v. Thorn*, 28 W. 548, 559.

3. A "properly authenticated copy of a will, devising lands in this state", proved and allowed in another state, recorded in the proper

county here, (under Sec. 2295), "is as valid and effectual to pass the title to such lands as though the will had been duly proven and allowed by the proper court of this state.

4. So far as the devise of real estate is concerned, the provision supercedes the necessity of proving anew a foreign will by making the record of the duly certified copy operate as an original probate".

5. But this statutory provision does not "prescribe a rule of evidence, nor declare what should be legal proof of death, or of the authority of an executor to act", and such authenticated copy of a foreign will, and such record thereof, is not proof of death, or of the authority of the executor to act.
—*Hayes v. Lienlokken*, 48 W. 509, 511.

6. A foreign will devising lands in this state to an executor in trust for the payment of debts, and the probate thereof in the state of the testator's domicile, can have no effect as to the lands here without compliance with our statutes for probate thereof, or the proper filing of a certified transcript of the foreign will and the probate thereof. Secs. 2295, 3790, 3793.

7. "The decree of that court (Nevada), as to realty certainly, can have no extra territorial effect. It cannot affect for a moment the title to real estate in Wisconsin. This is elementary law. *Robertson v. Pickrell*, 109 U. S., 608".

8. An action by a creditor to compel the executor to prove such will in this state, "cannot be maintained, for the reason that the plaintiff, as a creditor of W., (the testate), has the same right" as the executor to "procure its allowance". Secs. 3790, 3793.

—*Wells, Fargo & Co. v. Walsh*, 87 W. 67, 71.

9. Under sec. 2295, "the recording of a certified copy of a foreign will and its probate passes the title to the lands devised by the will as effectually as if the will had been probated in the proper court of Wisconsin", and so held as to "the title to the lands" to a trustee "in trust to pay the creditors of" the deceased non-resident.

10. And it is held that a foreign creditor can "by action, enforce the performance of that trust, when the trustee refuses to do so".

11. While it is not decided whether, under sec. 3793, letters may be issued on such foreign will "where there are no debts due to residents of this estate", it is held,

12. That the enforcement of such a trust "is one which calls for the exercise of the general equity powers of the circuit court, notwithstanding the fact that the plaintiff, by proceeding in the county court, might obtain some part of the relief which it seeks"; and especially because the trustee "procured to be issued to herself a tax deed upon" the lands, and claims title thereunder, and to obtain relief therefrom "brings the case within" *Hawley v. Tesch*, 72 W. 299 and *Lamberton v. Pereles*, 87 W. 449 (See CONCURRENT JURISDICTION).

13. "The trust now existing in this land in favor of the creditors"

may be administered in the circuit court which has full and plenary power in such matters, and "other creditors" "may be made parties to the action".

—*Wells, Fargo & Co. v. Walsh*, 88 W. 534, 536.

14. The construction of sec. 2295 in *Wells, Fargo & Co., v. Walsh*, 88 W., *supra*, is approved, and that section and sec. 3267, "are independent sections, intended to cover different situations.

15. Sec. 2295 is intended to cover cases where, by the terms of the will, lands are devised, or authority given to convey";

16. "While sec. 3267 is intended to provide for cases where the executor or administrator must obtain judicial authority to sell or convey lands".

17. A will duly authenticated as "admitted to probate by the proper court of Pennsylvania", where "it appears by a decision of the supreme court", "introduced in evidence" (*Holliday v. Ward*, 19 Pa. St., 485), "as well as by the testimony of a member of the Pennsylvania bar, that a formal decree of probate is not usual in that state, and that the papers here presented would be" admissible there,—is held to be likewise effective here, upon proper recording in the register's office. Sec. 1, art. 4, U. S. Const., *Parker v. Stoughton M. Co.*, 91 W., 174.

—*McIntosh v. Marathon L. Co.*, 110 W., 296, 303.

18. In proceedings to probate a foreign will, 'by duly filing an exemplified copy of said will and of the record admitting the same to probate', sec. 3789,—“immediately following the copy of the will in the record are these statements; 'Will proved and admitted to record in open court this (date, name, and title 'Probate Judge'). State of Illinois, county of Cook, ss. In the Probate Court of Cook county. Proved and admitted to record in open court this (date, name, and title 'Clerk');' ” then “follows 'Letters testamentary to J. H.' as executor, purporting to be issued by and under the seal of the probate court”, signed by the clerk. “Then come” “certificates under the seal of said probate court, all under” the same date, and the same date as the two foregoing dates, the first by the clerk, then by the judge, and then again by the clerk. Held, that such record does not give the county court jurisdiction.

19. “In order to entitle such records or proceedings” of the courts of another state, to full “faith and credit it must appear, in the manner prescribed by law, that the court rendering the same had jurisdiction. (Many cases)”.

20. “There is a certificate by the clerk that a paper in the record is a true copy of the will, but there is nothing in the record indicating that the same had ‘been by him compared with the original’,” as prescribed by sec. 4140. Sec. 4145.

21. Under the statutes, secs. 3789, et al., as to probate of foreign wills, and secs. 4140, 4145, as to authentication, “such ‘exemplified copy’ clearly means a duplicate or transcript of the records or proceedings of the probate court of Cook county admitting such will to probate, ‘duly

authenticated' under the seal of that court and duly certified to by the custodian of such records and proceedings". This record fails to so comply.

22. "The same is true as to the mode of authentication" under sec. 905 R. S. of U. S., "from which some of the sections of our statutes were taken".
—*In re Box's Will*, 127 W. 264, 270.

23. Under sec. 3790, where "the foreign probate was made by a court of competent jurisdiction", and "the exemplified copy" "is regular in every respect", it is held, that the foreign will be admitted to probate, notwithstanding "no guardian ad litem was appointed to represent the minors in the" foreign proceeding.

24. The statute "is mandatory", and provides for the "essentials" in the foreign state and not as "to the essentials of a valid original probate of a will in this state".
—*In re Gertsen's Will*, 127 W. 602, 604.

25. "A duly authenticated copy" of a foreign "will and the probate thereof", recorded, without probate here, "was presumptive evidence of the authority of P. as sole surviving executor to convey the land under the power of sale contained in the will. Sec. 2295".

—*Ill. S. Co. v. Konkel*, 146 W. 556, 570.

FORFEITURE.

Equity: never favors, 2, 7, 8.

Not enforce or insert, 6.

Reasonable meaning, 9.

Requires what is just, 2.

Ignorance, not construed as, 3.

Promptness required, 5.

Settled law, avoidance, 9.

Waived: rent acceptance, 1.

Tender of amount due, 4.

1. Forfeiture is waived by acceptance of rent after breach. See LANDLORD AND TENANT.
—*Gomber v. Hackett*, 6 W. 323.

2. "Equity never favors a forfeiture; and will not, unless bound down by statute, lend its aid to enforce one, but will, as a condition of relief, hold the party to the performance of what is just and equitable".
Dixon, C. J.
—*Fay v. Lovejoy*, 20 W., 403, 405.

3. "Courts will not construe ignorance or misapprehension of the true nature or existence of a right into a forfeiture of the power to enforce it". See ESTOPPEL.
—*Gove v. White*, 20 W. 425, 434.

4. In an action for wages, with a defense of forfeiture, "prior to the first trial there was a dispute as to the amount due, and the defendant offered and tendered judgment for the amount which he considered due; with costs of action. Such offer and tender were competent evidence,

and authorized a verdict of waiver of all forfeiture under the contract. *Cahill v. Patterson*, 30 Vt. 592, (et al).

5. A party who proposes to insist upon a technical forfeiture should act promptly, and consistently with the right claimed." See also *SERVICES*.
—*Bast v. Byrne*, 51 W. 531, 538.

6. "Precisely the same reason why courts of equity will not take jurisdiction to declare and enforce the forfeiture clause already contained in a deed, would have equal force against courts of equity entertaining a complaint for the purpose of inserting a forfeiture clause in an absolute deed;

7. And that reason is, that forfeitures are not favored. 'Neither penalties, forfeitures nor re-entries for conditions broken are favored in equity.' *Willards Eq. Jur.* 56; *Story's Eq. Jur.* 1319".

—*Mills v. Evansville Seminary*, 52 W. 669, 671.

8. "When it is said that forfeitures are not favored and will not be enforced if they depend upon judicial construction, if a meaning can be found within the scope of the language involved which will justify avoiding it,

9. The meaning intended by the proviso is: "if a meaning can be so found reasonably,—found in accordance with settled law for the determination of contractual intention from the language used by the parties".
—*Behling v. N. W. Nat. L. Ins. Co.*, 117 W., 24, 27.

FRAUD.

See also *EQUITY*. *FRAUDULENT ORDERS*. *UNDUE INFLUENCE*.

Abuse of trust relations, 19.

Confidence reposed, 20.

Inadequate sale price, 19.

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51, 52.

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Clear and satisfactory proof, 31, 39, 40,
46, 52.

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Election of remedies, 10.

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Equity: no limit rules, 15.

Way open to punish, 16.

Exempt property purchase, 32.

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1. Intentional misrepresentation of a material fact, or false impression created to mislead another, or to entrap or cheat him, or to obtain undue advantage of him, is positive fraud.

—*Smith v. Mariner*, 5 W. 551, 575.

2. "The party selling must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity representations founded on mistake, resulting from such negligence, is fraud." *Smith v. Richards*, 13 Peters, 26.

—*Miner v. Medbury*, 6 W. 295, 309.

3. "Conveyances of property, and agreements between parties, to defraud creditors, though void, as to creditors, are nevertheless valid and binding on the parties themselves and their personal representatives".

—*Fargo v. Ladd*, 6 W. 106, 118.

4. Fraud or mistake may allow a prior parol agreement to vary a written contract. See PAROL.

—*Reed v. Jones*, 8 W. 392, 413.

5. Acceptance of fraudulent securities does not vitiate a lien for purchase money on the sale of real estate. See LIEN.

—*Tobey v. McAllister*, 9 W. 463.

6. False statements "to constitute legal fraud, must not only be false, but must operate injuriously to the party".

—*Castleman v. Griffin*, 13 W. 535, 538.

7. Contract on account of fraud must be rescinded in toto. See RESCISSION OF CONTRACTS.

—*Hendricks v. Goodrich*, 15 W. 679, 682.

8. "Fraud vitiates all contracts and proceedings, even records and judgments of the most solemn character".

9. "Any person; who, knowing the incapacity of parties so situated (non compotes mentis), takes unjust or improper advantage of it, is deemed in the law to perpetuate a meditated fraud". See also *INSANE PERSONS*.
—*Encking v. Simmons*, 28 W. 272, 280.

10. In "an action in equity for a rescission of the contract on the ground of fraud" either as to real or personal estate, "the plaintiff must make his election, either to rescind the contract by restoring all that he obtained by it", or "sue for damages sustained by reason of the alleged fraud. But he cannot affirm so much of the contract as may be advantageous to him, and rescind as to the residue".
—*Grant v. Law*, 29 W. 99, 104.

11. While, "In *McLachlan v. Staples* (13 W. 448) a bill in equity was sustained" to set "aside certain fraudulent accounts which the executors had procured to be allowed", and in *Bassett v. Warner*, (23 W. 6) an action was sustained "to set aside certain fraudulent conveyances made by the administrator under licenses granted by the proper probate court"; yet the court does "not decide whether the decree of the county court admitting the will to probate may or may not be reviewed in this action by reason of frauds charged" "to have been committed at the probate" five years before.
—*Holden v. Meadows*, 31 W. 284, 290.

12. "The law is well settled that a party must elect as soon as he discovers the fraud practiced upon him, whether he will abide by the contract or not.

13. He cannot adopt the contract if it proves to be beneficial and profitable, and also have the right to repudiate it if it proves to be a bad speculation".
—*Grannis v. Hooker*, 31 W. 474, 476.

14. "The general rule in equity, or the most frequent form of misrepresentation met with in the books", may be conceded to relate "to the quantity, quality, situation or value of the property sold, or the pecuniary responsibility of the purchaser, or to something of that nature; otherwise equity will not grant relief on that ground".

15. However, "equity does not limit itself by set rules nor by precise definitions, particularly in matters of fraud".

16. "Fraud is so multifarious as to admit of no such rules or definitions; and hence equity always leaves the way open to punish frauds, and redress wrongs perpetrated by means of them, in whatsoever new form they may appear".

17. "A misrepresentation producing confusion and terror of mind, unsettling the judgment and depriving the party of the reasoning faculty, so that he cannot think or act deliberately or with knowledge and composure,—such a misrepresentation purposely made in order to take advantage of the mental derangement and fear which ensues to secure a hard and unconscionable bargain, is certainly a fraudulent misrepresentation".

sentation in the eye of a court of equity, and one against which that court will grant relief in a proper case. Such is the misrepresentation complained of in the present case”.

—*Kuelkamp v. Hidding*, 31 W. 503, 508.

18. Equity will not set aside the probate of a will for fraud at the probate, consisting in concealing the original fraud on the testator. Query, whether in any case, equity will interfere. See EQUITY.

—*Archer v. Meadows*, 33 W. 166, 171.

19. A sale by an administrator and guardian of infants, of a patent at an inadequate price, to a brother-in-law, was, “set aside because it was procured through fraud and abuse of trust relations, and because advantage was taken of these confidential relations to consummate it, and to gain an advantage over the weak, helpless and ignorant by the experienced and strong”.

20. “The rule is familiar and almost axiomatic, that where parties occupy with respect to each other peculiar relations in which confidence is necessarily reposed by one party and influence is acquired by the other, all transactions and dealings between them are watched by courts of equity with more than ordinary jealousy to see that such confidence is not betrayed”.

21. “Fraud is so various in its nature and so extensive in its application to human concerns, that it has been found impossible to give full definition of it, but ‘in the sense of a court of equity’, says Mr. Justice Story, ‘it properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’ 1 Story’s Eq. 187.”

22. “‘The line between actual and constructive fraud cannot be accurately drawn’ in all cases; but an agreement, to be valid, must be freely entered into by the parties, and there must be no concealment of material facts, and no surreptitious advantage taken by the intelligent and strong over the unwary and ignorant.”

—*Leonard v. Barnum*, 34 W. 105, 109.

23. A fraudulent conveyance in equity, is held to result in a trust for the party intended to be benefited. See TRUSTS.

—*Lombard v. Cowham*, 34 W. 486, 491.

24. The probate of a will, is not set aside in county court, fraud being alleged, but laches shown. See EQUITY.

—*In re Est. of Holden; Meadow’s Appeal*, 37 W. 98.

25. “Where once a fraud has been committed, not only is the person who has committed the fraud, precluded from deriving any benefit from

it, but every other person is so likewise, unless there has been some consideration moving from himself". See **PRINCIPAL AND AGENT**.

26. "Where there has been consideration moving from a third person, and he was ignorant of the fraud, there such third person stands in the ordinary condition of a purchaser without notice; but where there has been no consideration moving from himself, a third person, however innocent, can derive no sort of benefit or advantage from the transaction". Vice Ch. Wood, in *Scholfield v. Templer*, Johns. 156.

—*Law v. Grant*, 37 W. 548, 558.

27. It would seem the question of fraud relating to a will "may be tried at any time when rights are claimed under the will", either before or after the probate. See **REFORMATION**.

—*Sherwood v. Sherwood*, 45 W. 357, 362.

28. Inserting stipulations never made, in a contract signed in blank, makes the contract void for fraud. See **OMISSIONS**.

—*Rounsavell v. Pease*, 45 W. 506, 509.

29. "Where money is so charged to have been obtained by fraudulent representations, the only material questions to be considered are: First, Were such representations intentional, material and false? Second, Did they produce a false impression upon the mind? Third, Were they the inducement of the payment? Fourth, Were they relied upon as being true?

30. If these elements are present, they constitute a positive fraud without exception, and the matters to which such fraudulent representations relate, whether legal or illegal, will not lessen the fraud or affect the liability of the guilty party. (Citations)". See also **UNLAWFUL CONTRACTS**.

—*Kiewert v. Rindskopf*, 46 W. 481, 484.

31. In all classes of cases, "fraud must be proved by clear and satisfactory evidence". See **RESCISSION OF CONTRACT**.

—*Lavassar v. Washburne*, 50 W. 200, 201.

32. On the sale of non-exempt property (notes) by an insolvent debtor, and the purchase, with the proceeds, of exempt property, with fraudulent intent, the debtor can hold the exempt property.

33. "The sale of the notes is the only fraud in the transaction", and the creditors "only remedy against the fraud", is to reach the notes "in the hands of the fraudulent purchaser, collect or sell them, and apply the proceeds on their demands". See also **EXEMPTION**.

—*Comstock v. Bechtel*, 63 W. 656, 663.

34. In *Clemens v. Clemens*, 28 W. 637, "after mature consideration, it was held that a sale of property made by a debtor for the purpose of defrauding his creditors, although void as to the creditors who should seek

to subject such property to the payment of their debts, was valid as between the parties to such fraudulent contract. This decision is in strict accordance with the language of the statute. Sec. 2320”.

35. “The case of *Clemens v. Clemens* is sustained by a large preponderance of the decisions of other courts upon similar statutes. (Many cases).”
—*Davy v. Kelley*, 66 W. 452, 457.

36. As to conveyance by husband, through a third party, to the wife, held in fraud of creditors except as to the homestead, it is said: “This court has decided that fraud cannot be alleged as of a conveyance of the homestead. Fraud cannot affect the homestead or other exemptions in any manner whatever. (Many cases)”.

—*Rozek v. Redzinski*, 87 W. 525, 531.

37. “Relationship of the parties to a transaction is not considered in the law as a badge of fraud”. Bump, Fraud. Conv. (3d ed.) 56. “Relationship is simply a circumstance proper to be shown, and which, when shown, calls for closer scrutiny and clearer explanation of the transaction”. So held.

—*Bleiler v. Moore*, 88 W. 438, 440.

38. “Facts and circumstances, small and inconsiderable in themselves, often lead to unerring conclusions,” in cases of fraud. The story of witnesses may sound plausible, but may become improbable by circumstances. The uncontradicted statement of a witness, “may be impeached by the attendant circumstances.” See also IMPEACHMENT OF WITNESSES.

—*Zimmerman v. Bannon*, 101 W., 407, 411.

39. “He who alleges fraud must establish it by clear and satisfactory evidence. Only reasonable certainty of the existence of the fact is required, the same as in case of any other fact in a civil action.

40. Nevertheless the presumption of innocence and fair dealing among men is so persuasive,” that fraud “must be established by clear and satisfactory evidence or there can be no recovery.”

—*Maldaner v. Smith*, 102 W., 30, 34.

41. “The true rule is”, as to fraud and undue influence, that the burden is upon the party charging, but circumstances suggesting fraud, in law, may shift the burden to meet the prima facie case. See UNDUE INFLUENCE.

—*Small v. Champeny*, 102 W. 61, 68.

42. Negligence of the maker of a note, is held to make him liable on a fraudulent promissory note in the hands of an innocent holder. See PROMISSORY NOTES.

—*Keller v. Schmidt*, 104 W., 596, 601.

43. In a contest, where the will gave a son R. a large portion of the estate, and a son J. none, evidence of “witnesses to the effect that they had heard the testator declare on many occasions that R. should have no

more of his property, and by the assertion that the testator was unable to understand enough English (he being a Welshman) to comprehend the will, in question," though "met by much evidence to the contrary", "even if they stood undenied, without more to aid them", held insufficient to justify belief "in the perpetration of so gross and unprofessional a fraud by" the attorney, of reversing the names of such sons in the will.

—*Roberts v. Roberts*, 107 W., 213, 215.

44. "The principle of law is that, if it be clearly and satisfactorily proven that a party signed a note or contract relying upon false and fraudulent representations as to its true character,

45. And was guilty of no negligence in failing to ascertain what the contract really was, he is not bound by it. *Bowers v. Thomas*, 62 W., 480". On the evidence, a verdict for defendant, the defense being fraud, was set aside and judgment for plaintiff directed, and sustained.

—*Dowagiac Mfg. Co. v. Schroeder*, 108 W., 109, 110.

46. "Fraud must be clearly and satisfactorily established before a court is justified in inferring its existence. *Shaw v. Gilbert*, 111 W. 165".

47. "It is not per se fraudulent for a husband to convey his property without his wife's knowledge. He has a perfect right to do so.

48. Nor is it per se fraudulent as against a wife, to withhold such a conveyance from record, either negligently or by agreement between the husband and the grantee.

49. As to her the reasons fail which have led the courts to declare such act by agreement fraudulent as to creditors who are likely to be induced to extend credit on the face of the record.

50. The fraud in the case, if any exists, can consist only in the purpose to defeat her rights, and even such purpose entertained by the grantor is ineffective unless also shared or at least known by the grantee".

—*Richmond v. Smith*, 117 W. 290, 293.

51. As to "burden of proof", and proof raising "inference of fraud", and cases discussed. See UNDUE INFLUENCE.

—*Winn v. Itzel*, 125 W. 19, 32.

52. "The claim of fraud" to allow parol testimony to vary a written agreement, "should not be allowed to prevail unless established by clear and satisfactory evidence".

53. "He who alleges fraud" "must establish his claim" with "that ordinary degree of certainty" "something less than beyond a reasonable doubt", "yet something more than mere reasonable certainty which may be grounded on a bare preponderance of the evidence". (Cases). See also PAROL.

—*Lepley v. Andersen*, 142 W. 668, 670.

FRAUDS, STATUTE OF.

See also PART PERFORMANCE.

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 Written within a year, 46.
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1. To take the case out of the statute, not only the promise but the consideration must be expressed in writing.

—*Taylor v. Pratt*, 3 W. 674, 698.

2. The statute does "not apply to implied trusts" but does to express.
 See TRUSTS.

—*Whiting v. Gould*, 2 W. 552, 585.

3. Part payment without delivery of possession of realty, even by tenant in possession, will not take the case out of the statute.

—*Blanchard v. McDougal*, 6 W. 167.

4. Deed shown to be a mortgage by parol, without fraud or mistake at its inception, held to be an invasion on principle to be held on authority only, if at all. See PAROL.

—*Rasdall v. Rasdall*, 9 W. 379, 392.

5. A verbal contract for the sale of lands is a nullity, without part performance, and mere payment of part of purchase money is not such part performance.

6. The English statute and that "of all the states excepting five, among which are Wisconsin and New York" as to such contracts "make them simply not actionable," while ours "is entirely silent as to the bringing or maintaining of actions" but makes the contracts void.

—*Brandeis v. Neustadt*, 13 W. 142, 147.

7. "The promise of one person, though in form to answer for the still subsisting debt of another, if founded upon a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter", not in writing or subscribed, is not "within the statute of frauds," as evidenced by decisions "for more than a century". Dixon, C. J.

—*Dyer v. Gibson*, 16 W. 557, 560.

8. Consideration not necessarily expressed in exact terms, if the promise is implied, may make the agreement valid. See CONSIDERATION.

—*Williams v. Ketchum*, 19 W. 231, 232.

9. "Our statute of frauds makes a verbal agreement for the sale of lands not merely voidable but void".

—*Madigan v. Walsh*, 22 W. 501, 505.

10. "The case of a party transferring for value securities which he owns, and, as a part of the contract, guarantying their payment or collection, is" not within the statute.

—*Wyman v. Goodrich*, 26 W. 21, 23.

11. "An agreement or promise, the performance of which is contingent upon the duration of human life, is not within the statute, because by the death of the person within one year, upon the happening of which the performance is to take place, a valid execution or performance may be had within that time according to the very terms of the contract. The fact that the performance may be thus, by possibility, be required within the year, relieves the contract from the operation of the statute".

—*Jilson v. Gilbert*, 26 W. 637, 642.

12. An oral contract to support during life is valid, because it "might have been entirely performed within a year".

—*Heath v. Heath*, 31 W. 223, 229.

13. An oral promise to indemnify a surety is valid. See SURETIES.

—*Vogel v. Melms*, 31 W. 306, 311.

14. "If A. requests B. to pay C. \$100 on a purchase of real estate, and promises to repay the money advanced, as between A. and B. the

transaction is essentially a loan of money, and does not involve any question under the statute of uses and trusts, or under the statute of frauds."

—*Whitman v. Lake*, 32 W. 189, 194.

15. "A verbal executory contract for the sale of goods for the price of \$50 or more, is void by the statute unless some part of the purchase money be paid at the time the contract is made," and "payment at a subsequent time will not render the contract valid".

—*Paine v. Fulton*, 34 W. 83, 85.

16. Answering for the debt of another under a new consideration, valid; *Dyer v. Gibson*, 16 W. supra, approved.

—*Young v. French*, 35 W. 111, 116.

17. Where an executory contract was within the statute, "the contract was valid from the time of delivery, although it may have been within the statute so long as it remained unexecuted."

—*Mason v. H. W. Co.*, 35 W. 164, 167.

18. Acceptance of goods under a void agreement, validates the contract. See PART PERFORMANCE.

—*Amson v. Dreher*, 35 W. 615, 618.

19. Our statute for the sale of lands (Sec. 2303) provides that the memorandum "be subscribed by the party by whom the sale is to be made", contrary to the English statute which requires it "to be signed by the party to be charged"; and a land contract to be binding need not necessarily be signed by the grantee. See LAND CONTRACT.

—*Lowber v. Connit*, 36 W. 176, 182.

20. "The mere fact that an advantage may result incidentally to the promisor is not alone sufficient to take the agreement out of the statute", as to a promise to pay the debt of another.

21. "The resulting advantage to him must be the object of his promise—the consideration upon which it was made.

22. We are not aware of the existence of any rule of law which authorizes the inference that, merely because the promisor may be incidentally benefited by his promise, his object in making it, and the consideration therefor, is such incidental benefit."

—*Clapp v. Webb*, 52 W. 638, 642.

23. A parol agreement to devise both real and personal estate "is indivisible, and, failing in part, the whole fails." See SERVICES.

—*Ellis v. Cary*, 74 W., 176, 184.

24. "The English statute 29 Car. 2, and the statutes of many of our states copied from it, do not make the contract void, but only voidable."

25. "Under a statute (sec. 2304) like ours, the authorities uniformly hold that such a contract is void, and that nothing will take it out of statute except such part performance on the part of the purchaser, by entering into the possession of the premises, as would render him a trespasser if the agreement is held void, and even in such a case the relief can be sought only in a court of equity." *Cameron v. Austin*, 65 W., 652; *Popp v. Swanke*, 68 W., 364; *Brandeis v. Neustadt*, 13 W., and other cases, *supra*. So held. See also *QUANTUM MERUIT*.

—*Koch v. Williams*, 82 W., 186, 189.

26. "This court, at an early day (*Bird v. Morrison*, 12 W. 138), adopted the position that a contract of partnership for dealing in lands was within the statute, and has adhered thereto ever since. (Cases)".

27. "In applying the statute of frauds, courts long since recognized an exception, or more properly a distinction, in cases where a contract void by the statute has been fully executed, and one party sought to retain the fruits of the dealing in defiance of his promises. Such situation was declared to be not within the purpose of, and so not sheltered by, the statute. (Many cases)". —*Smith v. Putnam*, 107 W. 155, 162.

28. In an oral agreement "made Oct. 29, 1903, for services to be rendered for the period of one year commencing on the 1st day of November following", "the excess of two days was just as efficient as a longer period to render the agreement void under subd. 1, sec. 2307", as "not to be performed within one year from the making thereof".

29. "The fact that the period of service agreed upon was to extend one year from the time performance commenced does not take the case out of the statute, for where performance is to commence in the future, for the purposes of the statute, the period to be considered is that beginning with the date of the agreement. (Many cases)".

30. Though "the death of the servant ends his term of service without breaking his contract", "leaving the employer liable upon the contract for the time service was actually rendered", such fact is "not presumed to have in mind the termination of the agreement in that way", and does not take the contract out of the statute.

31. A contract for "continuous service terminable upon a stipulated contingency, as to support another for the remainder of his natural life" is different, and "not within the statute because by its terms it ceases with the death contemplated. *Heath v. Heath*, 31 W. *supra*".

32. "Partial performance of a contract void under the statute of frauds does not save it. Either party can terminate the services at any time and the employee recover, as he did in this case, the reasonable value of the work done. (Many cases)". —*Chase v. Hinkley*, 126 W. 75, 77.

33. "A promise, in form, by one person to guarantee payment of the debt of another, where such promise is in fact to pay such person's own debt, is not within the statute because not collateral. (Cases)".

—*Kaufer v. Stumpf*, 129 W. 476, 482.

34. Where defendant sold plaintiff mining stock at fifty cents a share, and agreed to repurchase the same within a year at \$1 a share, the contract is held to be "one entire contract, which had been fully performed by the delivery of the shares and the payment of the original purchase price",

35. And the plaintiff "is entitled to recover the price stipulated upon a return of the stock as part of the original contract",—neither sec. 2307, nor sec. 2308, applying though the contract was oral. (Cases).

—*Vohland v. Gelhaar*, 136 W., 75, 77.

36. An oral antenuptial contract, reduced to writing after marriage, held void under the statute. See MARRIAGE CONTRACTS.

—*Rowell v. Barber*, 142 W., 304, 306.

37. The "statutory defense", as to validity of a contract under the statute, "is held to be personal and is not available to strangers to such agreements". (Cases).

—*Draper v. Wilson*, 143 W. 510, 512.

38. "The oral contract" as to sale of personalty and realty, "was void as to the real property under" sec. 2302, "and, being entire and indivisible, was under this statute also invalid as to the personal property. *Clark v. Davidson*, 53 W. 317, (See QUANTUM MERUIT).

39. It was also "void under the statute of frauds relating to personal property (Sec. 2308).

40. But," later, on "the execution and delivery of the so-called receipt" as to payment and possession of the realty, and "entering into possession of the real estate" under deeds delivered, and "plaintiff's listing" the personalty, "there was, when all taken together,

41. Such part performance of the entire contract as to take the contract out of the operation of the statute of frauds.

42. The status quo was altered to an extent that to then hold void the unexecuted fraction (as to the personalty) of this entire contract would operate as a fraud upon the plaintiff, and the damage if any which the law could allow him would be inadequate compensation. (Cases)". See also PAROL.

—*Kipp v. Lawn*, 146 W. 591, 601.

43. An oral promise by the father "to pay his (minor) son's debt" "was clearly void under the statute of frauds". See also RATIFICATION.

—*Fisher v. Lutz*, 146 W. 664, 666.

44. In an "order for lumber" subscribed by the vendee corporation "in type-writing", "the signature is sufficient to meet the calls of the statute," sec. 2308. (Cases).

45. Nor is such contract "void under the statute of frauds because it is not signed by the" vendor, because the shipping and acceptance of a portion of the order "was a sufficient part performance to take the case out of the statute. (Many cases)".

—*Garton T. Co. v. Buswell, L. & Mfg. Co.*, 150 W., 341, 348.

46. Where "under the terms of the original (written) contract the entire work might have been completed before the expiration of the year from the making thereof", "the contract must therefore be treated as not within the statute of frauds. (Sec. 2307).

47. Under these facts of the case the trial court properly received parol evidence tending to show that the parties at the time alleged made an agreement which modified the written contract.

48. The parties to the contract could by mutual agreement modify it without any new consideration. *Schoblasky v. Rayworth*, 139 W. 115 (See PAROL)".
—*Foley v. Marsch*, 162 W. 25, 30.

49. "An oral agreement" to buy jointly, is held not within the statute, which is "applicable only to contracts between seller and buyer". See also SALE OF PERSONALTY.

—*Stack v. Roth Bros. Co.*, 162 W. 281, 286.

50. A contract "void under the statute of frauds because not in writing", being "not to be performed within a year", and "not in writing" is not void under the statute, sec. 2307, if it "was reiterated" within the year.
—*Huebner v. Huebner*, 163 W. 166, 170.

FRAUDULENT CONVEYANCES.

See ACTIONS BY EXTR. OR ADMR. CREDITORS' ACTIONS. DOWER. FRAUD. FRAUDS, STATUTE OF. HUSBAND AND WIFE. INCOMPETENTS' SALE OF REALTY. INFANTS' SALE OF REALTY. MARRIED WOMAN. SALE OF REALTY. UNDUE INFLUENCE.

FRAUDULENT ORDERS.

See also FRAUD. MISTAKE. SETTLEMENT. VACATING JUDGMENTS.

Acts of opposite party, 13.
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After appeal expired, 21.
After minor's majority, 23.
Broad rule stated, 1, 2, 32.
Acts of opposite party, 2.
Defense not available, 1.
Fraud or accident, 2.
Ignorance of fact, 1.
Prevented from availing, 2.
Without fault or negligence, 2.
Burden on the trustee, 16.
Compel new accounting, 8.

Constructive fraud, facts, 24.
Contrary to equity, 1.
Default judgment against ward, 27, 28.
Laches: heir's interest, 29.
Payment, been admitted, 28.
Prior to ward's decease, 27.
Defense prevented, 13.
Directly induced judgment, 30.
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Estate, one-third value, 16.
Estate to wrong persons, 5.
Exception, confirmed rights, 4.
Limitation statute, 4.

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| Failure of guardian ad litem, 25. | Not grant specific relief, 9. |
| Final judgment, five years, 10. | Obtained by fraud, 3, 11. |
| Administrator's false pretense, 17. | One year limitation, 22. |
| Application year later, 17, 18. | Parties lived at distance, 16, 18. |
| Laches of petitioner, 10. | Probating will, vacated, 25. |
| Marriage concealment, 10. | Regardless of circuit court, 6, 19. |
| Fraudulent concealment, 14, 15, 17, 18, 26. | Releases, mere conveniences, 18. |
| Ignorance of the fact, 13, 14, 15. | Rule, elastic, restrictive, 32, 33. |
| Inequitable; ignorance, 12. | Settlement not opened, 20. |
| Irregularity entered, 3. | Only order complained of, 20. |
| Laches: of applicant, 2, 13, 21. | Vacate orders; proceedings, 3. |
| Heir's interest developed, 29. | Without fault or negligence, 13. |
| New York; Massachusetts, 7. | Wrongful administration, 5, 17, 18. |

1. "The rule seems to be quite well settled, that chancery will relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense,

2. Or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party unmixed with negligence or fault on his part. (Cases)". (In *Laun v. Kipp*, 155 W., post, it is said that this "broad rule", "is the law of this forum").

—*Stowell v. Eldred*, 26 W., 504, 507.

3. "This court has repeatedly held that the county court may set aside its orders and proceedings, when they have been irregularly entered, or when they have been obtained through the fraud of parties obtaining the same. See in re *Fisher*, 15 W. 511, (cited under *MISTAKE*; other cases).

4. We see no reason for limiting this jurisdiction, except, as was done in the case of *Betts v. Shotten*, 27 W. 667, so as to prevent disturbing rights which have become confirmed, under the order of proceedings asked to be set aside, by the running of the statute of limitations in favor of those claiming under them".

5. "The petition in this case, if true, shows that there has been a wrongful administration of the estate, and a direction of the court to deliver the estate to persons who have no right to any part thereof". See also *DEMURRER*.

6. "The fact that" an action might be maintained in circuit court, "is no reason for holding that the county court cannot and ought not to remedy the wrong done by its own order".

7. "A like rule has been adopted for the probate courts of New York (many cases); also by the courts of Massachusetts (cases)".

8. It is indicated, without being decided, that the county court could compel a new accounting by the administrator who procured the fraudulent order, and "if the money or property is still in the possession of such person (who wrongfully received it) enforce such order under sec. 2460".

9. Because the county court might not grant the specific relief sought, is not sufficient reason for dismissing the petition.

—*Est. of Leavens*, 65 W. 440, 446.

10. An application, five years after its entry, to set aside the final judgment in the estate of T. assigning all the estate to the widow, on the allegation of fraud on her part as to concealment of a former marriage without a valid divorce to enable re-marriage, was denied on the facts showing an absence of fraud whether the divorce was valid or not (undetermined), and on the laches of petitioner in not having "made the discovery long before" and in "not having made any inquiry even of S. (the widow) herself, when they ought to have made it", the judgment having been "rendered without fraud and on due personal notice to all". *Rogers v. Van Nortwick*, 87 W. 414 (see LACHES).

11. "The power of the county court to vacate a final order shown to have been procured by fraud is well settled in this state. *Est. of Leavens*, 65 W. supra."

12. "The relief will be granted when the former judgment is inequitable, and the defendant was ignorant of the fact in question pending the former suit,"

13. Or was prevented from making his defense by fraud, accident, or the acts of the opposite party, unmixed with negligence or fault on his part. *Stowell v. Eldred*, 26 W. 504; *Tucker v. Whittlesey*, 74 W. 74; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332. It is obvious that the ignorance of fact which will afford grounds for relief must be intentional or negligent ignorance".

14. "Whether, therefore, we regard the proceeding as founded upon fraudulent concealment of fact by Mrs. T. or mere ignorance of fact by the petitioners pending the settlement of the estate,

15. In either case, if their failure to defend was wholly or partially the result of their own intentional or negligent ignorance of fact, they cannot now be granted relief". —*Thomas v. Thomas*, 88 W. 88, 93.

16. Where the "legatees and devisees all lived at great distances", and their information was acquired only from the administrator with the will annexed to whom they assigned their whole interest in the "estate, both real and personal, for about one-third its value", "the burden is upon the trustee to show that the cestui que trust knew at the time all the facts relating to the value of the property and their rights therein. *Leach v. Leach*, 65 W. 284; (other cases)".

17. A final order assigning the whole estate, on such assignments, to the administrator personally, entered May 20, 1890,—on petition filed Oct. 26, 1891, was held properly set aside, on the ground that the assignments "were procured by his false pretenses and fraud", and to require the administrator to account, though "the county court had no jurisdiction to set aside the conveyance" "of the real estate" though pro-

cured by fraud. *Brook v. Chappell*, 34 W. 405 (See JURISDICTION); *Est. of Leavens*, 65 W. supra; (other cases).

—*Creamer v. Ingalls*, 89 W. 112, 11

18. Following cases, supra, a final judgment of distribution is set aside as being "procured by fraud", on petition to the county court near a year later, by two elderly sisters of the testator, heirs, alleging the releases given to one of the "apparent relation of adopted daughter" on the representation that a large estate was largely given by the will to such adopted daughter, which was untrue, and that such releases were merely conveniences, that "they believed and trusted the information given them"; the estate was in the Milwaukee county court, and the petitioners resided in Minneapolis, and neglected to make inquiry or search the records.

19. Such proceeding by petition was held proper though the circuit court might have been asked to allow an appeal, and "that there may be a remedy by a direct suit is no objection to granting this motion." *Brook v. Chappell*, 34 W. 405."

20. It is not "necessary to open or set aside the settlement of the estate", but only the judgment of distribution complained of need "be revoked or set aside" and such matter heard and adjudicated.

—*Est. of O'Neill*, 90 W. 480, 485-

21. While the county court may, even after the time for appeal has expired, set aside an order, for fraud or mistake, "it will be denied if the facts show laches on the part of the applicant. *Thomas v. Thomas*, 8 W., supra; *Case of Broderick's Will*, 21 Wall., 503."

—*Weadock v. Ray*, 111 W., 489, 49:

22. "Where the order or judgment (of the county court) is attacked on the ground of want of jurisdiction or fraud", "the one-year limitation did not apply", to enable setting aside.

23. Where "within about two months after the minor attained his majority he promptly made application to the county court to have the order probating the will" seven years before, "vacated",

24. His petition not alleging fraud, "but the facts constituting a constructive fraud are alleged", and "upon the undisputed facts the will was entitled to probate",—

25. "The failure of the guardian ad litem to call the attention of the court to such fact, therefore, obviously was at least a constructive fraud upon the infant", and the probate order was held properly set aside (Cases). See also LOST WILL. —*Parsons v. Balson*, 129 W. 311, 314

26. "It is well settled in this state that an order or judgment of the county court may be set aside for fraud or fraudulent concealment on the part of the prevailing party. (Cases, supra)."

27. An administrator, being also the heir, brought proceedings to set

aside for fraud, a judgment obtained on a trial two years before the decease of the intestate, while under guardianship, and vacation of such judgment is sustained,—

28. There having been made “no objection” to such claim, though the “general guardian and his attorney had long prior to said allowance been informed that the claimant had repeatedly admitted that she had been fully paid and that the incompetent did not owe her anything.”

29. The administrator, though heir, was held not “guilty of laches”, because the claim had been “fully paid” when he learned of it, and he “got no interest in the estate until the death of the intestate”, and “until then he could not know whether he would get any interest”. See also ADMISSIONS. —*Scheer v. Ulrich*, 133 W., 311, 316.

30. “Fraud which can be made the basis of an attack upon a solemn judgment of a court of record must have directly induced the rendition of the judgment,

31. Not merely have induced or brought about a condition upon the real existence of which the court acted as the basis of its decree”.

—*Uecker v. Thiedt*, 137 W., 634, 636.

32. The rule of “*Stowell v. Eldred*, 26 W. *supra*, is the law of this forum, leaving administration thereof sufficiently elastic to meet the necessities of such serious situations as require a remedy,

33. And sufficiently restrictive as not to invade the wise public policy to, as generally as practicable, terminate litigation as to a single controversy”.

—*Lawn v. Kipp*, 155 W. 347, 372.

FUNERAL EXPENSES.

See also ADMINISTRATION EXPENSES. CLAIMS.

Debt; applies to all estates, 6.

Estates liable for, 3.

Not contract relation, 5.

Expenses, attending funeral, 1.

Married woman: separate estate, 4.

Credit of the estate, 7.

Estate primarily liable, 8.

Husband liable or not, 7, 8.

Married woman—continued

Husband ordered charges, 7.

Near friend or relative, 2.

Paid by party or stranger, 2.

Before administration, 2, 9.

Re-imbursed from estate, 2.

Widow with estate funds, 9.

Rank and condition, 3.

1. The court does not “think the time has yet come when a request from one near friend or relative of a deceased person to another, to attend his funeral, will be construed as implying a promise on the part of the former to pay the latter for his time, trouble and expenses”.

—*Rothe v. Rothe*, 31 W. 570, 574.

2. "An heir, a legatee, widow or guardian, or even a stranger, who has paid reasonable burial expenses, necessarily incurred before administration", can be "reimbursed from the estate". See ADMINISTRATION EXPENSES. —*Samuel v. Est. of Thomas*, 51 W. 549, 551.

3. "It seems to be well settled that estates of deceased persons are liable for funeral expenses such as are usually adopted for persons of like rank and condition in society. (Citations);

4. And this rule applies to married women leaving separate estates to be administered. (Mass., O. & N. Y. cases).

5. The liability of the estates in such cases does not rest upon contract relation, but upon a charge which the law imposes upon the estate. (Citations)".

6. Under sec. 3852, "funeral expenses are treated as a debt of the estate, and apply alike to all estates being administered".

7. Where "the husband ordered" the funeral charges, but the services were rendered "solely upon the credit of the estate" of the wife, the husband's liability is not determined,

8. But it is held "that the estate is primarily liable, and that the claim for funeral expenses may be enforced against it without regard to the liability of the husband. (Citations)".

—*Schneider v. Est. of Breier*, 129 W. 446, 447.

9. Recovery against a widow denied for estate funds paid by her for funeral expenses before administration. See ACTION BY EXTR. OR ADMR.

—*Merrill v. Comstock*, 154 W. 434, 443.

FUTURE CONTINGENT ESTATES.

See also POWER. TRUST VARIATION. VESTING OF ESTATES, ETC.

Circuit court:

Ninety-nine year lease, 8.

Pending administration, 7.

Loan and mortgage, 1.

No means available, 1.

To prevent sale, 1.

Remainder: to pay heirs, 4.

Balance for parties' benefit, 6.

Estate in solido, 6.

Remainder—continued

Preserved as provided, 5.

Sale of portion or whole, 6.

Threatened destruction, 5.

Statute; not more power, 3.

Merely provides method, 2.

Ninety-nine year lease, 8.

Not a trust violation, 8.

1. There "being no means of payment available", and "to protect the infant's (and future-born children) interest and to prevent a sale of the premises in satisfaction of" a mortgage, "another loan to secure the money to pay it" and a mortgage to secure it, is authorized. "Such a course is promotive, within the contemplation of ch. 300, L. 1899 (Secs. 3519c et al), of her interest in the property". See also POWER.

—*Lueft v. Lueft*, 129 W. 534, 543.

2. Ch. 300, L. 1899, Secs. 3519c, et seq., merely provides "a method by which the title to property of persons under legal disability can be alienated in cases theretofore well recognized in the law, for the promotion of the interests of such owners", and

3. "It was not intended to confer on the courts additional powers to those now exercised for the sale of interests in lands".

4. Where "the object of the application" "is to dispose of the interests in remainder for the purpose of separating them from those of petitioner's life estate", "upon the alleged ground that he, as life tenant, is unable to discharge the liens and charges against the property", the order for sale is reversed.

5. To prevent "threatened loss and destruction" of the future estates, following *Ruggles v. Tyson*, 104 W. 500 (See TRUST VARIATION), "the interests in remainder are to be preserved, as nearly as circumstances will permit, as the creator of them has provided".

6. And "the estate must be maintained in solido" "unless the court encounters some insurmountable obstacle" Held, "practicable to obtain relief either by mortgaging", or by "sale of a portion", or "the whole may be sold", the liens paid, "and the remainder be kept in lieu of the real estate," for the "benefit of the parties as intended".

7. "As to the propriety of this proceeding in the circuit court during the administration of the estate by the county court",—not determined.

—*In re Kingston's Est.*, 130 W. 560, 562.

8. As to ch. 300, L. 1899, not authorizing a leasing for ninety-nine years, nor a trust violation, though such leasing is sustained in an action in equity. See TRUST VARIATION.

—*Upham v. Plankinton*, 152 W. 275, 286.

FUTURE DELIVERY CONTRACTS.

See UNLAWFUL CONTRACTS.

GARNISHMENT.

See LIABILITY.

GIFT.

See also DELIVERY.

Assessed against donor, 63.

Causa mortis:

Conditional gift, 14.

Definition, 13, 23.

Delivery also essential, 2, 12, 22, 67.

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Causa mortis—continued

Donor survives; defeated, 13, 24.

May be revoked, 14, 24.

Not complete before decease, 11.

Taken; pay donor's debts, 25.

- Custody, third person, 76.
- Title actually passes, 77.
- Turn over after death, 76.
- Delivery essential, 1, 2, 49.
- At law and in equity, 2.
- Causa mortis: completed, 2, 22, 67.
- Change of possession, 7, 8, 67, 69.
- Directed: not effected, 9.
- Chattel or chose, 2.
- Circumstances excuse act, 64, 65.
- Constructive; intent, 28.
- Delivered after decease, 9.
- Insurance policy; manual, 47.
- Instrument, is of fund, 46.
- Inter vivos: completed, 2, 21, 43.
- Nature of property, 65.
- Promisor's own note, 50.
- Such as subject admits of, 45.
- To agent of donee, 74.
- Deposit box: with key, 54.
- Contents after death, 54; 55, 56.
- Evidence:
 - Declarations: afterward, 59.
 - Character of possession, 60.
 - Declarations of deceased, 62.
 - Of donor to third persons, 70, 71.
 - Self serving: in derogation, 78.
 - Abortive will or codicil, 79, 80.
 - Donee of dec'd. donor, 81, 82.
 - Donee's talk, dec'd. donor, 81.
 - Opposite party not testifying, 82.
 - Family circumstances, 5.
 - Indefinite; held gift, 29.
 - Large amount of personalty, 37.
 - Grand-niece; paralytic uncle, 37.
 - Large attorney's fee, 38.
 - Large physician's fee, 39.
 - Large sums to relatives, 40.
 - Not undue influence, 40.
 - Other circumstances, 41, 42.
- Res gestae as to gift, 4.
- Not hearsay, 4.
- Statements of parties, 6.
- "Was to pay for operation," 52.
- Fund: in bank, 27.
- Intent emphasized, 28.
- Inter vivos; causa mortis, 27.
- Symbolical delivery, 46.
- Infants: brother to sister, 4.
- Note, father to infant, 16.
- Creditors; subsequent, existing, 19.
- Father, not invalidate, 20.
- Handed to mother, 17.
- In trust for child, 17.
- Irrevocable, 18.
- Insurance policy; manual, 47.
- Inter vivos:
 - Absence of recovery hope, 14.
 - Donee actual possession, 15, 43.
 - Fully executed before decease, 10.
 - Effect irrevocably, 61.
 - Intention to part with, 43.
- Land, parol, possession, 31, 35, 36.
- Ownership acts; will, 33.
- Title by will; not gift, 34.
- Unambiguous declarations, 35.
- Unmistakable evidence, 32.
- Valuable improvements, 31, 32.
- Negotiable instruments, 44.
- Without written assignment, 44.
- Note: and mortgage, 1, 73.
- Endorsement and delivery, 57.
- Name of absent son, 53.
- Note delivery essential, 1, 49.
- Payable after decease, 48.
- Promisor's note; promise, 50.
- Settlement: causa mortis, 68.
- Parent and child; scrutiny, 66.
- Promise without act, 3.
- Re-delivery; special purpose, 30, 57.
- Endorsements erased, 57, 58.
- To collect interest, 75.
- Reservation for donor, 72, 75.
- Revocable until delivery, 1.
- Subjects and delivery, 26.
- Testamentary only, 51.
- Immediately after death, 51.
- Not if title passes, 77.

1. "A delivery of the note was essential in order to pass title and give effect to the gift" of a note and mortgage. "The note was the principal, the mortgage the accessory," and while the note remained undelivered the gift was revocable. —*Wilson v. Carpenter*, 17 W. 512, 516.

2. "Delivery is essential both at law and in equity to the validity of a parol gift of a chattel or chose in action; and it is the same whether it be a gift inter vivos or causa mortis. Without actual delivery the title does not pass".

3. "A mere intention or naked promise to give, without some act to pass the property, is not a gift. 2 Kent, 438".

—*Resch v. Senn*, 28 W. 286, 291.

4. A minor son of an insolvent father, may make a gift (piano) to an infant sister, and "what was said, as well as what was done, on the occasion of the presentation or gift, were part of the *res gestae*, and not hearsay;

5. And the general circumstances of the family at the time of the pretended purchase, and gift were proper to be shown, to sustain and corroborate and make probable the transactions". See PARENT AND CHILD.

—*Wambold by Gdn. v. Vick*, 50 W. 456, 458.

6. Statements by the parties as to "the gift and possession", on the question of title are admissible. See RES GESTAE.

—*Kellogg v. Adams*, 51 W. 138, 145.

7. "We know of no case where a gift has been upheld when no act has been done tending to change the possession of the property which is the subject of the gift from the donor to the donee".

8. "To make a gift perfect, all the cases hold that the possession of the subject of the gift must pass from the donor to the donee." "See *Wilson v. Carpenter*, 17 W. supra; *Resch v. Senn*, 28 W. supra".

9. In this case the deceased, three hours before he died, told the nurse to take from under the feather bed he was lying on, his pocketbook, and to give it with the money and papers therein to his wife when she came. It was not so taken and delivered until some hours after his decease, and it was held no completed gift, and no title in the wife of a note in the purse, endorsed in blank, though she was the sole heir.

—*Wilcox v. Matteson*, 53 W. 23, 27.

10. "Where a gift of personal property is made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor at the time is in extremis, and dies soon after. *Tate v. Leithead*, Kay, 658; *McCarthy v. Kearnam*, 86 Ill. 292.

11. But where such intent is not manifest, and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *causa mortis*. *Rhodes v. Childs*, 64 Pa. St. 23, 24; *Grymes v. Hone*, 49 N. Y. 17.

12. But even such a gift is not complete without delivery. *Ibid.*; *Wilcox v. Matteson*, 53 W. supra; *Brunn v. Schuett*, 59 W. 260.

13. Such a gift may be defined as one made by the delivery of personal property by the donor in his last sickness, and in expectation of death then imminent, and upon condition that it shall belong to the donee if the donor dies, as anticipated, without revoking the gift, leaving

the donee him surviving, and not otherwise. (Citations) But even such a gift is defeated if the donor survive such sickness. *Staniland v. Willott*, 2 Macn. & G. 664."

14. In this case "in view of the apparent absence of any hope of recovery, it would seem that the note, mortgage, and satisfaction may be regarded as so delivered to the mortgagor as an absolute gift in presenti," but if the intent was not to make the gift unconditional "and he was at the time in his last sickness, and died soon thereafter, without revoking the gift, we must regard it as a valid and binding gift *causa mortis*." —*Henschel Admr. v. Maurer*, 69 W. 576, 580.

15. "A gift *inter vivos* does not become perfected so as to change the title to personal property until the donee gets actual possession thereof, either by himself or his authorized agent. *Wilcox v. Matteson*, 53 W. supra; (other cases)". —*Wells v. Collins*, 74 W., 341, 344.

16. As to a Christmas gift by a father to a minor son, of a note of \$1000, placed in an envelope marked with the child's name thereon, and also written on the note by the father, handed to the wife and mother, "placed by her in a drawer in her own room to be so kept", is held a sufficient delivery.

17. In the case of "a minor child of ten years of age," "the most common and approved method of perfecting the gift in such a case is by delivering it to the child's parent, guardian or friend in trust for the child."

18. "The gift having been made by the parent to the child, it was irrevocable. *Kellogg v. Adams*, 51 W., supra.

19. Such a gift is valid as against subsequent creditors of the donor, and as against existing creditors, also, if made in consideration of natural love and affection and when the donor was free from embarrassment, and the gift was but a small part of his estate, and it being a reasonable provision for the child, and made without intent to defraud. (Many cases)". (Followed in *Horn v. Horn*, 152 W., post.).

20. The gift having been exchanged for stock, and the stock with other valid consideration for land, it is said that the father "could do nothing afterwards to invalidate this gift is too plain for argument or authorities. If he could do so, then it follows that he could revoke the gift at his pleasure, and that we have seen he could not do. He could not do indirectly what he could not do directly. He could do nothing to invalidate this gift." —*Second Nat. Bank v. Merrill*, 81 W. 142, 148.

21. "A gift *inter vivos* must be completed by delivery of the subject of the gift.

22. A "donatio causa mortis must be completely executed, so far as delivery is concerned, in the lifetime of the donor, precisely as required in the case of gifts *inter vivos*.

23. A donatio causa mortis is a gift absolute in form, made by the

donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of title only upon the happening of the donor's death".

24. "It may be revoked by the donor; and is completely revoked by his recovery from the sickness or escape from the danger in view of which it was made.

25. And, if not so revoked, the gift may be taken by the administrator of the donor, if necessary for the payment of his debts. 3 Pom. Eq. Jur., sec. 1146; *Basket v. Hassell*, 107 U. S., 609, 610; *Henschel v. Maurer*, 69 W., supra".

26. "So far as the subjects which may be disposed of by gift and the question of delivery are concerned, the law is the same in either case", inter vivos or causa mortis. (Cases).

27. As to a receipt signed by the cashier of a bank of four bonds "to be sold and the proceeds placed to her credit", given to A., and endorsed and signed by her, "Please let M., my nephew, have the amount of the within bill, and oblige," with the intent to give such fund, it is said, "equitably at least, if not legally, it possessed all the characteristics of a regular certificate of deposit," and the transaction "construed with reasonable liberality" must be held "a gift of this fund due from the bank to A.", to M., "and evidence would doubtless be admissible," "to show a gift of the fund either inter vivos or causa mortis."

28. (Cited and discussed in *Dickson v. Bills*, 144 W., post, where the intent was "found the contrary", and intent emphasized "in all such cases of constructive delivery.")

—*Crook v. First Nat. Bank*, 83 W., 31, 36.

29. Where there was "evidence tending to show that about two weeks before", her marriage to plaintiff W., "she was at his room, and he stated to her that he had bought her a present, and asked her to guess what it was; that just then a man came with the piano, and placed it in his room; and that she and he had both treated it as her piano ever since", it is held "sufficient to sustain the verdict" that it was hers as against the husband's creditor. (Cases supra).

—*Williams v. Hoehle*, 95 W. 510, 512.

30. A gift of a mortgage and notes was made from father to son by written assignment therein and delivery, the father "to have the interest on the notes so long as he lived"; subsequently the notes were given to the father "that he might receive the interest, and were found among his papers after his death. These facts are not necessarily inconsistent with the hypothesis" that it was "to take effect, in presenti, as a gift". So held, on the evidence.

—*McNally v. McAndrew*, 98 W. 62, 65.

31. "Equity will protect and specifically enforce a parol gift of land if accompanied by possession, and the donee, induced by the promise to

give it, has made valuable improvements upon the property. *Neale v. Neales*, 9 Wall. 1.

32. Such a gift, however, must be established by certain and unmistakable evidence and the fact that substantial and valuable improvements were made in reliance upon it must be directly and unequivocally proved. *Dawson v. McFaddin*, 22 Neb., 131, *Pomeroy Cont.* 130, 131."

33. On the facts, with about twenty years possession, receipt of the income, making valuable improvements, payment of taxes except three several years, but showing acts of ownership by the father in various ways, and "no direct evidence of any conversation in which the testator said to his son that he gave him the farm", and the testator having long after such possession willed the son the farm charged with a legacy, it is held,—

34. "That the testator placed the defendant on the farm with the intention of giving him title by will, but not with the intention of transferring title by the gift itself." See also *LEGACIES*.

—*Hawkes v. Slight*, 110 W., 125, 128.

35. Following *Hawkes v. Slight*, 110 W., *supra*, it is held, under circumstances of over twenty years possession, payment of taxes, etc., "and unambiguous declarations of the alleged grantor", as to the lands, and reversing the circuit court,—

36. "That a parol gift, followed by complete possession and extensive and valuable improvements in reliance thereon, is proved", and that judgment be entered accordingly.

—*Kelley v. Crawford*, 112 W., 368, 377.

37. Where, on the evidence of the deed of gift and order for delivery of a large amount of personalty, from an old man of 88 years to a grand-niece, he suffering from paralysis, it was found that the proceedings were in all respects valid, and that the donor was fully competent and not influenced,

38. It is held, that paying an unduly large fee to a young attorney for his services therein, by the donee with the knowledge and consent of the donor, and that the donee also paying,

39. An unduly large fee to the physician of the deceased in attendance, "may excite suspicion",—but that such facts,

40. And the payment by the donee, "six days after the death" of the donor, voluntarily, of large sums to the heirs and other relatives, "and took back releases from them, respectively,—is no evidence that she exercised undue influence over the deceased in procuring such deed of gift".

41. And money deposited in the name of the donee, by the hotel-keeper to whom it was given by the donor for safe-keeping, and paid out by the donee for expenses during the lifetime of the decedent, and at his direction, was held spent, "really for his use and benefit";

42. "But even if it were to be regarded as a gift, yet the delivery

seems to have been sufficient to satisfy a gift *inter vivos*", and it did not belong to the estate or administrator. (Cases).

—*Citizens' L. & T. Co. v. Holmes*, 116 W. 220, 234.

43. "To consummate a gift *inter vivos*, there must be an absolute delivery of the subject of the gift by the donor, with an intention to part with his interest in and dominion over the property sought to be transferred.

44. The rule seems well settled that bonds and other negotiable instruments for the payment of money can be transferred by delivery to the intended donee as a gift without a written assignment.

45. The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of", and "many of the strict requirements" of the earlier cases have been relaxed. *Crook v. First Nat. Bank*, 83 W., *supra*.

46. "The delivery of the instrument is a symbolical delivery of the fund, and the contract or gift becomes executed and completed, vesting title in the person receiving it".

47. A gift to a fiancée of an insurance policy, payable to the insured's executors, by manual transfer without regular assignment, was held valid and effective. See also *INSURANCE*.

—*Opitz v. Karel*, 118 W., 527, 529.

48. A claim against an estate on a promissory note 'payable after my demise, out of my estate', is held "no valid claim", the note being "without consideration", and "a mere promise to make a gift in the future", and as such "cannot be enforced.

49. Actual delivery of the property is essential to the validity of a gift,

50. And delivery of the promisor's own note is not delivery of the property, but a mere promise to deliver it".

—*Tyler v. Stitt*, 127 W. 379, 381.

51. A proposed gift by one in extremis, in writing, of furniture and certificates, stating, 'that the above written order shall be in full force immediately after my death', "was purely testamentary, and only to take effect after her death and not in present", and "the transaction was not a valid gift *causa mortis*", nor a "gift *inter vivos*". (Cases, *supra*.)

—*Schultz v. Becker*, 131 W., 235, 240.

52. In an action by the father of defendant's wife, to recover on alleged express contract, for a surgeon's bill for an operation on defendant's wife, a declaration by plaintiff to a third party "that he was to pay for the operation because the defendant had had expense enough," was held competent testimony against him, to show gift. 20 Cyc., 1222.

—*Fallon v. Vandesand*, 136 W., 246, 247.

53. A note and mortgage on money loaned by the father Joseph, w taken by him in the name of his absent son John, and "it is establishe by the evidence that Joseph never gave nor intended to give the note ar mortgage to John and that John never knew of the execution thereo and that there was no acceptance on the part of John; therefore, the was no gift. (Many cases)." —*Tobin v. Tobin*, 139 W., 494, 49

54. On the evidence, including a signed writing to a safe depos company to 'give over contents of' her deposit box to her brother, deli ered to him with the "two keys of the box", during her illness, but h "did not present the writing of surrender" "until after her death' there being also oral testimony, it was held,

55. That "the acts of both parties furnished evidence that" "an change in the situation" "was probably not intended to be done durin the lifetime of the donor,

56. But that the delivery should take place pursuant to said orde after her death", (cases), such being the "finding of the trial court" *Crook v. First Natl. Bank*, 83 W. supra, distinguished. "The admini trator recovered," and such judgment affirmed.

—*Dickson v. Bills*, 144 W. 171, 17

57. Where K. during his lifetime transferred, by endorsement an delivery, a note to S., also "expressing satisfaction that he had ma said gift", and after such delivery the note "was delivered back" to F to allow "him to collect the interest thereon", he having "reserved th interest for himself" during his life, and his "executor found sai note among the papers of deceased", and "erasures were made over th endorsement" without the authority of S.,—

58. On claim being filed therefor by S. and disallowed by the count and circuit courts, such disallowance was reversed, the note being hel a valid gift.

59. Testimony of "declarations of K., several months after the tim of the alleged gift, affecting the validity of the gift of the note" an involving intent of gift, was held "'hearsay and self-serving and no competent",

60. And not within any "exception to the general rule", "the ques tion involved" not being "one of character of possession, but of title t the note", and not 'part of the *res gestae*'. *Griswold v. Nichols*, 12 W. 401.

61. "Where a gift of personal property is made with intent to tak effect irrevocably, and is fully executed by unconditional delivery, it i a valid gift *inter vivos*. *Henschell v. Maurer*, 69 W. supra". See als
TRANSACTIONS WITH DECEASED PERSONS.

—*Will of Klehr*, 147 W. 653, 655

62. On the evidence "of the declarations of the deceased and of th facts and circumstances showing the relations of the deceased and hi son L.", a gift of horses to the latter is sustained,

63. And on petition of the son, personal property purchased by him from the avails of such horses, was stricken from the inventory of the estate, and such order upheld, though the property was assessed against the father.

64. The father being a paralytic and father and son residing together, "under these circumstances a delivery of the horses to L. required no act from the father aside from the declaration that he then gave them to L. and surrendered dominion over them, and aside from his regarding them thereafter as the property of L."

65. "The question of the delivery of this property and the transfer thereof is controlled by the nature of the property and situation of the parties at the time.

66. While the relationship of parent and child requires close scrutiny of the evidence of transfer of property by way of gift, yet when it is clearly shown by evidence it becomes irrevocable. (Cases, supra)".

—*Horn v. Horn*, 152 W. 482, 486.

67. "A gift, inter vivos, requires a completed transit of the subject of the transaction inter partes, and" "the same is true of a donatio causa mortis. *Schultz v. Becker*, 131 W. supra."

68. A promissory note for a given sum, payable at a definite time, to the order of G. R. S., signed by W. J. S., containing a clause, 'should G. R. S. die first this to be a gift to W. J. S.', the payee dying before the note was due, it being given in "settlement" as a "completed transaction",—has "the characteristics of" "a donation causa mortis", and such clause "took effect" upon such decease, "leaving nothing due" on the note. See also PROMISSORY NOTES, ETC.

—*Miller v. Slater*, 154 W. 35, 38.

69. "A purpose to make a gift of property can only be consummated by the donor actually parting with possession of and dominion, as owner, over the subject by an absolute delivery thereof to the donee, or some one for such donee, and an acceptance by the latter". (Cases).

70. "Declarations made by V. to third persons that she had given the property in question to C. were proper. *Pritchard v. Pritchard*, 69 W. 373 (See ADMISSIONS); *Taylor v. Thieman*, 132 W. 38 (See SERVICES).

71. In the first of those cases, the court said, that statements made by a deceased person to a third party that he had made a gift of specific property to a person named, are competent evidence in an action between the donee and the administrator of the estate of the deceased".

72. Where "L. was made by C., her bailee of the securities, V. to have the income so long as she lived and such of the principal as necessary for her support", that "would not defeat the purpose to make a gift", such benefit being "reserved, and without any authority in V. to resume control as owner.

73. So the case does not fall within the doctrine that the mere delivery of the assignment of a mortgage does not constitute delivery of the note

signed thereby so as to pass title and execute a purpose to make a gift to the assignee”.

74. “Delivery to the agent of a donee to control the title for him, the agent being actually put in possession and control as such, is sufficient to complete a gift. (Cases)”.

75. And the fact of the bailee “letting V. take the securities, if she desired,” is construed, “not that she might take as owner but merely to collect the interest reserved for her benefit”. (Cases).

76. “Title to property may be vested by one person in another, as donee, and custody remain in a third person, as bailee, conditioned to turn the subject over to the donee after the death of the donor. (Cases).

77. And “the transaction” is not “testamentary in character, so long as the title actually passed to C.”, the donee.

—*Pirie v. LeSaulnier*, 161 W. 503, 507.

78. “Self-serving declarations” and declarations “in derogation of” a gift, “are incompetent”. See also ADMISSIONS.

79. It is not decided: “when the alleged acts and words of gift are so ambiguous that the transaction might be either a gift or a bailment,

80. Whether the declarations of the alleged donor contained in an abortive attempt by him to make a will or codicil are competent as verbal acts and part of the *res gestae*”.

81. “We discover no error in excluding the testimony of” the alleged donee, “relative to transactions or communications personally had with his deceased father”, the donor, as to the gift, on certain dates,

82. There being no witnesses of the opposite party “examined in their behalf concerning the communications of” those dates, although examined “with reference to other transactions or communications between appellant and his father, deceased”. Sec. 4069. *Anderson v. Anderson*, 136 W. 328 (See TRANSACTIONS WITH DECEASED PERSONS).

—*Hilton v. Rahr*, 161 W. 619, 623.

GUARANTY.

Collection of debt, 1, 7.

Exhaust other remedies, 7.

Consideration; expressed, 1.

Expressed by implication, 4.

Satisfies statute, 5.

Fails to express, 8, 10.

“For value received,” 1, 2.

Need not pass, 3.

Creditor’s own debt, 6.

Note of third person, 6.

Definition, 1, 12.

Collection: payment, 1.

“Guarantor,” ordinarily, 13.

Other meanings, 14.

Infant’s guarantor, 11.

Unenforceable contract, 11.

Liability limit, 15.

Exception; disability, 16.

Notice of acceptance, 9.

Promise to pay debt, 10.

1. Guaranty may be (1) for payment which “is an absolute undertaking” to pay and (2) for collection which requires the guarantee to

first "diligently prosecute the principal debtor". Must be in writing, for consideration which may be expressed "for value received". (Diligence, waiver and guaranty discussed). —*Day v. Elmore*, 4 W. 190.

2. "The words 'for value received', in a guaranty, sufficiently express the consideration required by the statute of frauds. *Day v. Elmore*, supra; *Watson v. McLaren*, 19 Wend. 557".

3. "The consideration of a guaranty need not pass between the parties to it. It is enough if a benefit arises to the party for whom the guaranty is given; and forbearance and extension of credit on the original indebtedness is sufficient. (Cases)".

—*Dahlman v. Hammel*, 45 W. 466, 468.

4. A written guaranty of 'payment for all goods A. and B. may buy from C.' expresses the consideration "by necessary and inevitable implication from its terms", that being that if C. "will sell and deliver goods to A. and B. upon credit, the defendant will guaranty payment of the price".

5. It is held to satisfy the statute, sec. 2307, requiring the consideration to be expressed, and to cover goods purchased of the plaintiffs by either A. or B.

—*Young v. Brown*, 53 W. 333, 335.

6. Where a debtor takes in settlement from his creditor, a note of a third person, the property of the creditor, with a guaranty of the latter not expressing the consideration, such guaranty is for the payment of the creditor's own debt, and is not within the statute of frauds.

—*Eagle M. & R. M. Co. v. Shattuck*, 53 W. 455.

7. The guarantee in the collection of a debt must exhaust "all the remedies" he has against the principal debtor, including the security in case of a note and mortgage, "before he can proceed against the guarantor," and the latter is "not liable to a judgment for a deficiency in the foreclosure action."

—*Cottrell v. New London F. Co.*, 94 W., 176, 178.

8. Where "at the foot of" a valid guaranty to pay for goods to be purchased of plaintiff, the defendant signed an agreement that he 'agrees to assume one half of S.'s liability under the above guaranty' it is held:

9. "We express no opinion upon the somewhat vexed question whether notice of acceptance by the plaintiff was necessary to charge the defendant with liability as a guarantor."

10. In our judgment it is certain that the written instrument fails to express any consideration, and hence is void under subd. 2, sec. 2307, because it is at best merely a promise to answer for the debt of another person. (Many cases)".

—*Klee v. Stephenson*, 130 W., 505, 506.

11. Guarantor of infant's unenforceable contract, held not liable. See INFANTS.

—*International T. Co. v. McKone*, 133 W., 200, 204.

12. "The nature of the instrument should determine its character rather than the name which the parties applied to it".

13. "While the word 'guaranty' ordinarily means an undertaking to answer for the debt or the performance of a duty by another in case such other fails to pay or perform,

14. Colloquially it is frequently used in reference to an original undertaking. The cases recognize the fact that the word is often used as a synonym for 'promise' and to denote an absolute agreement. (Cases)"

—*Drovers' D. Natl. Bank v. Tichenor*, 156 W. 251, 255

15. "While it is the general rule" "that the liability of the principal debtor measures and limits the liability of the guarantor",

16. An exception "is where the principal contractor is an infant.

This and other instances where the principal contractor is incapacitated to contract are excepted from the general rule".

—*International T. Co. v. Mabbott*, 159 W. 423, 425

GUARDIAN AD LITEM.

See also COMPENSATION OF EXTR., ADMR., GRDN. & TRUSTEE.

Accountable; attorney only, 39.

Administration; voidable, 17.

Valid as to others appearing, 52.

Void as to the minors, 51.

Admr. de bonis non, 36.

Nunc pro tunc guardian, 37.

Appeal; without leave, 21.

Duty to; not affect costs, 35.

Leave to perfect, 22.

Permission unnecessary, 28.

Appointed: during trial, 15, 54.

Attorney; court matters, 38, 39.

Continued until discharged, 24.

Appointed in lower court, 28.

Court, where prosecuted, 23.

Circuit court, same appointee, 54.

Not necessarily so, 53.

Notice; not required, 16.

Other parties; no interest, 16.

Attorney's fees; expense, 20, 41.

Attorney to be appointed, 13, 38, 39.

Claim contest; party, 43.

Irrregularity, waiver, 44.

Common law, 7.

Continued until removed, 18, 24.

Counsel employed; leave, 41.

Disqualification: county judge, 40.

Former guardian ad litem, 40.

Duties and powers:

Appeal without permission, 28, 31.

Appearance when necessary, 46.

Continues throughout, 28.

Court matters only, 38, 39, 49.

Examine into case, 26.

General guardian ignored, 21, 34.

Illy advised; court interferes, 33.

Take advice of court, 29.

May proceed without, 29.

At his peril, 30.

Not perfunctory merely, 27, 31.

Ordinarily passive only, 47.

Power limited; property rights, 48.

Protect infant's interest, 25, 31, 45.

Protect testamentary scheme, 45.

Quasi-official character, 49.

Stimulate, executors, attorneys, 46.

Advisory capacity, to them, 47.

Stipulate; no right, 50.

Supported by counsel, 32.

Under control of court, 25, 49.

General guardian, adverse, 8, 21.

After guardian ad litem, 18, 21.

Guardian ad litem necessary, 10, 23.

May be guardian ad litem, 12.

Not affect guardian ad litem, 18, 21, 34.

Practice; foreclosure, 11.

Usually guardian ad litem, 13.

- Infant: not bound, 2.
- Appeal, signed by attorney, 14.
- Consent, ratification, 2.
- Defendant: guardian ad litem, 23.
- Disaffirm after age, 4.
- No laches charged, 2.
- Reasonable diligence, 5.
- Inference; other court, 19.
- General guardian, 21.
- Liability: in damages, 25.
- Necessary where notice, 1.
- Neither person nor property, 39.
- Probate of wills, 1.
- Subsequently, insufficient, 3.
- Widow elects; no guardian, 9.
- Removal; no cause, 21.
- Stipulation; judgment, 50.
- Ward's property rights, 50.
- Subsequent appointment, 3, 6.
- Disaffirm notwithstanding, 4.
- Jurisdiction, not cured, 6.
- Prior proceedings, 3.
- Trustee of property, not, 38, 48.
- Trust estate; new appointee, 42.
- Void: on failure, 1, 51.
- Valid as to others, 52.
- Voidable only, 17.
- Waiver of irregularity, 44.
- Not formal notice, 55.

1. "Although the statute is silent as to the appointment of guardian (ad litem) to represent infant heirs and other persons under disability at the probate of wills, such appointment is incidental and necessary in all cases where notice to persons interested in the estate is required; and, if not so represented, the proceedings as to such persons will be void".

2. "If the notice had been sufficient as to all persons of proper age, and the proceedings otherwise regular, the infant heir would not be bound unless represented by guardian, and such infant could not be charged with laches, consent or ratification during the time of minority".

3. Where the infant ward H. was not represented at the probate of the will, "if a guardian was appointed for H. at the time of the settlement of the estate, and acted in her behalf in such settlement and in receiving the proceeds of the sales under the will, and in executing receipts and acquittances therefor, this would not make valid the prior proceedings, in which she was not represented;

4. And there can be no question that, within a reasonable time after becoming of age, she could disaffirm all such proceedings and ask the court to declare them void as to her and set them aside on the ground of her infancy alone. *Bresee v. Stiles*, 22 W. 120."

5. "A minor is bound to disaffirm her contracts within a reasonable time after obtaining her majority". See also *INFANTS*.

—*O'Dell v. Rogers*, 44 W. 136, 173.

6. Where defective service on infants was had, "the subsequent appointment of guardian ad litem was clearly irregular, and did not cure or aid such want of jurisdiction". See *SERVICE*.

—*Helms v. Chadbourne*, 45 W. 60, 69.

7. By the common law, the legal designation of a person representing an infant was "next friend". See *WORDS AND PHRASES*.

—*McKinney v. Jones*, 55 W. 39, 46.

8. A guardian ad litem to appeal for an incompetent, should be appointed, where the general guardian is adversely interested. See *GUARDIAN AND WARD*.
—*Marx v. Rowlands*, 59 W. 110, 114.

9. Probate proceedings are held valid where the widow elected and minor heirs were not represented or harmed. See *JURISDICTION*.
—*Melms v. Pfister*, 59 W. 186, 193.

10. "Still, notwithstanding these general provisions of the statute", as to the general powers and duties of a general guardian, "the appointment of a guardian ad litem is generally deemed necessary, and made", in "proceedings in ordinary actions in court".
—*Van Steenwyck, Extr. v. Washburn*, 59 W. 483, 504.

11. In a foreclosure of action,—of a note and mortgage "given to the general guardian" F., who was succeeded before commencement of the suit by K. as general guardian,—brought in the name of the infant wards, "by K. their guardian ad litem", it is held that there is no "valid objection to the practice adopted, either in the appointment of the guardian ad litem or the method of bringing suit.

12. The court, or judge thereof, had authority under the statute to appoint the general guardian as guardian ad litem, if it was deemed proper to do so. Sec. 2613; *Foster v. Hammond*, 37 W. 185.

13. The person appointed as guardian ad litem is usually the general guardian, unless special reasons exist for appointing another person". (But, see sec. 4052a subsequently enacted, as to the guardian ad litem being an attorney).

—*Straka, by Gdn. ad litem v. Lander*, 60 W. 115, 117.

14. Where a minor's claim was disallowed in county court, and an appeal, signed by her attorney, taken to the circuit, the appeal was not dismissed, where a guardian ad litem was appointed before the hearing.

15. "The case is ruled by that of *Sabine v. Fisher*, 37 W. 376", where, "the court appointed a guardian for her during the trial, when it was disclosed that she was a minor".

16. Notice for such appointment was not required as "the defendant had no more interest in it than a party has in the selection of an attorney by his opponent".

—*Hepp by Gdn. ad litem, v. Huefner, Admr.*, 61 W. 148, 151.

17. Where a minor heir was unrepresented in administration proceedings, and after he came of age and after the final order of distribution, he began proceedings to have such administration proceedings set aside for fraud of the administrator, it is said, that "while he is not bound by the order of distribution", "on account of his minority and want of proper notice of it when it was made, it is not clear that the appointment of the administrator was void as to him, though a minor", because

neither the statute nor court rule in terms provided for a guardian ad litem at such hearing.

—*Est. of Leavens*, 65 W. 440, 449.

18. In a divorce action against an insane wife, held to be still pending after judgment, as to custody and support, it is said: "that the guardian ad litem appointed by the (circuit) court at the commencement of the action continues to be such guardian until removed by the court which appointed him, and the appointment by the county court of a general guardian of Mrs. H. cannot operate to suspend any function of such guardian ad litem."

19. Mrs. H. is the ward of the circuit court, and no other court or tribunal has any authority to supersede the guardian appointed by it, or interfere with its orders and judgments affecting her custody and support."

—*Hicks v. Hicks*, 79 W., 465, 470.

20. "Attorney's fees and disbursements", of guardian ad litem, in general litigation of the estate. See COMPENSATION OF ADMB., ETC.

—*Ford v. Ford*, 88 W. 122, 134.

21. On the facts in this case, showing good faith and diligence, the court refuses to dismiss the appeal of the guardian ad litem from the adverse judgment of the circuit court "because leave was not granted to take it, or because improvidently granted, or to discharge the guardian ad litem and appoint another in his place", though after notice of appeal, a general guardian appointed, presented a petition stating "in effect, that, after a full investigation made by him, it is his belief that there is no merit in the appeal".

22. The appeal not having been perfected by the filing of the undertaking, for lack of facilities, the motion to file such undertaking in the supreme court is denied, but leave is granted to allow the appeal to be perfected in the circuit court, and to be served, filed and certified to the supreme court thereafter.

23. "An infant defendant can only appear as defendant by a guardian ad litem appointed by the court in which the action is prosecuted, or by the judge thereof. Sec. 2613."

24. The appointment of such guardian is for all the purposes of the action. It is necessary on account of the disability of the minor defendants. For that reason it continues till such disability ceases, unless the guardian is sooner discharged, by the court.

25. While such guardian is at all times under the control of the court, the responsibility of protecting the infant's interest wholly devolves upon him, and he is answerable in damages for negligence in that regard.

26. It is his duty to examine into the case, and to use all the usual methods for the protection of the interests of the minor which the exercise of reasonable care and prudence would dictate. 1 Wait, Prac. 486; *Stunz v. Stunz*, 131 Ill. 210.

27. The mere perfunctory performance of duty does not meet the

requirements of the position. It is the duty of the guardian to use all reasonable means to thoroughly master the minor's case, and to make a vigorous defense, if in his judgment the circumstances are such as to demand it for the protection of the interests of such minor.

28. To that end the guardian appointed in the lower court continues throughout all stages of the case unless discharged. Sec. 3, rule 30 (now 29), circuit court rules; rule 7 (now rule 54 chap. 8) supreme court rules. The idea advanced by the respondent that the general powers of the guardian are limited to defending in the court where appointed; that he cannot take an appeal from a judgment against the minor without permission, is contrary to the nature of the office and to the uniform practice. *Thomas v. Safe D. & T. Co.*, 73 Md. 451; *Sprague v. Beamer*, 45 Ill. App. 17.

29. He may, and often prudence requires that he should, take the advice of the court, and act under its direction in proceedings to maintain the rights of the minor; but he may proceed without such advice or direction if he sees fit.

30. But, whether he proceeds or fails to proceed, unless under the direction of the court, he does so at his peril of being held responsible for a reasonably prudent and intelligent performance of duty.

31. In the performance of such duty he may interpose a defense, affirmative or otherwise, set up a counterclaim, or may appeal from an adverse judgment, as in his judgment the exigencies of the situation may require, in order to fully maintain the rights of the minor."

32. In this case, especially being supported "by the advice of eminent counsel", "it was not only his right, but it was his duty", to proceed.

33. "Cases may arise where the proceedings of the guardian ad litem are so obviously illy advised, and not in the interest of the infants, as to require the interposition of the court for their protection;

34. But where the only objection to proceedings is raised by the adverse party, or a general guardian, however eminent and honorable, appointed at the request of such party (the mother), apparently for the purpose, among others, of preventing a review of a judgment in his favor",—the guardian ad litem will be retained and sustained in his acts.

—*Tyson v. Tyson*, 94 W. 225, 228-31.

35. The fact that a guardian ad litem "took the appeal without leave of court, does not affect the question of costs". It was his right, and, in a proper case, "his duty to do so". *Tyson v. Tyson*, 94 W. supra.

—*Jones v. Roberts*, 96 W. 427, 434.

36. Appointment of an administrator de bonis non, without notice and without guardian ad litem as to minors.

37. Appointment of previous guardian ad litem, who was present by nunc pro tunc order, held "without significance." See ADMR. DE BONIS NON.

—*Hubbard v. C. & N. W. R. Co.*, 104 W., 160, 165.

38. "A guardian ad litem" is not a "trustee charged with the duty of caring for property or looking after some interest then pending" requiring accounting. "He is an attorney appointed to conduct or care for a particular matter in court.

39. He neither has charge of the person nor of the property of the infant, and is accountable to the court only as an attorney is always accountable for the faithful discharge of his duties".

40. And a county judge is held not disqualified, under section 2447, referring to his disqualification when interested as "executor or administrator" or as "guardian of any ward", to act in a trust estate because he had been a guardian ad litem there three years before becoming county judge.

—*Richter v. Est. of Leiby*, 107 W., 404, 407.

41. As to amount of compensation and employment of counsel, without leave of court. See COMPENSATION OF ADMRS., ETC.

—*Richardson v. Tyson*, 110 W., 572, 583.

42. In a trustee's sale of realty, "the appearance, without appointment, by one who had been such guardian in the then fully completed proceedings for settlement of the estate, could serve no purpose. *Hubbard v. C. & N. W. R. Co.*, 104 W., supra".

—*Bloor v. Smith*, 112 W., 340, 347.

43. A guardian ad litem is not a necessary, nor adverse, party, nor entitled to recognition in appeal proceedings, in a contested claim hearing in county court.

44. However, with the court's permission, he may "waive any irregularities there might have been". See PARTIES.

—*Est. of Koch*, 148 W. 548, 571.

45. It was "his duty as guardian ad litem" for minors, "to protect the wards' interest in the testamentary scheme if it was valid, not endeavor to obtain the same or a greater interest by destroying it".

46. "Had" he "merely entered appearance whenever necessary" "to make a binding and orderly termination, stimulated the executors and their attorneys to do their duty,

47. And occupied an advisory or adversary attitude toward them as occasion required, and otherwise remained passive in the administration proceeding, unless there was reasonable necessity to do otherwise, he would have performed his whole duty.

48. His power was very limited. It did not extend to dealing at all with his wards' property rights.

49. He was in reality an assistant to the court in the administration, with duties of a quasi-official character".

50. "To stipulate away a ward's property or consent to any judgment or order adverse to his interests is utterly beyond the guardian's

jurisdiction. Will of McNaughton, 138 W. 179 (See COMPENSATION OF ADMINISTRATOR, ETC.)". See also PROBATE OF WILLS.

—*Will of Rice*, 150 W. 401, 473, 475.

51. "It has been held that probate proceedings as to minors for whom no guardian ad litem was appointed when letters testamentary or of administration were first issued, are void as to the minors; that is, they are not bound by them.

52. As to others who appear therein the proceedings are valid. (Cases)". See also ADMINISTRATOR DE BONIS NON.

—*Jenks v. Allen*, 151 W. 625, 629.

53. Sec. 2613 which "provides that the guardian may be appointed by the court in which the action is prosecuted", "does not require that a guardian must be so appointed".

54. The guardian ad litem having been "appointed by the county court", and on objection raised "the circuit court named the appointee of the county court as guardian and ordered the trial to proceed",—"if there was any irregularity about the appointment", the court "had the right" to proceed as it did. (Cases).

—*Green v. Appleton W. M.*, 162 W. 145, 149.

55. (Formal statutory notice should not, and probably can not effectually, be waived by a guardian ad litem. See ZIMMERMAN'S PROBATE PRACTICE, §§ 472, 473).

GUARDIAN AND WARD.

See also ACCOUNTS OF GUARDIANS. BONDS. GUARDIAN AD LITEM. INCOMPETENTS. INCOMPETENTS' SALE OF REALTY. INFANTS. INFANTS' SALE OF REALTY. INSANE PERSONS. PARENT AND CHILD. SPECIAL GUARDIAN. SURETIES. TRUSTEES. TRUST FUNDS.

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- Reasonable time, 18.
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- Ward's decease; after, 16.
- Accounting; administration, 22.
- Guardian powerless, 16.
- Will; under guardianship, 29.

1. In the sale of real estate, the guardian of an incompetent cannot bind his ward's estate in a covenant to remove incumbrances. See *REAL ESTATE*.
—*Person v. Merrick*, 5 W. 231, 239.

2. "Cases at law are properly controversies between parties, and not the appointment of guardians for minors or insane persons", within the meaning of the constitution.

3. "The right of trial by jury shall remain inviolate" refers "to the state of the law as it existed at the formation of the constitution, and" that it shall remain as it was at that time.

—*Gaston v. Babcock*, 6 W. 503, 506.

4. The sale of real estate by a guardian is valid, though the bond was "not formally approved". See *BONDS*.

—*Emery v. Vroman*, 19 W. 689, 700.

5. After the guardian has qualified he is the proper "adverse party", and not the petitioner, to whom to execute the appeal bond. See *BOND*.

—*State ex rel. Tallmadge v. Flint*, 19 W. 621, 623.

6. "The debt the admissions tended to prove was contracted before the guardianship, and proved by evidence other than his admissions". Held, the admissions of a deceased spendthrift were competent and would have been had the debt "been contracted during the guardianship", it appearing to have been contracted for necessities.

—*McNight v. Estate of McNight*, 20 W. 446, 448.

7. Circuit courts may appoint and remove guardians. See CIRCUIT COURT.

—*Glasscott v. Warner*, 20 W. 654.

8. The guardian of an incompetent cannot bring an action of unlawful detainer on a valid lease executed by the ward before the guardianship, in his own name as guardian, but such action "should have been brought in the name of the ward."

—*King, Gdn. v. Cutts*, 24 W. 625, 626.

9. Courts of equity have concurrent jurisdiction over guardians in "extraordinary cases," to compel an accounting and give damages for mismanagement and waste. See CONCURRENT JURISDICTION.

10. "The guardian is but a trustee, and is amenable in that character for a violation of his trust to a court of equity, like other trustees".

—*Willis v. Fox*, 25 W. 646, 648.

11. "The power and jurisdiction to appoint guardians do not depend at all upon the citizenship or nationality of the wards".

12. "The courts of one country may appoint guardians for persons resident therein, who are citizens of another country, or who have a different nationality".

13. "So the courts of one state or country may appoint guardians for the estate or property, situate therein, of persons residing in any foreign state or country, and who are citizens thereof."

—*Farrington v. Wilson*, 29 W. 383, 400.

14. Where the guardian in the sale of an infant's interest in a patent, took advantage of his fiduciary relations, and sold at an inadequate price, the sale was set aside. See FRAUD.

—*Leonard v. Barnum*, 34 W. 105, 109.

15. "If the guardian fails to collect a demand or to recover property belonging to his ward, no good reason has been suggested why the ward may not recover therefor after he attains his majority".

—*McCrubb v. Bray*, 36 W. 333, 341.

16. "After the death of his ward" the guardian is powerless "to charge the estate with an expense for which there was no immediate or pressing necessity", and he could not "bind the estate".

—*Samuel v. Est. of Thomas*, 51 W. 549, 553.

17. Where a ward delayed four months after becoming of age, before commencing proceedings to set aside an order irregularly made during his minority, he "did not lose his right to the relief prayed by the delay".

18. "It is sufficient to say that the respondent (ward) commenced this proceeding within a reasonable time after he became of age,

19. And that the county court may at any time, in furtherance of justice, revoke an order which has been irregularly made. In *re Fisher*, 15 W. 511".

20. Where the ward after becoming of age, pending the proceedings, received a portion of a fund, and released the guardian "from all further liability on account of such guardianship", it is held, that he is not estopped from recovering a balance of disputed funds.

21. "It would be a strange application of the doctrine of estoppel to hold that unless he left the money, which was undisputably his, in the hands of his guardian until he established his right to the balance of the purchase money, he would lose his right to recover such balance".

22. Accounts of the guardian of a deceased ward, probably can only be adjusted in administration proceedings. See ACCOUNTS OF GUARDIANS.
—*Israel v. Silsbee*, 57 W. 222, 228.

23. Where the general guardian of an incompetent, is also executor and residuary legatee of the will of such incompetent's mother, he cannot properly represent such ward on the probate of the will, though "ordinarily, it is true, the insane party would be represented by his general guardian".

24. "Under the circumstances it was clearly the duty of the court to appoint a guardian ad litem to prosecute the appeal against the general guardian, who was acting as executor of the will and whose interests were hostile to the interest of his insane ward in that litigation".

25. While the son of the incompetent could not himself appeal from an order admitting the will to probate, it is held, that after his own appeal was dismissed, and after the sixty days in which to appeal, had expired, he could properly "petition for leave for his insane mother to appeal" and for the appointment of a guardian ad litem for that purpose.
—*Marx v. Rowlands*, 59 W. 110, 113.

26. Accounts must be settled before the ward can bring an action at law for recovery. Also generally in equity. See ACCOUNTS OF GUARDIANS.
—*Kugler v. Prien*, 62 W. 248, 250.

27. "While the guardianship might be said practically to continue only until the ward arrived at the age of twenty-one years, still in law it did not terminate until the guardian had settled his final account, and had been discharged". (But see, distinguished in *Paine v. Jones*, 93 W. post.)
—*Stinson v. Leary*, 69 W. 269, 270.

28. An incompetent ward was held to be a resident of the county in which he died and had been located a year or more, though having been under guardianship in another county of which he had been a resident, the guardianship as to person having been practically abandoned. See *DOMICIL*.

29. The mere fact of being under guardianship does not incapacitate a ward from making a valid will. See *TESTAMENTARY CAPACITY*.

—*Will of Slinger*, 72 W. 22, 26.

30. As to a guardian charging for board of his ward, before and after appointment, without a previous order, effect of annual accounts as to estoppel, etc. See *ACCOUNTS OF GUARDIANS*.

—*Olsen v. Thompson*, 77 W., 666.

31. W., the guardian of the minor, sold realty of his ward, the grantee paying the balance due through H., who left it in a bank at W.'s request, and gave the latter who received it, a deposit certificate dated January 24th, reading,—“H. has deposited in this bank two thousand dollars, payable to the order of W. in current funds, on the return of this certificate properly endorsed”. W. held the certificate for use February 12th at his final settlement. On February 8th “the bank broke, and the money was lost”. On the settlement, the county court allowed the guardian a credit for this \$2000, and this was sustained by the circuit court, which decisions are set aside and the guardian held accountable for the sum.

32. “It could not be known by the books of the bank that this was trust money, and not his own.

33. The rule may be technical and arbitrary to some extent, but it is based upon the soundest principles of business economy and integrity, and approved by the highest courts of this country and of England with such a unanimity of judgment as to make it an established principle of law,

34. That if a guardian deposits the money in his hands belonging to the heirs in a bank in his own name and to his own credit, without any earmarks or indicia to distinguish it as the money of the heirs or of the estate or trust funds, and the bank fails, it will be held to be his own personal loss, and not that of the heirs.

35. No circumstances will justify it if such is the character of the deposit. It is not a question of good faith or of integrity—it is a question of naked fact—which determines its legal character”. *Williams v. Williams*, 55 W., 300 (See *TRUSTEES*).

—*Booth v. Wilkinson*, 78 W., 652, 654.

36. Where a guardian invested his minor ward's funds in a drygoods business, it is said that he “had no right to put his ward's money into trade. When he did so he converted his ward's estate and became per-

sonally liable for the amount. The goods bought did not become the property of the ward.

37. The ward, when he became of age, could demand his money, or he could elect to take the property which his money had purchased, if still in the hands of his guardian, together with the profits of the trade, if any. Until such election, the title to the property purchased was in the guardian”.

38 “It is a well-settled principle of law that when one assumes the office of guardian who is at the time indebted to his ward, the indebtedness becomes assets in his hands, to be accounted for as property. *Winship v. Bass*, 12 Mass., 203; *Neill v. Neill*, 31 Miss., 36; *Griffin v. Bonham*, 9 Rich. Eq., 77.”

39. Where a guardian B. “in effect, sold” goods “to E. in consideration of a release of his liability as guardian of E., and the assumption by E. of B.’s liability to G.”, another ward not yet of age,—“this created a valid obligation on E.’s part to pay G., which was not affected by the statute of frauds. *Hoile v. Bailey*, 58 W., 434 (cited under TRUSTS)”. As to the assent of G., perhaps necessary to bind E., there was “an inchoate or contingent liability on the part of E., subject to be made absolute by G., when he became of age”, which it is held he did and which is covered by the guardian’s bond.

—*Martin v. Davis*, 80 W. 376, 378.

40. The statutory proceedings specified in sec. 3919, cannot “be waived by the guardian.” See INFANTS’ SALE OF REALTY.

—*Weld v. Johnson Mfg. Co.*, 84 W., 537, 543.

41. “A guardian of a minor derives his authority entirely from the act of the court appointing him such, and this must be evidenced by matter of record—the record of the court.

42. The appointment cannot be shown in part by the record and in part by matter in pais; and of necessity the record itself is the sole and conclusive evidence of the facts, and cannot be contradicted or varied by parol evidence. It imports absolute verity, and no allegation can be admitted against it.”

43. Under the statute, sec. 3966, “all the prescribed conditions of the bond are prospective, and none of them have any relation to what has occurred in the past. The bond is therefore no protection or security to the ward for any interference or intermeddling with his property by his guardian before he was appointed such.”

44. (Quoted and explained in *Brehm v. U. S. Fidelity & G. Co.*, 124 W. post, in which it was said as to this case that “the question of ‘the liability of a surety on an additional or cumulative bond of the guardian’ was not there involved, and of course was not adjudicated”).

45. The appointment of guardian, “could not relate back so as to validate acts done by him in relation to the property and estate of his wards previous to such appointment, and when he had no authority

over it. *Huntsman v. Fish*, 36 Minn. 148. *Wiswell v. Wiswell*, 35 Minn. 371.

46. The fraudulent or mistaken representations, even, of one who without authority assumes to act as guardian for an infant, afford no foundation for an equitable estoppel against the infant or his guardian subsequently appointed, so as to bind the infant or charge his property. *Sherman v. Wright*, 49 N. Y. 228.

47. And if the same party is appointed guardian his rights and authority as such are the same as of one appointed who had made no such representations.

48. The case of one acting as guardian for an infant without authority is not analogous to that of an executor de son tort, or of acts done by an executor or an administrator before letters are issued to him, as no one can make himself guardian for any purpose by wrongfully intermeddling with the property or affairs of an infant."

—*Holden v. Curry*, 85 W. 504, 510.

49. As to "the meaning of the term 'discharged', as used in sec. 3968", limiting the time for action against the sureties to "four years from the time the guardian shall have been discharged'", following Massachusetts and Michigan decisions, from which states the statute was adopted, (after distinguishing *Stinson v. Leary*, 69 W. supra, as there involving only the continuation of the guardian "in the sense of being trustee of the estate, so that such estate still stood as security for obligations lawfully incurred in good faith as such trustee"),—it is said:

50. "We hold that the term 'discharged', as used in sec. 3968, is synonymous with 'termination of the guardianship',—not of the relation of trustee and cestui que trust, but of the office, of the right to be guardian,—

51. And that such termination occurs in the event of the death of the guardian, the arrival of the minor ward at the age of twenty-one years, or by any other event by which the office of guardian, strictly so called is brought to a close,

52. Though the trust relation in respect to the property may still continue up to the time of the settlement and discharge in respect to such relation". (Followed in *Wescott v. Upham*, 127 W. post.).

—*Paine v. Jones*, 93 W. 70, 76.

53. "While it would have been desirable to have appointed as guardian some one of the same religious faith as the parents and blood relatives of the infant, yet it does not appear that any such person, competent and suitable, offered to accept the trust," and the court "exercised a wise and just discretion."

54. As to appointment of guardian by the circuit court, the county judge having made an order as to custody. See CUSTODY AND COMMITMENT.

—*In re Gdnsp. of Klein*, 95 W., 246, 249.

55. It is not determined, whether a divorced mother having custody of the child, has a right to name a testamentary guardian, but the fact may properly be considered in appointing such guardian. See PARENT AND CHILD.

—*In re Gdnsp. of McChesney*, 106 W., 315, 321.

56. In an action against sureties on the bond of the mother, a deceased insolvent guardian of minor children, it is held:

57. That where moneys of the wards came into the widow's hands and was applied to the account of the estate, she being both executrix and guardian, "she must be chargeable therefor", as guardian, and likewise her sureties, though she received the moneys under a benefit policy as trustee for the beneficiary minors and herself. See also ACCOUNTS OF GUARDIANS.

—*Hutson v. Jensen*, 110 W., 26, 35.

58. Where "the guardian had made provisions for the wants of" his incompetent ward, as to necessary personal attentions, "a mere volunteer, who assumed to perform the services without the authority or knowledge of the guardian, cannot recover for them."

—*Schramek v. Shepeck*, 120 W., 643, 644.

59. As to guardian and surety liability for past defalcations, and as to individual notes by and to the guardian. See BONDS.

—*Brehm v. U. S. F. & Guaranty Co.*, 124 W. 339, 349.

60. "The guardian is discharged, within the meaning of this statute (sec. 3968), when the ward attains his majority. *Paine v. Jones*, 93 W. supra.

61. The fact that the same person is also guardian of other minors, although appointed such by the same order and the performance of his duties secured by the same bond, is no obstacle to this conclusion.

62. Obviously, when a minor attains his majority, his former guardian is no longer such. *Probate Judge v. Stevenson*, 55 Mich. 320".

63. In the four-year limitation in which a surety may be sued, under sec. 3968, the action accrues at the ward's majority, regardless of a later or "protracted" accounting, and includes "action on any bond given by a guardian", including bonds under sec. 4004, as to ward's sale of realty.

64. "We deem it clear that want of legal capacity to sue, as used in this and other statutes of limitation, refers to some characteristic of the person disqualifying him in some degree from acting freely for the protection of his rights, not to an impediment to the suability of the particular cause of action. (Many citations)". See also STAY OF PROCEEDINGS.

—*Wescott v. Upham*, 127 W. 590, 593.

65. It is not decided "whether a married woman had the right to appoint a testamentary guardian over the person of her children.

66. Whether the absconding of the father, or the award of the custody of the children by the judgment of divorce to the mother, was sufficient to authorize her to make the testamentary appointment as to the person of the minors, we need not and do not decide”.

67. Such appointee is held “entitled to take and hold the property for the minors during minority” “as a trustee for the minors”. See also *LIFE ESTATES*.
—*Otjen v. Frohbach*, 148 W. 301, 314.

68. “Sec. 3995b is the only statute providing for bar of claims against persons under guardianship, and this statute plainly has not been complied with in the instant case; hence the claim was not barred”.

69. A claim for non-contractual personal services for six years prior to the decease of Y. was allowed against his estate, there having been a guardianship over him for over a year immediately preceding his death.
—*Gardner v. Young's Est.*, 163 W. 241, 245.

GUARDIANS' ACCOUNTS.

See *ACCOUNTS OF GUARDIANS*.

HABEAS CORPUS.

Certiorari, for record, 5.

Court commissioner's right, 6.

Jurisdictional defects only, 1, 2, 4.

Merits not considered, 2.

Not change of venue, 3.

Not remedy, mere error, 1.

Reaches body, not record, 5.

1. “For mere error, no matter how flagrant, the remedy is not by writ of habeas corpus”. “Nothing will be investigated on habeas corpus except jurisdiction defects, or illegality, as some courts and authors term it; by which is meant the want of any legal authority for the detention or imprisonment”.
—*In re Crandall*, 34 W. 177, 179.

2. “The learned circuit judge before whom the writs of habeas corpus were heard, is understood to have declined consideration of the merits, and to have passed upon the question of jurisdiction only. In this he was undoubtedly right.

3. When a prisoner is held by legal process, the writ of habeas corpus does not operate, so to speak, by way of change of venue from the court or officer issuing the process of arrest, to the court or officer issuing the habeas corpus.

4. The latter writ, in such a case, raises only the question of jurisdiction of the court or officer to issue the process of arrest. If anything

can be settled by long and uniform series of decisions in this court, this is. *Re Booth* 3 W. 1; (many cases)."

—*In re Eldred*, 46 W. 530, 539.

5. "A writ of habeas corpus reaches the body but not the record; it also reaches jurisdictional matters, but it does not reach the record", which latter is the office of certiorari. See also WRIT OF CERTIORARI.

—*State ex rel. Gaster v. Whitcher*, 117 W. 668, 672.

6. As to the right of a court commissioner to act, and not to be restrained. See COURT COMMISSIONERS.

—*Potter v. Frohbach*, 133 W., 1, 3.

HANDWRITING.

Comparison of writings, 4.

Already in the case, 4, 13, 15.

Ancient writings, 4.

English, old rule here, 5, 14.

Genuineness admitted, 1, 13, 15.

True rule given, 13.

Adopted here, 14, 15.

Correspondence knowledge, 6.

Cross-examination:

Not admitted or denied, 1.

English and American, 2.

Deceased persons:

Common law presumption, 34.

Overcome; clear evidence, 33.

Execution and contents, 33.

Guarantor's execution, 33.

Endorsements, statute:

Not apply to guarantor, 32.

Experts, unsatisfactory, 3.

Fraudulent insertion, 23.

Innocent holder, 23.

Not admitted or denied, 1.

Signature:

Affidavit, party or not, 23.

Signature—continued

Deceased; proof required, 29, 30, 33.

Common law rules, 33, 34, 35.

Though not denied, 29.

Denial as a witness, 11.

Denied before trial, 12.

During trial, 21.

Perhaps before noticed, 12.

Denial must be specific, 10.

Denial not specific, 8.

Direction; mark signed, 24.

Sealed instrument, 31.

"Execution" and "executed," 17.

Execution only, denied, 7.

Fraud, without denial, 18.

Inference insufficient, 10.

Mark; without witnesses, 24, 28.

Can write or not, 25.

Practice to witness, 28.

Prima facie genuine, 27.

Statute likewise applies, 26.

Not alleged; forgery, 9.

Object of statute, 16.

Summons, printed, 19.

Testimony, interested, 20.

General, not specific, 20.

1. It is held that "the party denying the signature may" not, "upon the cross-examination of witnesses who have testified that they know his hand writing and believe the signature to be genuine, lay before them papers purporting to have been signed by him, the genuineness of which is neither admitted nor denied, and ask them whether they believe the signature to be his, for the purpose of testing their knowledge of his handwriting, by the agreement or disagreement of their testimony on this point".

2. "Upon the question thus narrowed, we believe the decision of the court below" overruling objections to such proceeding, "is not sustained by a single authority, English or American." Opinion by Dixon, C. J.
—*Pierce v. Northey*, 14 W. 9, 12.

3. "The unsatisfactory nature of such evidence (handwriting experts) is well known". See EXPERT TESTIMONY.

—*Daniels v. Foster*, 26 W. 686, 693.

4. In *Pierce v. Northey*, supra, "the court evidently favored the rule which prevails in England and in many of the states, that a comparison of hands by juxtaposition of two writings is wholly inadmissible, either as primary and sufficient or as corroborating evidence, except when the writings are of such antiquity that they cannot be proved in the ordinary way, or where the other writings, clearly proved, are already in the case and before the jury for some other purpose."

5. "It is true that a different rule has been adopted in several other states, but we think the English rule is sustained by the stronger and better reasons, and ought to be adopted in this state".

—*Hazleton v. Union Bank*, 32 W. 34, 47.

6. A local agent had been in correspondence with a general agent for a year and a half, "knew nothing about the handwriting" of the general agent otherwise, but "thought the signature to the letter was genuine"; held this "was sufficient proof of the genuineness of the letter in question to entitle it to be received in evidence".

—*Parker v. Amazon Ins. Co.*, 34 W. 363, 368.

7. As "the statute (Sec. 4192) requires a denial of the signature in order to put the party to a proof of the same", it is held that an affidavit denying "that he executed the note" without specific denial of the signature, does not put the latter in issue.

—*Snyder v. Van Doren*, 46 W. 602, 615

8. "The answer of the defendant did not specifically deny the signature of the note, and for the want of such denial the genuineness of the signature was not put in issue.

9. It is true, the answer alleges, upon information and belief, that the note was a forgery; but such answer is not a specific denial of the defendant's signature, within the meaning of" sec. 4192.

10. "This court holds that in order to put the plaintiff to the proof of the defendant's signature, or to put the fact of his signature in issue, there must be a specific denial thereof upon oath or affidavit, or verified answer; and an answer which only denies the same by inference is not sufficient".

11. "Nor is it sufficient to put the plaintiff to the proof of the defendant's signature to the contract (note) upon which suit is brought, that

the defendant, after plaintiff has made his proofs, goes upon the stand as a witness in his own behalf and denies such signature”.

12. “The reasonable rule is, that the signature must be denied before the trial is commenced, and perhaps before the cause is noticed for trial; otherwise such denial cannot be made except upon leave of the court first obtained for that purpose”.

—*Smith v. Ehnert*, 47 W. 479, 480.

13. “The true rule” in comparison is: “‘The jury may form their opinion as to the genuineness of a document by a comparison of it with any other document already in evidence before them, and shown to be the genuine production of the person whose handwriting is in question’.

Roscoe’s Crim. Ev. 5.

14. This was the English rule until changed by statute of 28 Victoria, and is the rule adopted by this court”.

15. “The rule as stated by this court is explicit, that such a comparison will not be allowed except with writings ‘clearly proved and already in the case, and before the jury for some other purpose’. *Pierce v. Northey*, supra; *Hazleton, Admr. v. Union Bank*, supra”.

—*State v. Miller*, 47 W. 530, 533.

16. “The only object of that statute (sec. 4192) clearly is, if complied with, to dispense with proof of the signature to a written instrument”.

17. While the word ‘executed’ also appears, “hereafter let it be understood that the words ‘execution’ and ‘executed’ as used in the section, mean nothing at all, and that the section should be read and construed as if these two words were both left out, and that neither is in it”.

18. Proof of fraud in misreading the time when a note becomes due, may be made without a previous denial under oath of the signature.

—*Nielson v. Schuckman*, 53 W. 638, 643.

19. The statutory provision (secs. 2629-30), that the summons ‘shall be subscribed’, does not mean ‘written signature’ (subd. 19; 4971), and as “the summons is not a writ or process of the court, but is simply a notice to the defendant”, the signature of the attorney thereto may be made by others, or may be printed.

—*Mezchen v. More*, 54 W. 214, 215.

20. Held, that an interested party may testify as to the signature of a deceased widow to an election, “especially if her opinion was based upon her general knowledge of the handwriting, and not upon the fact that she saw her write the particular signature in question. See *Daniels v. Foster*, 26 W., supra.”

—*Beem v. Kimberly*, 72 W. 343, 363.

21. In harmony with *Wallis v. White*, 58 W., 26, it is held that the court may properly allow the affidavit denying the signature to be interposed during the trial.

22. And as to the affidavit of the witness, "it is immaterial whether such person is or is not a party to the action".

—*Parroski v. Goldberg*, 80 W., 339, 342.

23. A homestead description fraudulently inserted by the husband in a blank mortgage signed by the husband and wife, is held binding as to innocent holder. See OMISSIONS.

—*Nelson v. McDonald*, 80 W., 605, 607.

24. "The statute (subd. 19, sec. 4971) expressly provides that if a person is unable to write his signature may be written in his presence by some other person by his direction, or he may sign by his mark. It does not require that the mark shall be witnessed."

25. "Except as controlled by statute, a mark made for one's signature is good whether he can write or not, and whether witnessed or not. (cases)."

26. Sec. 4192, as to presumption of signature, until specifically denied as provided, applies where "signed by a party by making his mark, precisely the same as if signed in any other way."

27. A paper so signed prima facie establishes its genuineness; that is, if signed by a mark, that the signer was unable to write his name, and that he therefore made his mark for the purpose of adopting that in lieu of a written signature, and that the mark was made by the person by whom it purports to have been made."

28. There is no necessity, though "the general practice," of having it witnessed.

—*Finlay v. Prescott*, 104 W., 614, 617.

29. "No defense except a general objection to the allowance of the claim was offered in the county court," and no denial as to signature being made, the notes being received in evidence as proof of the claim, was held error.

30. "The alleged maker of the notes being dead, the rule of the common law applied, and proof of his signature was necessary before they could be received. *Campion v. Schinnick*, 93 W., 111 (See CLAIMS)".

—*Deering H. Co. v. Johnson*, 108 W., 275, 278.

31. Where an "instrument was executed by plaintiff's son in plaintiff's presence and at his immediate parol direction, then the execution is the act of the plaintiff and the instrument has validity as a properly executed sealed instrument".

—*Mariner v. Wiens*, 137 W., 637, 639.

32. Sec. 4193, as to presumption of endorsements, "applies only" to "an endorsee", and not to "a guarantor". (Cases).

33. And, under sec. 4192, where the signer "deceased before the trial", "common-law proof of the execution and contents of the guaranty was necessary. (Cases)".

34. When such "proof of the signature was given", then as to time of

signing, "that, properly, called on the common-law presumption" "that the writing was, when signed, in the form appearing at the time of its production in a proceeding to enforce it,

35. And such presumption should prevail till overcome by clear and satisfactory evidence. *Maldaner v. Smith*, 102 W. 30 (See ALTERATIONS)".
—*Ripon H. Co. v. Haas*, 141 W. 65, 68.

HEIR-LOOMS.

1. Heir-looms "descend to the heir like real estate, and usually retain their distinctive character and identity."

—*Est. of Kirkendall; Cramer's App.*, 43 W. 167, 175.

HEIRS, HEIRSHIP.

See also BIRTH, ETC. DESCENT AND DISTRIBUTION. LEGITIMACY.

Action for his share, 2.
Action for personality, 24.
An existing executor, 24.
Foreign heir bring, 25.
No administration, 25.
Bond of administrator, 3.
Certificate of descent, 31.
Contract as to heirship, 32.
Creditors: against heir, 4.
Ancillary administration, 16.
Claim not filed, 16.
Executor not appointed, 4.
Not barred by sec. 3873a, 6.
Ejectment preceding administration, 5.
Fraudulent deed set aside, 7.
"Heir": in will, unambiguous, 28.
Heirs of, living person, 29.
Entitled, on his death, 30.
"Heirs at law" term, 9.
Legal sense, 10.

Heirship, before settlement, 8.
Indians; federal laws, 14.
Administration; allotted lands, 17.
Heirship question stipulated, 18.
Illegitimate son as heir, 22.
Judgment; not transfer title, 20.
Jurisdiction; county court, 19.
Parents' declarations, 23.
Paternity by preponderance, 22.
U. S. may recognize or not, 21.
"Legal heirs," technically, 11.
Benefit certificate; widow, 13.
Personalty transfer, 12.
Realty succession, 11.
Realty: possession, 1.
Conveyed without consideration, 15.
"To her heirs in fee," 26.
Not mean children, 27.

1. The administrator is entitled to the possession and proceeds of real estate until the order of assignment, as against the heirs. See EXECUTORS AND ADMINISTRATORS.

—*Edwards v. Evans*, 16 W. 181, 184.

2. An heir has a right of action against the administrator for his share.

3. The heir has a right of action on the bond of the administrator as a cumulative remedy.

—*Williams v. Davis*, 18 W. 115.

4. Where a will was admitted to probate, but no executor or administrator was appointed, or further proceedings had, it is not necessary that further administration should be had of the estate of C. (the testator) before an action can be maintained by a creditor of the estate against the heirs, legatees or devisees of the deceased, the action in the case being brought five or more years thereafter.

—*McGonigal, Judge v. Colter*, 32 W. 614, 62

5. "The heir may maintain ejectment", pending administration where the administrator is not in possession of the land. See REAL ESTATE.

—*Filbey, Admr. v. Carrier*, 45 W. 469, 47

6. The remedy against the heirs as to realty under secs. 3274 et al, not barred by the limitation of sec. 3873a. See LIENS. REAL ESTATE.

—*Fisk v. Jenewein*, 75 W., 254, 25

7. Heirs, after their father's decease may have a deed obtained by undue influence and fraud from him by his third wife, set aside. See UNDUE INFLUENCE.

—*Disch v. Timm*, 101 W., 179, 19

8. The fact of "the county court's acting in determining who are the heirs of" the decedent, prior to reaching "the stage for a final distribution of the estate", is held proper,—due notice having been given.

—*In re Marchant's Est.*, 121 W., 526, 53

9. "The term 'heirs at law' is often used in its popular sense—those upon whom the law casts title to realty possessed by the intestate at the time of his death, and next of kin as well".

10. "In their legal sense", the term refers to taking realty only, as 'next of kin' to personalty. See also KIN.

—*Perry v. Scaife*, 126 W. 405, 40

11. "The term 'legal heirs', in its technical sense as used in the common law, includes all persons born in lawful matrimony who succeed to estate in real property of an ancestor. (Cases)."

12. "Unless a contrary intent is indicated, the words, when used respecting a transfer of personal property, mean all persons designated as distributees by the statutes for the distribution of the property of intestates. (Many cases)."

13. As to a benefit certificate with the term 'legal heirs', "the widow was entitled to share equally with the decedent's children in the avails pursuant to subdivision 6, sec. 3935.

—*Thomas v. Covert*, 126 W. 593, 59

14. Lands of an Indian, as to heirship, are held "subject to regulations or control", not "by the law of this state", but of federal law "and the condition of the grant imposed by Congress, prohibiting

alienation, is effective and controlling". Illegitimates as well as legitimates are made heirs under the reservation allotment statutes.

—*In re Heirs of House*, 132 W., 212, 217.

15. The owner of realty may as against the heir-at-law, convey it to another without consideration. See ESCROW.

—*Schumacher v. Draeger*, 137 W., 618, 622.

16. A creditor cannot proceed against an heir where he fails to file his claim in an ancillary administration had here. See ANCILLARY PROCEEDINGS.

—*Davis v. Davis*, 137 W. 640, 647.

17. Where, pending administration of the estate of S., an Indian, there being "other property" "which authorized the administration", besides allotted lands,

18. "The parties have by stipulation and mutual consent submitted to the state (county) court the question of whether a certain person was the heir at law of S.,"—

19. "We perceive no valid ground for saying that the state court had no jurisdiction to make the order" finding heirship and assigning to such heirs "the entire interest of said S. in and to the lands in question", though allotted lands subject to federal control as to title.

20. "The order or judgment does not transfer the title or disturb the possession of the land in question. (Cases)."

21. And the United States as trustee may recognize, or refuse to recognize, this order as evidence conclusive or prima facie. (Citation)".

22. The finding of an illegitimate son as heir, where "the statute (federal) made illegitimate children lawful heirs", was a question "of pedigree or heirship and not of legitimacy", and "therefore paternity is to be proved by a preponderance of evidence" only.

23. Declarations of the father and mother, in the absence of more "convincing evidence", "must be held sufficient to form a basis for belief or mental conviction. (Citation)."

—*Smith v. Smith*, 140 W. 599, 601.

24. The questions (1) whether "an action to recover personal property, belonging to an estate, in any event" can "be brought by an heir," there being an existing executor, or not,

25. And (2) whether "a foreign heir" can "come into the courts of this state to maintain such action, without ancillary administration or the filing of letters testamentary by the executor,"—are not decided.

—*Norton v. Clark*, 149 W., 4, 6.

26. Where a will gave realty 'to my sister C., for life, remainder to her heirs in fee', she having at the time two children who died after the testator and before the mother, without issue, her heirs at her decease being nephews and nieces, it is held,

27. That the latter take the remainder, and that when "the testator used the word heirs" he "did not mean children".

28. "The meaning of the word 'heirs' when used in a will is no ambiguous, and" "the evidence must be clear and conclusive to show that the testator made an inaccurate use of the word."

29. "It is not accurate to speak of a designated person as the heir of another person who is living, although it is customary enough to do so."

30. It is accurate to speak of the heirs of a living person when reference is intended to be made to those unknown persons entitled to inherit his real property at his death under the laws of descent. See also CONSTRUCTION OF WILLS. VESTING OF ESTATES, ETC.

—*Flint v. Wis. Trust Co.*, 151 W., 231, 237

31. As to effect on adverse possession, of certificate of descent under sec. 2276a, on unknown omitted heirs. See TITLE.

—*Bourne v. Wiele*, 159 W. 340, 345

32. A contract as to heirship must be "clearly established." See ADOPTION.

—*Winke v. Olson*, 164 W. 427, 431

HIGHWAY.

See also CONDEMNATION.

Appeal bond:

Inadvertent omission in, 6.

Boards or bodies, 2.

Act judicially, 2.

Failure to take oath, 4.

Jurisdiction:

Act judicially, 2.

Commissioners appointed, 2.

Jurisdiction—continued

No consent or waiver, 2.

Strict compliance, 2.

Town supervisor, 2.

River, public highway, 1.

Time and place; meeting, 7.

Slight discrepancies, 7.

Two, make valid decision, 5.

1. A river "of sufficient capacity to float logs" is held to be "a public highway".

—*Sellers v. U. Lumbering Co.*, 39 W. 525, 52

2. The town supervisors, the commissioners appointed by a justice and the commissioner appointed by the county judge, as to laying out or discontinuing a highway, "three boards, or bodies", "the first acting originally, and the two last upon appeal, are tribunals, and act judicially and can obtain or retain jurisdiction only by strict compliance with the statutes,

3. And no consent or waiver can dispense with such strict compliance with the statutes in matters of substance".

—*State, ex rel. Vos v. Hoelz*, 69 W. 84, 85

4. Where one of the three highway commissioners appointed under secs. 1279 et al.,—"failed to take a valid oath", he could not lawfully act,

5. But under subd. 3, sec. 4971, it is held that the other two could "make a valid decision".
—*Rogers v. Draves*, 154 W. 23, 24.

6. As to inadvertent omission of the word 'not' in appeal bond, held not to invalidate it. See MISTAKE.

7. Commissioners' meeting at 10:30 instead of 10, and meeting in the yard instead of in the house stated, and other slight discrepancies, are held "inconsequential matter".

—*Marlatt v. Chipman*, 160 W. 193, 196.

HOLIDAYS.

See also SUNDAY.

Appoint administrator, 9.
Authority to hear cause, 1.
Waiver not applied, 2.
Contracts maturity on, 4.
Next succeeding day, 4.
Court business suspended, 8.
Judgment on, void, 2.

Judicial act prohibited, 5, 6.
Deposition by notary, 7.
Not extra-territorial, 5.
Not mere ministerial, 6.
As justice summons, 6.
Jurisdiction: person, subject, 3.
Person "work or not," 8.

1. "The term holiday imports, dies non juridicus. Such being the case, the court (justice) had no authority to hear the cause and render judgment on that day, and would not have had authority to do so, even though the express prohibition had been omitted from the statute."

2. The judgment was therefore void; "there was an absolute want of authority to hear the cause and render the judgment, and it is not a case to which the doctrine of waiver can properly be applied."

3. "For that day the justice had no jurisdiction either of the person of defendant or the subject matter of the action for the purposes of trial and judgment, and all that he did in the cause on that day was coram non judice".
—*Lampe v. Manning*, 38 W. 673, 674.

4. "We are satisfied that the rule fixing the time for the performance of all contracts which by their terms mature on Sunday or on a holiday, should be uniform, and that no distinction in this respect should be made between commercial paper and other contracts. Hence, by analogy to the statute" providing that "commercial paper maturing on Sunday or on a legal holiday becomes due and payable on the next succeeding secular day", the rule is here applied to an ordinary contract to deliver hogs.
—*Siegbert v. Stiles*, 39 W. 533, 535.

5. "If it be conceded—a point we do not decide—that the taking of a deposition in this state is a judicial act, which is prohibited, still it is plain our statute can have no extraterritorial effect", and is held inapplicable to a deposition taken without this state on a holiday.

6. As to business of the courts on prohibited days, the statutory "prohibition only relates to judicial acts, and does not apply to mere ministerial acts,—such as the issuing of a summons by a justice of the peace,—as this court has decided. *Weil v. Geier*, 61 W., 414.

7. It would be a most liberal, not to say forced, construction of language to hold that the taking of a deposition by a notary public was the act of a court, or a judicial act in the legal sense".

8. "On a secular day which is made a holiday the ordinary business of courts is suspended, and while the law does not require, its policy may favor, the appropriation of the day to rest and festivity. Still every man is left free to follow the dictates of his judgment and conscience in that regard. He may abstain from work or not."

—*Green v. Walker*, 73 W. 548, 550.

9. It is assumed "that the court had no authority to appoint" an administrator on a legal holiday. See also *DEMURRER*.

—*Jenks v. Allen*, 151 W., 625, 627.

HOMESTEAD.

Absence from home, 9.

Himself rents elsewhere, 9, 89.

Rent to a tenant, 8, 89.

"Agricultural purposes":

Annexed to city, 3.

Without regard to use, 87.

Alimony: charge on, 135.

Buildings construed:

Four-story store, 2.

Second story, saloon, 89.

Several on quarter acre, 7, 75, 144.

Occupied by family servants, 75.

Stores, shops, offices, etc., 8.

Three-story brick hotel, 61.

Claim in supreme court, 42.

Conveyance:

Defective; effect, 65.

Effect on husband, 67, 77, 109, 124.

Reformation, now, 67, 143.

Specific performance, 66.

Devisee, before probate, 29.

Homestead; existing judgment, 29.

Equity rights, against heirs, 103.

Specific performance, 103.

Husband, not wife, void, 76, 124, 125.

Equitable interest husband, 124.

Right reserved for grantor, 77, 109.

Conveyance—continued

Husband, etc.—continued

Void now, without wife, 125.

Husband to trustee for wife, 24, 41.

Husband to wife; creditors, 19, 134.

Without wife's signing, 41.

Not fraud to creditors, 26.

Parol contract by husband, 38.

Judgment before deed, 39.

Wife ratifies by deed, 38.

Passive trust for wife, 25.

Presumed for new home, 37.

Statute quoted as amended, 46.

To son, reserving life est., 20.

Wife alone, occupying, 27.

Wife; not witnessed or ack., 44, 48.

Creditors: equities against, 28, 91.

All cases included, 28, 36, 70.

Peculiar situation, 136, 137.

Presumed to know fact, 83.

Security or other property, 70.

Third persons or husband, 69.

Decedent's homestead:

Exempt from his debts, 78, 154.

Not heir's debt, when, 155.

Exemption to only \$5,000, 152.

Family afterward broken up, 21.

Decedent's, etc.—continued

- Interstate; widow life estate, 147.
- Disposition of proceeds, 150.
- “Expectancy,” indeterminable, 149.
- On condition subsequent, 147.
- Proceeds, widow's interest, 148.
- Proceeds of, how disposed, 150.
- Sale to carry out will, 146.
- Reversioner's proceeds, 146, 154.
- Not as to own debt, when, 155.
- Seven years, removed from, 89.
- Intent to return to, 89.
- Vendor's purchase lien, 112.
- Whole title vests at death, 153.
- Widow's rights, sec. 2271, 79.

Definitions, 4, 5.

- “Agricultural purposes,” 87.
- As used in a will, 88.
- Compact as possible, 6, 72.
- Exempt only \$5,000, 152.
- House and appurtenances, 54.

Devised homestead:

- Legacy payments; reversion, 99, 105.
- Not specifically; charge on, 111, 126, 127.

- Adm. expenses, debts, etc., 111.
- Legacies by gen'l. directions, 129.
- Proceeds balance exempt, 128.

Widow sole, elects, 106.

Disconnected tracts, not, 5, 72.

- Crossed by public alley, 84.
- Divided by highway, stream, etc., 6.
- Easement across tract, 73.

Domicil: husband change, 49, 53, 110, 121, 123.

Abandoning family, 122.

Ceases to be homestead, 50.

Dower: widow entitled, 14.

Exemption; not descent, law, 145.

Favored in the law, 69, 92.

Embrace all cases, 70.

Home: can have but one, 34, 74.

Intention of acquiring, 80.

Overt acts in fitting, 80.

Presumption where living, 35.

Purchase with intent, 81, 82.

Relates back to purchase, 81.

Temporary purpose certain, 35.

Husband: seized in fee, 47, 58.

Free himself to alienate, 52, 53, 110.

Abandoning family, 122.

Change, in good faith, 123.

Defiance of wife's wishes, 122.

Owner and possessor, 130.

Intention of: acquiring, 80, 81, 107.

After seven years' removal, 89.

Overt acts in fitting, 80.

Return when able, 132.

Intention of—continued

Three years; return intent, 114.

Voting in other state, 115.

Not conclusive, 116.

Judgment: any civil action, 12.

Against devisee occupying, 29.

Between contract and deed, 39.

Creditors presumed to know, 83.

Tort action; also exempt, 12.

Land contract for:

Advances for improvements, 91.

Satisfaction as release, 113.

Lease: secured under, 118, 138.

Governed by same rules, 119.

Surrender by husband, 120, 122, 123.

Wife's refusal to consent, 120, 123.

Liberally construed, 92.

Material: for repairing, 31.

For building same, 81.

Relate back to purchase, 81.

Mechanic's lien; wife, 43.

Mortgage:

Defective description, 94, 95, 141.

Note, family maintenance, 96.

Reformed now, statute, 97, 143.

Homestead subsequently, 136.

Liens on included property, 137.

Husband to wife, 40, 41.

Past indebtedness alone, 71.

Power of attorney to sell, 117.

Subsequent judgment, 13, 28.

Subsequent mortgage, 36.

Not covering homestead, 36.

Wife living apart, 90.

Husband's food necessities, 90.

Wife; not witnessed or ackn., 44, 48.

Husband's homestead est., 45, 52, 53, 110.

Not release her dower, 44, 51.

Statute quoted as amended, 46.

With other property, 13, 136.

Without wife's signature, 1, 2, 40, 90.

Not statute of descent, 145.

Exemption law only, 145.

Occupancy: specific, 23.

Herself, agents or tenants, 64.

Must be present right of, 138.

Remainderman, revisioner, 139.

Lives with life tenant, 140.

Proceeds by overt acts, 91.

Storing furniture, 62, 63.

Partition: widow's interest, 104.

Policy and spirit of law, 92.

Presumption of, 62.

Proceeds: with intention, 68.

Balance; foreclosure sale, 108.

Extends without state, 68.

House and lot received in sale, 100.

Proceeds—continued

- House, etc.—continued
 - Not asserted till action, 102.
 - Subject to three-year lease, 101.
 - Portion used; debts, expenses, 86.
 - Sale with personalty, 85.
- Protection for whole family, 114.
- Reformation, defective inst., 60, 94, 97, 141, 142.
- Presumably, now reformed, 143.
- Removal from homestead, 32, 33, 74.
- New failed in effect, 62.
- Temporary purpose certain, 35.
- Without return intention, 32, 89.
- Reversioner: remainderman, 139, 140.
- Sale to carry out will, 146.
- Title subject to widow's estate, 153.
- Selection: reasonable right, 10.
- Adverse party, survey, 17.
- Assumed to include house, etc., 10, 54.
- Compact, where claimed, 11.
- Government subd., lines, 10, 18.
- Unless otherwise selected, 18, 55, 56, 98.
- Waiver by failure, 57.

- Single man may hold, 15.
- Street, alley, not included, 30.
- Tenant in common, 23, 131.
- Acquiescence sufficient, 133.
- Free from creditors, 134.
- Hotel, proceeds in, 131.
- Intended to re-occupy, 132.
- Use for unlawful purposes, 93.
- Undivided interest, realty, 22, 23, 131.
- Vendor's purchase lien, 112.
- Widower; children gone, 16.
- Board with tenant, 16.
- Widow: intestate estate, 147.
- Disposition of proceeds, 150.
- "Expectancy," indeterminable, 149.
- Life estate; condition subsequent, 14 153.
- Proceeds, same interest in, 148.
- Right in only \$5,000, 152.
- Wife no estate in, 52, 58, 110, 130.
- Merely veto power, 59.
- Will, not statutory only, 88.

1. "Mortgage would not be valid, even against the husband, without the signature of the wife."
—*Williams v. Starr*, 5 W. 534, 550

2. A four-story building in a city, two stories rented at \$1500 annually as a store, the upper two stories used as a residence by the owner, and the owner without the wife's signature placing a mortgage thereon, was held to be the homestead of the owner and the mortgage invalid. (Homestead subsequently limited by statute to \$5,000).

—*Phelps v. Rooney*, 9 W. 70

3. A homestead of agricultural lands which were lawfully annexed to a city against the owner's consent, is thereafter considered as city property and not exempt as "agricultural lands".

—*Bull v. Conroe*, 13 W. 23

4. "The word * itself means a place of residence, which again implies occupancy, possession. If the property is not a homestead when the judgment is obtained, it is a lien upon it."

—*Upman v. S. W. Bank*, 15 W. 449, 45

5. Homestead "is the land where is situated the dwelling of the owner and family," and cannot include disconnected tracts not contiguous.

6. "The intention of the law is, that it should form one body, as compact as possible," though it may be divided by "a stream of water, a highway, or railroad track."

—*Bunker v. Locke*, 15 W. 635, 63

7. The legislature never intended "that a person should hold all the buildings which might be erected upon a quarter of an acre of ground in a city or village, whatever might be their character or for whatever purposes they were designed, under the homestead exemption law, merely because he might live in one of them."

8. Held that "various other buildings, which are used and occupied for stores, ware-rooms, shops, school-rooms, offices, etc.," on a quarter of acre with the homestead, are not exempt from execution.

—*Casselman v. Packard*, 16 W. 114, 115.

9. "A party would not forfeit the exemption on being absent from home a season, traveling with his family, even though he should rent the premises to a tenant in the meantime, or should be prevented, by some temporary necessity, from occupying his homestead for a time with his family", or where he has rented his homestead to a tenant and in another town "with his family" boarded at the tavern owned by him.

10. The owner has a reasonable right of selection, and "it should be assumed that he intended the land should be laid off where he designated in such a manner as to include his dwelling house and its appurtenances" and not "that he had reference to any particular government subdivision, or any rectilinear lines."

11. "But the land, including such dwelling, should be laid off where claimed, in as compact form as possible".

—*Herrick v. Graves*, 16 W. 157, 166.

12. A homestead is not "liable to forced sale on execution where the judgment was rendered in an action of tort", and the homestead is exempt "from sale on a judgment in any civil action".

—*Smith v. Omans*, 17 W. 395, 396.

13. Where a homestead and other property is covered by a mortgage and there is also a subsequent judgment, held "we do not think the right of the mortgagor to have the homestead preserved to him superior in equity to the right of the judgment creditor to have the mortgage debt first charged upon that portion of the mortgaged premises not subject to his lien". (This rule was changed by subsequent statute. Sec. 3163. See also *Hanson v. Edgar*, 34 W. post).

—*White v. Polleys*, 20 W., 503, 506.

14. The widow is entitled to "dower in the homestead, as well as in the residue of the real estate".

—*Bresee v. Stiles*, 22 W. 120, 126.

15. "A single man may own property, reside upon it, and have a family occupying the house with him," and hold it as a homestead.

16. A widower, his children married and away, occupied the premises

but "had rented them, and boarded with his tenant, and had his bed in the house and slept there;" held to be his homestead.

17. "If the plaintiff in the execution was dissatisfied with the quantity of land claimed as a homestead, he should have caused a survey to be made, and sold the excess." —*Myers v. Ford*, 22 W. 139, 141.

18. Held that the homestead is not fixed or limited by the government forty on which his house is situated, in the absence of selection. (Overruled, and held that "he ought to be held to a tacit selection of the legal subdivision on which his dwelling house stands" unless he actually exercises the "right of selection given by the statute, beyond the limits of the legal subdivision on which the dwelling house stands". *Kent v. Lasley*, 48 W. post). —*Kent v. Agard*, 22 W. 150.

19. A conveyance of the homestead from husband to wife cannot be held "fraudulent as to creditors". See HUSBAND AND WIFE.

—*Pike v. Miles*, 23 W. 164, 168.

20. A father by giving a deed of his homestead to his son, reserving a life estate and support, did not thereby "extinguish his right to claim the property as his homestead". —*Murphy v. Crouch*, 24 W. 365.

21. "If the lands descended to the heirs, released from any liability for the debts of their ancestors, although the family was afterward broken up, and the premises ceased to constitute its homestead, they would not thereby become liable to such sale".

—*Howe v. McGiven*, 25 W. 525, 532.

22. "An undivided interest in real estate is not as such susceptible of such an ownership and occupancy as the law contemplates in order to constitute a homestead".

23. "The occupancy, in order to constitute a homestead, must be of some specific portion capable of being set apart by metes and bounds, and thus separated from that which is not exempt." (Subsequently changed by Sec. 2983, R. S., 1878, and still the law, allowing a tenant in common, "with the consent, expressed or implied, of the cotenants," to hold his undivided interest as a homestead. See *Bartle v. Bartle*, 132 W. post.) —*West v. Ward*, 26 W. 579, 580.

24. A conveyance of three-fourths of a homestead by the husband to a trustee of a passive trust for the wife and two children, is held valid without the wife's signature thereto, and that such conveyance "was not an alienation of the homestead within the meaning and intent" of the statute providing that "a mortgage or other alienation of a homestead by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same".

25. Such conveyance, however, to P. as trustee for the parties, is held

to be "clearly a passive one (trust), and the grantee took no title by virtue of the conveyance, but the legal estate vested immediately" in the cestuis que trust to the extent of the estate granted.

—*Riehl v. Bingenheimer*, 28 W. 84, 88.

26. A conveyance of a homestead "by the debtor cannot be considered fraudulent as to creditors".

—*Hibbin v. Soyer*, 33 W. 319, 322.

27. A wife owning premises "used and occupied as the homestead of the family", may convey without the consent of the husband. See HUSBAND AND WIFE.

—*Price v. Osborn*, 34 W. 34, 41.

28. "The policy of the law of 1870 (Sec. 3163) seems to favor the homestead right as against the equities of creditors arising under" the general equitable rule. For it requires that "the homestead shall not be offered for sale until all other lands covered by the mortgage shall have been offered and sold," and the language of "the statute is sufficiently comprehensive to include all cases".

—*Hanson v. Edgar*, 34 W. 653, 656.

29. Where a devisee sold his homestead, after the decease of the testator, but before the probate of the will, and at once occupied as a homestead a lot devised to him, an existing judgment against the devisee is a valid lien against such devised lot, it "having attached thereto" at the decease of the testator and before it became a homestead. See TITLE.

—*Bridge v. Ward*, 35 W. 687, 691.

30. The land to the center of the street or alley is not to be included, because not occupied, but "the exemption extends to the specified quantity which the debtor not only owns but may occupy for the purposes of a homestead."

—*Weisbrod v. Daenicke*, 36 W. 73, 77.

31. "Building materials procured by a debtor for the purpose of repairing the dwelling house in which he and his family live, and actually placed upon the lot on which such dwelling is situated, are exempt".

—*Krueger v. Pierce*, 37 W. 269, 271.

32. A debtor appears to have removed from his homestead premises "without any manifestation of intention to return to them or to retain them as his home; renting them to other occupants. He moved with his family to another building which he owned, in the same city. He had before been a hotelkeeper. And he made the removal for the purpose of keeping a hotel in the building to which he removed".

33. "He remained in the hotel for some eighteen months, leaving it only when it was obvious that he could not maintain his title to it against the incumbrances upon it".

Held, that he had lost his homestead right to the first premises.

34. "A person may live in successive homes, but can have one home only at one time."

35. "The presumption is that he is at home where he is found living. 1 Kent 76. The presumption may be rebutted by showing his abode temporary, and his home elsewhere. But to preserve his home upon removal from it, the temporary purpose, the *animus revertendi*, must be certain and definite".
—*Jarvais v. Moe*, 38 W. 440, 446.

36. The holder of a subsequent mortgage not covering the homestead, cannot insist that the prior mortgage covering it, shall first be paid out of the homestead. "The decision in *Hanson v. Edgar*, *supra*, controls this case".
—*Smith v. Wait*, 39 W. 512, 514

37. "One selling his homestead may well be presumed to do so, not for the purpose of abandoning, but for the purpose of changing his home".

38. On a parol contract by the husband, to sell the homestead, the wife "saw fit to carry out the contract, and joined in the conveyance which consummated it. In this way she gave full effect to the agreement, as much as though she had originally joined in the sale."

39. And a judgment filed subsequently to such contract and prior to the giving of such deed, is held not to be a lien upon the property, (1) because the husband "had parted with all interest in the property before the judgment was docketed", and (2) because "it was his homestead and exempt from sale on execution."

—*Goodell v. Blumer*, 41 W. 436, 442.

40. A mortgage executed on the homestead by the husband alone to his wife, to secure a note to the wife for money loaned by her, she being afterward divorced, is held valid.

41. In *Riehl v. Bingenheimer*, 28 W. *supra*, it was "held that the statute which enacts that any mortgage or other alienation of a homestead by the owner thereof, if a married man, shall be void without the signature of the wife (sec. 2203), has no application to a conveyance of a homestead by a husband to his wife. We all think that case was decided correctly". (By sec. 222, L. of 1911, this section, 2203, is amended, expressly excepting 'a conveyance from husband to wife').

—*Wochoska v. Wochoska*, 45 W. 423, 426.

42. Where a "homestead claim is made for the first time in this court, and no specific parcel of land has ever been designated as the subject of such claim," it "comes too late to be enforced".

—*Manseau v. Mueller*, 45 W. 430, 436.

43. In an action against the husband to enforce a mechanic's lien, judgment being entered by default, the judgment was vacated and the wife admitted to defend on the ground of her inchoate dower and home-

stead rights, and especially on account of certain possessory rights she had by reason of a divorce judgment. (Except as to the wife's dower and divorce judgment rights, this case and remarks therein are criticised in *Godfrey v. Thornton*, 46 W., and *Mash v. Bloom*, 126 W., post.)

—*Weston v. Weston*, 46 W. 130.

44. Where the husband and wife signed a mortgage on a homestead, but the wife did not acknowledge the same or sign in the presence of the witnesses, though there was no deception, and she "knew she was signing a mortgage of the homestead," "it is conceded that the mortgage is not so executed by the wife as to release" her dower.

45. "The signature of the wife to the mortgage, as made, operates to give validity to her husband's mortgage of his estate in the homestead",

46. The statute (sec. 2203) provided that "no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signature of his wife to the same". (Amended by Ch. 45, L. 1905, by omitting all after the word 'execution', and inserting in place thereof, 'or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance shall be valid or of any effect whatever'; and further amended by Ch. 222, L. of 1911, as to this point, by adding, 'except a conveyance from husband to wife'.)

47. "The husband, therefore, being the owner, living the wife, is seized of the homestead in fee, as of his other realty; and is placed, by the provision (of the statute) in question, under a mere personal disability to alienate his homestead without the signature of his wife as an evidence of her consent. (Cases)."

48. And such signature of the wife need not be acknowledged and witnessed to give it validity as a consent under this statute as it existed. "There is no doubt that the views of the provision here taken must be held to overrule *Hait v. Houle*", 19 W. 472, 475 (See HUSBAND AND WIFE).

49. "The law has not hitherto undertaken to prohibit a husband to change his domicile without his wife's consent, or to release the wife from her reasonable duty to accompany her husband upon his change of domicile. *Gleason v. Gleason*, 4 W. 64.

50. Upon such change, the husband's former place of residence ceases to be a homestead, and he may mortgage or convey it without his wife's signature, subject to her inchoate right of dower.

51. The husband cannot by his own act, divest his wife's right of dower because it is an estate.

52. But he can, by his own act, free himself from his disability to mortgage or convey his homestead without the signature of his wife, because his disability vests no estate in her.

53. And this is the plainer, because the husband, abandoning his homestead and so freeing himself from his disability to alienate it, has no

duty imposed upon him to acquire another to which the disability would attach". (Quoted and approved in *Beranek v. Beranek*, 113 W. post; see also *Mash v. Bloom*, 126 W., post.)

—*Godfrey v. Thornton*, 46 W. 677, 682.

54. The right to a homestead is "limited to the land on which the dwelling-house and its appurtenances are situate;

55. And when the dwelling-house, which is the controlling quality of the right, is situate upon a legal subdivision of land precisely equal to the statutory measure of the right, and when the owner of it, owning also adjoining land, has made no different selection, he ought to be held to a tacit selection of the legal subdivision on which his dwelling-house stands".

56. "Doubtless, when the owner's estate exceeds the statutory limit, there is a right of selection given by the statute, beyond the limits of the legal subdivision upon which the dwelling-house stands.

57. But this right must be held waived by failure to exercise it, except, perhaps, in the particular case expressly provided for in the statute", as to "the levy of an execution".

—*Kent v. Lasley*, 48 W. 257, 261.

58. "The homestead in controversy belonged to the husband. The wife had no estate in it by virtue of the homestead right.

59. She had only an absolute veto upon the power of her husband to alienate it, which the statute executes for her until she sees fit to affix her signature to her husband's conveyance of it. *Godfrey v. Thornton*, 46 W. 677, supra."

60. A defective mortgage by husband and wife of the homestead, cannot be reformed as to the wife. See REFORMATION. (But, see note to par. 67, post).

—*Petes v. Hambach*, 48 W. 443, 451.

61. Following *Phelps v. Rooney*, 9 W. supra, a "three-story brick hotel building," covering with a court "less than one-fourth of an acre", in the city of Green Bay, in which the owner "resided with his family", "claiming and intending it as his home", is held to be a homestead.

—*Harriman v. Queen Ins. Co.*, 49 W. 71, 84.

62. Where a homestead was abandoned to a tenant by removal to another which failed in effect, and "some two weeks prior to the judgment, a load of household furniture was taken" and placed in a room of the first house, where the woman "and her child remained for two or three days", it is held "that these things constituted a resumption of the homestead, even if it had been abandoned.

63. In *Brettun v. Fox*, 100 Mass. 234, it was held that storing furniture in a room of the dwelling-house was a sufficient occupancy within the meaning of their statute to retain the right of exemption.

64. In *Phipps v. Acton*, 12 Bush., 375, it was held that 'so long as the widow is in possession of the premises by herself, her agents or tenants, her right to the homestead will continue'."

—*Zimmer v. Pauley*, 51 W. 282, 286.

65. A deed of a homestead, defective as to description, executed by the husband and wife, "although it did not convey the land intended, must be treated in equity as an executory contract by" the husband "to convey such land. (Cases)".

66. "While the land intended to be conveyed remained the homestead," there could be no "specific performance of such executory contract, because, on the authority of the case last cited (*Pietsch v. Ham-bach*, 48 W. supra), the wife could not be compelled to sign the conveyance, and without her signature it would be void".

67. "But it was undoubtedly a valid contract" as to the husband, and he "would probably have been liable to respond to damages" for a breach. (After the Amdt. Ch. 45, L. 1905, to Sec. 2203; see *Gotfredson Co. v. Dusing*, 145 W. post. But under the subsequent amendment by Ch. 222, L. 1911, the deed can now be reformed to bind both.)

—*Conrad v. Schwamb*, 53 W. 372, 377.

68. The exemption of the proceeds of a homestead "with the intention to procure another", for two years under sec. 2983, extends to a judgment debtor who has removed from this state, and does not require "that his intention must be to procure another homestead in this state".

—*Hewitt v. Allen*, 54 W. 583, 584.

69. "The homestead right is favored in the law, and when it is made security for debt by the signature and consent of the wife, it is favored even more than a surety or the security given by a third person", including the husband.

70. "This principle is broad enough to embrace all cases where the homestead is made security with other property, or security collateral to the security upon other property."

71. Where a homestead mortgage "contains no provision for future advances", and there is no agreement or consent to such by the wife, "it must be held that the mortgage was made to secure past indebtedness alone, if there was any to which it could apply".

—*Dunn v. Buckley*, 56 W. 190, 192.

72. The rule of *Bunker v. Locke*, 15 W. supra, is approved that "a homestead under the exemption law cannot consist of two or more disconnected tracts", however convenient to the owner, but must "consist of but one body or tract of land".

73. "It seems clear, however, that the mere taking of an easement across the homestead, by right of eminent domain, does not divide the homestead into two separate and detached parcels".

—*Hornby v. Sikes*, 56 W. 382, 384.

74. Following *Jarvais v. Moe*, 38 W. supra, a debtor who "had a homestead right in actual possession" "on the west end of" a lot, "cannot have a homestead right in the house on the east end of the lot by construction and claim, (*Phelps v. Rooney*, 9 W. supra, and other cases)," though the latter had some years before been his homestead.

75. "If there be two dwellings, or a dwelling and other buildings, on the quarter acre, one dwelling occupied as a homestead, and the other building leased to tenants, the houses so leased and the ground on which they stand are not exempt, unless in a case where the rented dwelling is occupied by servants who were employed in the family of the owner. This was so held by this court in *Casselman v. Packard*, 16 W. supra; *Hoffman v. Junk*, 51 W. 613".

—*Schoffen v. Landauer*, 60 W. 334, 337.

76. It is "the settled law of this state", "that a conveyance by a married man of his homestead, containing no reservation of the homestead right, is null and void unless signed by his wife".

77. It is held, however, that such conveyance by the husband without the signature of his wife, where the homestead right is "reserved to the grantor", conveys his "reversionary interest in his homestead", and is valid to that extent. (Probably not, since the Amd't of sec. 2203, Ch. 45, L. 1905, quoted par. 46, supra.)

78. Sec. 2271 "was manifestly inserted for the purpose of exempting the homestead, should the widow inherit it under the statute of descents, from liability to be sold for the debts of the deceased husband; and not to increase or extend her rights in the homestead as a homestead".

79. "It does not, we think, enlarge her estate, present or prospective, in the homestead as such. That terminates in every case when she marries or dies". (Quoted and followed in *Van Matre v. Swank*, 147 W. post).

—*Ferguson v. Mason*, 60 W. 377, 388.

80. "The bona fide intention of acquiring the premises for a homestead, without defrauding any one, evidenced by overt acts in fitting them to become such, followed by actual occupancy in a reasonable time", gives them the character of a homestead;

81. "And the homestead exemption thus secured covers not only the land, but such materials so used thereon, and relates back to the time of purchase with such intent to make the premises a homestead.

82. This is in harmony with our own decisions, and is supported by the decisions of two courts for which we have great respect. *Reske v. Reske*, 51 Mich. 541; *Edwards v. Fry*, 9 Kans., 425".

83. The judgment creditors as "purchasers were presumed to know", "what the plaintiff had done, and was then doing, on the land indicating his intention of making it his homestead", and no notice to them was necessary to avoid waiver.

—*Scofield v. Hopkins*, 61 W. 370, 372.

84. "The fact that a public alley crossed the land, cutting off from the rest a small parcel, on which stood the barn, does not defeat the homestead right to that parcel if the balance was a homestead".

85. In a sale of the homestead and personal property, the value of the former, nevertheless is exempt, where held for homestead purposes.

86. The fact "that he used a portion of such proceeds to pay his debts and maintain his family does not deprive him of the right to such exemption if he is otherwise entitled thereto".

87. "The words 'used for agricultural purposes', as employed in the statute", sec. 2983, does not exclude the debtor "from the benefit of the homestead exemption therein given", "without regard to the uses to which the land appurtenant to his dwelling and residence might be put", under the statute and constitution, art. 1, sec. 17.

—*Binzel v. Grogan*, 67 W. 147, 149.

88. "The word 'homestead', as used in the will, manifestly means the house and all the grounds where the testator lived, and is not restricted to one-fourth of an acre mentioned in the statute".

—*Ford, Extr. v. Ford*, 70 W. 19, 52.

89. Where a widow with her children, shortly after the death of her husband moved out of the homestead, being the second story of a saloon building, and rented the same, in the meantime herself renting another building and keeping a boarding-house, intending to return to the homestead when her daughters married, and seven years after removal deeded the property as security for money borrowed, it was held that her rights of homestead exemption from execution, had not been impaired, and that cases cited, *supra*, "and all subsequent cases in this court, make the facts of this case perfectly consistent with the homestead right" of the widow.

—*McDermott v. Kernan*, 72 W. 268, 271.

90. A mortgage on the homestead by the husband without the signature of his wife is held absolutely void under the statute, though the wife was living apart from her husband, and the latter was old and infirm and the mortgage was given "for food and the necessities of life furnished by the mortgagee". See also DOMICIL.

—*Herron v. Knapp S. & Co.*, 72 W. 553, 557.

91. Where land is purchased by the husband, held under contract, with a parol agreement by him that advances by the vendor for improvements shall be a lien upon the premises, the wife not concurring, the homestead right of the latter is paramount to such advances.

92. "The whole policy and spirit of the law are to secure the homestead to the debtor and his family, in obedience to the express declaration of the bill of rights in the constitution; and it is a cardinal rule, which the court invariably acts upon, that exemption laws are to be liberally construed. *Zimmer v. Pauly*, 51 W., *supra*."

—*Chopin v. Runte*, 75 W., 361, 369.

93. The use of a homestead for unlawful purposes, does not destroy the homestead exemption privileges. —*Prince v. Hake*, 75 W., 638.

94. As under section 2203, "no valid conveyance of his homestead can be made by a husband unless his wife signs the same," it is held, where a mortgage signed by the wife, intended to cover a homestead, and by mistake of description did not, that, the consent of the wife for reformation, in her answer, "is not an effectual consent" and "is not equivalent to such signing", so as now to make the mortgage valid as to the homestead, though the husband is deceased.

95. "Of course, she may not lawfully convey to the plaintiff, or any other person, her interest in the homestead; but such a conveyance would not affect the rights of the children" as remaindermen.

96. The fact that the note also signed by the wife "was for money and supplies" for the family maintenance, she having no estate, does not make the mortgage valid, as "such support and maintenance was a legal charge against" the husband alone.

97. On the authority of *Petesch v. Hambach*, 48 W., supra, it is held that the mortgage cannot "be reformed to include the homestead, as the parties to it intended it should". "*Conrad v. Schwamb*, 53 W., supra, is not in conflict." (Cited, followed, and approved, after the amendment of ch. 45, L. of 1905, to sec. 2203, supra in *Gotfredson Bros. Co. v. Dusing*, 145 W. post. But changed by subsequent amendment to sec. 2203, by Ch. 222, C. 1911). —*O'Malley v. Ruddy*, 79 W. 147, 149.

98. Legal subdivision is held selected in the absence of other selection, and the rule of *Kent v. Lasley*, 48 W., supra, is expressly adhered to. —*Martin v. C. Aultman & Co.*, 80 W., 150, 155.

99. In a devised homestead "there remains attached to the property no quality of a homestead which interferes with the sale of the reversionary interest therein to complete the payment of legacies". See also LEGACIES. —*Will of Root*, 81 W., 263, 267.

100. A house and lot received as consideration for a farm, including a homestead, the balance of the farm being more than covered by the mortgage, is "the proceeds of the sale of the farm," and is held exempt for homestead purposes for two years under the statute (sec. 2983).

101. Such lot, being subject to a three year lease, and therefore not occupied by such purchasers, is their "homestead, although they may not have actually resided upon it, and may not do so until the expiration of the lease", under sec. 2983.

102. "It is immaterial that plaintiffs did not assert any claim to the lot as a homestead until the commencement of this action", to set aside an execution sale, it not depending upon any notice, and the lot being acquired "for use as his homestead, to be occupied as such as soon as the lease expired". —*Hoppe v. Goldberg*, 82 W., 660, 664.

103. In an ejectment action with an equitable counterclaim, where a deed from the father to son, was "void as a conveyance of the homestead, by reason of the failure of the wife to sign 'the same'" (sec. 2203), but "was based upon a good and valuable consideration, consisting not only of services rendered and to be rendered;" as agreed by a parol contract of the husband and wife with the son, and money, and through erroneous advice of a notary, the legal deed and written contract was not executed,—it is held that the son "is entitled to a specific performance of the same as against the heirs at law of the grantor. *Thrall v. Thrall*, 60 W., 503 (See BOND FOR MAINTENANCE; *Cable v. Cable*, 146 Pa. St., 451; (other cases)"). See also EQUITY.

—*Whitmore v. Hay*, 85 W., 240, 249.

104. The widow's homestead interest is not subject to partition and sale. See PARTITION.

—*Voelz v. Voelz*, 88 W. 461, 463.

105. As "the homestead may be devised, such devise may unquestionably be charged with conditions such as the payment of legacies or debts." "The power to charge it with conditions is a necessary part of the power to devise." (Approvingly cited in *Will of Madden*, 104 W. post).

—*Turner v. Scheiber*, 89 W. 1, 5.

106. When the widow as sole devisee, elects, the fee of the homestead descends to the children. See WIDOW.

—*Melms v. Pabst Brewing Co.*, 93 W., 140, 146.

107. As to bona fide intention, etc. *Scofield v. Hopkins*, 61 W., supra, quoted and followed.

—*Shaw v. Kirby*, 93 W., 379, 380.

108. On a sale of premises including the homestead, on foreclosure proceedings, the nonexempt portion being worth less than the debt, the proceeds remaining, are held exempt for homestead purposes. (Cases, supra).

—*Clancey v. Alme*, 98 W. 229.

109. While *Ferguson v. Mason*, 60 W., supra, allowing the husband to deed his reversion of the homestead is upheld, the court does not "feel disposed to extend in the least the doctrines," by any approval of a reservation short of absolute control in the grantor. (However, the amendment of Ch. 45, L. 1905, to sec. 2203, now undoubtedly invalidates any such conveyance.)

110. While, "strongly urged to declare that the wife's homestead right during her husband's life is an estate," "we prefer to leave the homestead right of the wife during her husband's life just as it was left in *Godfrey v. Thornton*, 46 W., supra, namely, as a disability imposed upon her husband in favor of the wife, and not as an estate in land." (Recognized and cited in *Prochnow v. N. W. Iron Co.*, 156 W., 408).

—*Town v. Gensch*, 101 W., 445, 449.

111. As to administration expenses, debts, and legacies, a charge on the homestead not specifically devised. See ADMINISTRATION EXPENSES.
—*Will of Madden*, 104 W., 61, 65.

112. A homestead, after the decease of the owner, is held not subject to a vendor's purchase money lien. See LIEN.
—*Berger v. Berger*, 104 W., 282, 287.

113. A satisfaction of a land contract given with a deed, releases the deed of the homestead as a mortgage, without a deed back. See MORTGAGE.
—*Cumps v. Kiyo*, 104 W., 656, 659.

114. It was ruled in *Cumps v. Kiyo*, 104 W., *supra*, "that the protection which the law of this state throws around the homestead right is not exclusively for the benefit of married women,—that it extends to the whole family, rendering the homestead inalienable otherwise than in the precise manner indicated in the statute."

115. "The circumstance of voting in the foreign jurisdiction was rebutted by the positive evidence of" the husband, "of his purpose in going to the state of Washington and his intention at all times to return", and other evidence "that the removal" was for the wife's health he having remained there three years until her decease, and his homestead right here was maintained and established.

116. While the act of voting there several times, "was inconsistent with his possessing a homestead," here, yet "the mere act of voting at a particular place is not conclusive on the question of residence". (Many cases).

117. As to inability to mortgage, on a power of attorney to sell, and the wife not being estopped by oral direction to sign for her, and accepting the fruits. See DEEDS.
—*Minnesota S. Co. v. McCrossen*, 110 W., 316, 322.

118. "Under our statute (sec. 2983), there can be no doubt but that a homestead may be secured in premises held under a lease.

119. It is also true that, in so far as leased property is susceptible of being conserved as a home, it is governed by the same rules that apply to homesteads based upon property held by more enduring titles".

120. Under sec. 2203, a written surrender of such leased premises without the signature of the wife, is held invalid as to her.

121. But the husband's "right to change his domicile, and to surrender and abandon his former homestead by leaving the old one and secure a new one, has been recognized and admitted in this state.

122. This he may do in utter defiance of his wife's wishes or desires". Held, so legally done here, but not "that such homestead right can be defeated by the husband abandoning his family and leaving them to shift for themselves".

123. He "had an absolute right", in good faith, "to change his home", "and thus relieve himself from the disability of the statute. The refusal of the wife to follow him did not preserve the status of the homestead."

—*Beranek v. Beranek*, 113 W., 272, 275.

124. Following *Conrad v. Schwamb*, 53 W. and *Ferguson v. Mason*, 60 W., supra, it is held, that where the husband "in form by warranty deed, conveyed", the homestead, the wife refusing to join, such deed conveyed his equitable interest, and upon the death of the husband and wife, the grantee "became possessed of the legal title".

125. (However, "the amendment (ch. 45, L. 1905, to sec. 2203) was passed as a direct result of the decision in *Jerdee v. Furbush*, and of the suggestion therein contained, in order to more completely protect the homestead estate and to render any alienation thereof by the husband, without the signature of the wife, void". *Gotfredson Bros. Co. v. Dusing*, 145 W., post). —*Jerdee v. Furbush*, 115 W., 277, 279.

126. Where the testator gave all his personalty and realty "which should 'remain after payment of' his 'just debts and funeral expenses'," to his widow,—under sections 3862 and 2983, "there can be no question but that the quarter of an acre constituting the homestead is exempt" from the payment of claims.

—*Pym v. Pym*, 118 W., 662, 668.

127. Where the testator, "after my just debts and funeral expenses have been paid," gave household furniture and \$1000 to a son C., "and the rest of" the property equally to two sons A. and C., and the property finally, after mortgage foreclosure, consisted only of \$1375, as homestead surplus, it is held,

128. That, under secs. 2271 and 3862, such surplus is exempt from the payment of claims, not being expressly chargeable thereon,

129. But that the legacy of \$1000 be first paid before division as there is nothing in the statute, sec. 3862, "to prevent legacies from being made a charge upon the homestead by a 'general direction' in a will, as that clause of the statute only relates to the payment of debts".

—*Kuener v. Prohl*, 119 W., 487, 490.

130. "During the husband's life he is the absolute owner and possessor of the homestead, and the effect of our statutes is no more than to impose a limitation upon his right to convey or incumber it, but in no wise to create a concurrent estate or possession in the wife". (Cases, supra).

—*Mash v. Bloom*, 126 W. 385, 389.

131. The interest of a tenant in common,—in a hotel which he occupied "as his dwelling and left it because of ill health", "had no other homestead, and had no other up to the time of his death", put homestead "proceeds into the hotel building",

132. "Intended to keep the hotel as his homestead, and return to

and reoccupy it as his homestead when able", and it being of value less than \$5000,—is held to have been his homestead, and exempt from claims.

133. "The language" of the statute, sec. 2983, "'express or implied consent'", was "intended to make acquiescence on the part of the tenant" presumptively "sufficient without further proof".

134. The conveyance of such homestead interest, for a nominal consideration, to the wife, shortly before decease, "was valid and cannot be set aside by his creditors nor the proceeds in defendant's (widow's) hands subjected to their claims under sec. 3835." See also *LIENS*.

—*Bartle v. Bartle*, 132 W., 392, 39

135. The divorce statute, sec. 2367, enabling alimony to be made charge upon any specific real estate of the party liable, is held to include a homestead, under the language of the exemption statute, sec. 2983, 'except as otherwise provided in these statutes'.

—*Schultz v. Schultz*, 133 W., 125, 12

136. Where a woman mortgaged a whole lot and with the money bought a house on the vacant half thereof, making this her homestead, and afterwards contracted to remodel the old house on the other half in which liens were filed thereon, and on foreclosure of the mortgage, it was held that "the portion of the premises not included in the mortgagor's homestead" was properly sold "first for satisfaction of the mortgage debt",

137. "It is evident that when appellants' lien arose the mortgagor, D., had established her homestead right to the premises she now occupies and that she was entitled to all the benefits that inhere in a homestead right," which "is superior in equity to that of creditors". *Clancey Alsme*, 98 W., supra.

—*Elsner v. Dorn*, 136 W., 73, 7

138. Notwithstanding, under sec. 2983 as now (1916) existing, the homestead exemption extends 'to any estate less than a fee held by any person by lease, contract, or otherwise,—' it is held "that there must be a present right of occupancy by title in the person claiming the homestead,

139. And that, in the present case the right of occupancy and title being in the life tenant, the remainderman or reversioner "has no present right of occupancy sufficient to carry with it the privileges of homestead rights during the life estate of his mother,

140. Even though permitted to live with her on the premises (Cases).

—*Reeves & Co. v. Sarton*, 145 W. 10, 1

141. Following cases supra, the court refused to reform a mortgage which did not but was "intended and supposed to cover their homestead", and so declined notwithstanding the consideration of sec. 225 and of the amendment to sec. 2203 by ch. 45, L. 1905.

142. "The phrase in the amendment, 'evidenced by her act of joining in the deed, mortgage or other conveyance', is equivalent to the phrase 'without the signature of the wife to the same' in the law as it stood before".

143. (However, by the subsequent addition to sec. 2203, by ch. 222, L. 1911, undoubtedly now reformation may be had 'when a mistake is made in the description of land occupied as a homestead'. See also NOTES to O'Malley v. Ruddy, 79 W. and Jerdee v. Furbush, 115 W., supra). —*Gotfredson Bros Co. v. Dusing*, 145 W. 659, 662.

144. "We need not" "decide this question", "but it is not clear that the homestead was part only of a tract of land" which "was less than a quarter of an acre, and there were two houses on it." See also SALE OF REALTY.

—*Milwaukee T. Co. v. Clark R. Co.*, 146 W., 230, 236.

145. Ch. 134, R. S. 1858, "rewritten and amended by ch. 270, L. 1864" (and said in *Ferguson v. Mason*, 60 W. supra, "intended" "to be retained in secs. 2271 and 2280), "entitled 'An act relating to homesteads'", following *Ferguson v. Mason*, supra, as establishing "a rule of property",—is held "not a statute of descent" but "an exemption law" only, and that the widow of an intestate who died in 1861, under the (then) statute of descent "took a life estate in the homestead which was not affected by her second marriage" subsequently. See also TITLE.

—*Van Matre v. Swank*, 147 W. 93, 96.

146. Where "title to this homestead passed" under the will, subject to "the widow's life estate therein", to the children to be divided among them at the widow's decease, the mere fact that "it became necessary" "to sell the homestead to carry out the will", did not take away the right of the devisees "to receive it free of all judgments and claims" under sec. 2280, and the proceeds on subsequent sale thereof. See also EQUITABLE CONVERSION.

—*Foote v. Foote*, 159 W. 179, 183.

147. "The homestead that descends to the widow where the intestate leaves issue", "is a life estate on condition subsequent that she does not remarry". Subd. 2, sec. 2271. *Ferguson v. Mason*, 60 W. supra.

148. "The widow's interest in the proceeds thereof remains the same as in the land itself, namely, the right to the use thereof during widowhood".

149. It is indicated "that in Europe there are tables determining the 'expectancy' of widowhood at different ages, but that such tables are not in use in the United States", and that the length of widowhood is indeterminable.

150. "So the court properly held that the widow was entitled to the use of the proceeds of the homestead, less her dower interest therein if she elects to receive that presently, during her widowhood, and that

upon her remarriage or death the funds should become the property of her son", the heir.

151. While under a will, a "homestead" may include more than the statutory limitation (*Ford v. Ford*, 70 W. supra), yet,

152. In an intestate estate "the statutory definition of the term 'homestead' (sec. 2984a) applies as well to the descent of land as to exemptions. The widow, therefore, has a homestead right in only \$5000".

—*Lands of Sydow*, 161 W. 325, 326.

153. As indicated in *Ferguson v. Mason*, 60 W., and *Lands of Sydow*, 161 W., supra, it is held that sec. 2271, in connection with sec. 2270, "provides for the descent (and vesting) of the whole title to the homestead at the death of the intestate owner, he leaving a widow and issue; a conditional life estate to the widow and the reversion to the intestate's then living heirs".

—*Miller v. Hart*, 161 W. 611, 614.

154. Saying that "this proposition" "is ruled" "by *Foot v. Foot*, 59 W. supra," it is held that the remainder to children as well as the widow's life estate in a testator's devised homestead, passed "clear of all judgments and claims under the statute";

155. That the share of one of such children "was exempt from any judgment rendered against her father or his estate, but was liable for any judgment against her, as it was not in any sense the homestead, she being at the time admittedly a resident of Chicago".

—*Polzen v. Polzen*, 164 W. 18, 19.

HOUSEHOLD FURNITURE.

Clock is furniture, 2.
Piano is not, 1.

Presumed husband's, 3.
Wife; proof of, 3.

1. "Although a piano more nearly resembles some articles of furniture than most other musical instruments do, and although it may be used at times for some of the purposes of an ornamental table, yet these facts do not divest it of its acknowledged character as a musical instrument. And it would be contrary to the common understanding to say that musical instruments are included in household furniture."

—*Tanner v. Billings*, 18 W. 163, 165.

2. In an action to "recover the value of a clock", it is referred to by the court as "a very common article of household furniture."

3. Household furniture is presumed to be in the possession of the husband, and the wife as against his creditors "ought to be prepared to show, by some other evidence stronger than that of possession merely, that the property is her own".

—*Stanton v. Kirsch*, 6 W. 338, 341.

HUSBAND AND WIFE.

See also CREDITORS' ACTIONS. HOMESTEAD. IMPLIED TRUSTS. INSURANCE. JOINT TENANCY. MARRIAGE CONTRACTS. MARRIED WOMAN. NECESSARIES. PARTIES.

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1. As a rule, "husband and wife cannot be witnesses for or against each other".
—*Mills v. U. S.*, 1 Pin. 73, 74.

2. They may enter into a deed for separate maintenance of the wife after separation.
—*Rolette v. Rolette*, 1 Pin. 370.

3. At common law they received estates by entireties and not by moieties, and the survivor took the whole.

—*Ketchum v. Walsworth*, 5 W. 95.

4. Household furniture is presumed to be in the possession of the husband. The wife as against creditors "ought to be prepared to show, by some evidence stronger than that of possession merely, that the property is her own". See MARRIED WOMAN.

—*Stanton v. Kirsch*, 6 W. 338, 341.

5. Where both "executed the bond and mortgage," "personal judgment" cannot be taken against the wife "for any deficiency" where it does not appear that the contract related to her separate estate.

—*Rogers v. Weil*, 12 W. 664.

6. At common law the wife could not hold property or contract. But the court of equity "early found means to evade" the rule, "through the intervention of trusts for the separate use of married women".

7. In equity even before the married woman statute, the wife could "contract as a feme sole with respect to her separate property".

8. The statute gives "married women, as necessarily incidental to the power of holding property * , the power of making all contracts necessary or convenient to its beneficial enjoyment." Such contracts are valid in law and "they may be enforced by legal remedies".

9. "Married woman is liable on a contract to pay for improvements on her separate real estate"; so held on note of husband and wife for materials.

—*Conway v. Smith*, 13 W. 125, 128.

10. If the witness was competent, the deposition may be used where the reason for taking still exists, though the witness subsequently married the party. See DEPOSITION.

—*Cameron v. Cameron*, 15 W. 1, 5.

11. "The contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding in law. * All her other engagements stand as before the passage of the statute, good only in equity."

—*Todd v. Lee*, 15 W. 365, 380.

12. "A feme covert may act as the agent or attorney of her own husband and as such with his consent, bind him by her contract or other act," and when so acting "the husband is also bound by her declarations and admissions in relation to matters done under her direction and they may be given in evidence against him".

13. "She may act as the agent of another in a contract with her husband; and when she does, or when she is the mutual agent of her husband and a third person, her declarations may be given in evidence by the husband and in his favor".

14. "The case of a wife acting as the agent of her husband should constitute an exception, as to all business transacted by her within the scope of her employment" and her testimony should be received.

—*Birdsall v. Dunn*, 16 W. 235, 238.

15. The wife's separate estate is not chargeable for a debt by specific lien in the absence of a specific writing. After-acquired property is chargeable on a judgment as well as what she had when the debt was created.

—*Todd v. Lee*, 16 W. 480.

16. "The husband * was a competent witness to prove the contract made by him as the agent of his wife, the receipt or payment of money, or other acts done by him within the scope of his agency."

—*Hobby v. Wis. Bank of Madison*, 17 W. 167, 169.

17. At common law (and until the statute of 1872) earnings of a married woman "are the absolute and unqualified property of the husband".

—*Elliott v. Bently*, 17 W. 591, 595.

18. Power of attorney from wife to her husband, and a "deed from her to the plaintiff executed by her husband as her attorney in fact" is held valid.

—*Weisbrod v. C. & N-W Co.*, 18 W. 35, 41.

19. "Though void at law, an absolute conveyance of real or personal property from the husband directly to his wife is good in equity, and sufficient, so far as the form is concerned, to divest the husband of such property, and to vest the same in the wife, as against all persons save the creditors of the husband, especially when the transfer is fairly made, upon a meritorious or valuable consideration". Dixon, C. J.

—*Putnam v. Bicknell*, 18 W. 333, 335.

20. The wife's "power to bind her husband by her contracts rests upon the sole ground of agency, she having as wife no original and inherent power to bind him by any contract made by her".

21. "In certain cases the law implies an authority on the part of the wife to charge her husband in procuring necessities for herself and family, growing out of his obligation to support her".

22. Mere absence temporarily of the husband does not "imply that the wife had authority to make the contract, or to let the horse to the defendant for hire," and he, "must show that she had power to make it", or present facts implying authority.

23. "In the management of household affairs it is said that it will be presumed, until the contrary appears, that she acts as the agent of her husband (*Pickering v. Pickering*, 6 N. H. 120)".

—*Savage v. Davis*, 18 W. 608, 613.

24. "If the wife elopes, though the tradesman has no notice of the elopement, if he gives credit to his wife, even for necessities, the husband is not liable". Same as to desertion "without cause".

—*Sturtevant v. Starin*, 19 W. 268, 269.

25. The husband's life interest in a joint tenancy estate subject to execution. See JOINT TENANCY. —*Bennett v. Child*, 19 W. 362, 366.

26. "A deed (mortgage) defectively executed or not acknowledged may be enforced as against a husband or other person not under disability, as an agreement to convey".

27. "But as against a married woman, a deed not acknowledged by her, or otherwise defective, will not be enforced even in equity".

28. A mortgage defectively executed as to the wife, of lands including the homestead, "cannot be enforced against either of the mortgagors", as to the forty acres comprising the homestead, but "is good only to convey" the husband's interest in the balance. (Overruled in *Godfrey v. Thornton*, 46 W. 677, 688. See TITLE. HOMESTEAD.)

—*Hait v. Houle*, 19 W. 472, 475.

29. "Mere poverty, sickness, intellectual inferiority or physical inability of the husband, without being caused by vice, are not alone sufficient to enable the wife to act as a feme sole".

—*Edson v. Hayden*, 20 W. 682, 685.

30. "The common law does not exclude husband and wife from testifying for or against each other solely on the ground of interest, or because they or either of them are parties to the action, but on a principle of public policy, to prevent dissensions between them".

31. "The statute has broken in upon the rule so far as to permit them to testify when parties to actions. We can go no further".

—*Farrell v. Ledwell*, 21 W. 182, 183.

32. "Married woman having a separate estate," is liable as surety for her husband or third persons. See SURETY.

—*Leffingwell v. Freyer*, 21 W. 392, 394.

33. In an action by an orphan infant for services the defendant's wife was not a competent witness within the rule, she having been "offered generally in the cause, and not to prove any understanding or agreement by her with the plaintiff in respect to wages, while acting as agent of the husband".

—*Mountain v. Fisher*, 22 W. 93, 97.

34. In an action "by husband and wife, to recover damages for injuries done to the person of the wife, such damages, when recovered, are not the separate property of the wife, under the statute enlarging the rights of married women as to property."

35. In such action for damages the husband's "admissions should be received".
—*Shaddock v. Clifton*, 22 W. 114, 116.

36. Prior to the statute of 1891, it is held that "the husband having effected an insurance on his life for the benefit of his wife, and surviving her, can dispose of the insurance money by will or otherwise".
—*Kerman v. Howard*, 23 W. 108, 111.

37. "A conveyance of the homestead by the husband to the wife cannot be held fraudulent as to creditors".

38. "As to the portion not exempt, the conveyance must be regarded as a voluntary settlement upon the wife by the husband. And in regard to that, if it was not unreasonable in its character in view of the property and situation of the husband, and there was no fraudulent intent in fact, I think the law is that it cannot be impeached by a subsequent creditor".

39. "There are authorities that sustain the same rule as to existing creditors". Conveyance sustained, where the homestead was valued at \$40,000., the excess thereof not exempt \$5,000., and the husband otherwise "worth \$75,000., over and above his debts".

40. Such property of the wife "is not to be regarded as her separate estate as to which she has the powers and rights given by our statute in regard to the separate estate of married women, because she derived this from her husband, while the statute applies only to real estate derived by married women from other sources".

—*Pike v. Miles*, 23 W. 164, 168.

41. A deed to husband and wife with a "conditional limitation" that the "estate was granted to the wife on condition that she should continue to live with her husband, and was to expire and vest in her husband whenever she should cease to live with him, unless she had good cause for a divorce", was held valid, and entitling the husband to judgment removing "a cloud upon the title," she having deserted him and he having obtained a divorce.
—*Smith v. Smith*, 23 W. 176, 182.

42. A married woman does not lose possession of her farm or the products thereof, merely because the husband lives on the farm and works it. See MARRIED WOMAN. *Boos v. Gumber*, 23 W. 284, 286.

—*Feller v. Alden*, 23 W. 301, 304.

43. A "deed from the husband to the wife, directly is" good in equity.
—*Hannan v. Oxley*, 23 W. 519, 521.

44. In supplementary proceedings which "are a substitute for a creditor's bill under the old practice", the wife "can be required to answer whether she has the property belonging to her husband in her

possession and under her control"; and held impliedly, "that she might be compelled to deliver it up." —*In re O'Brien*, 24 W. 547, 54

45. In an action by husband and wife for injuries sustained by the wife for a defective highway, recovery can be had for "the loss of time and services of the wife, and the expenses of nursing and medical attendance during her illness." —*Kavanaugh v. Janesville*, 24 W., 618, 62

46. A divorced wife may testify against her husband as to non-confidential communications. See DIVORCE.

—*Crook v. Henry*, 25 W., 569, 57

47. A husband's power as agent of his wife is no greater than that of a stranger. See PRINCIPAL AND AGENT.

—*Livesley v. Lasalette*, 28 W., 38, 4

48. The husband may through a third party (a trustee of a private trust) make a valid conveyance of the homestead to his wife and children without the signature of the wife. See HOMESTEAD.

—*Riehl v. Bingenheimer*, 28 W. 84, 8

49. "The husband is under legal obligations to support his wife, and nothing but wrongful conduct on her part can free him from such obligation".

50. "If he fails to provide her with suitable and proper necessities, any third person who does provide her therewith, may maintain an action against him for the same".

51. A husband, prosecuting his wife living with him, to compel her to keep the peace, and failing to substantiate the charge is liable "to the attorney for professional services rendered by him", on the retainer of the wife, on the ground that "the services of the attorney are necessities".

—*Warner v. Heiden*, 28 W. 517, 51

52. In the case of the husband as "a mere absent owner", the wife has no implied authority to dispose of his property, except "for the necessary support of herself or his family".

—*Butts v. Newton*, 29 W. 632, 63

53. "Where the wife has a separate estate, she may deal with her husband; may loan him money and take a transfer of property from him in payment thereof; and she doubtless might buy property of him where the transaction is fair and honest, and where it appears that the husband does not convey it to her merely for the purpose of covering up and placing it beyond the reach of his creditors".

54. "But, on account of the great facilities which the marriage relation affords for the commission of fraud, these transactions between

husband and wife should be closely examined and scrutinized, to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of his creditors."

55. Conveyance of land from husband to wife through a third party, held fraudulent as to creditors. —*Hoxie v. Price*, 31 W. 82, 86.

56. "It was competent for the plaintiff to take a chattel mortgage from her husband to secure a debt which he owed, and which was contracted on account of her separate property".

—*Fenelon v. Hogboom*, 31 W., 172, 179.

57. Where a husband purchases, pays for, and makes improvements on real estate on which by his direction before final execution, the deed was made out in his wife's name, equity will not set the conveyance aside as "made in fraud on his rights. He saw fit to have the title of the property conveyed to her, which conveyance was in the nature of a voluntary settlement. Such settlements are valid in a court of equity, when not made in fraud of the rights of creditors".

58. The fact that "this property was used and occupied as the home-stead of the family," does not prevent the wife from conveying it "without the consent of the husband" "with like effect as if she were unmarried".

—*Price v. Osborn*, 34 W. 34, 40.

59. The wife is a competent witness in an action against the husband for necessities. See NECESSITIES.

60. "In general the wife is debarred from being a witness for or against her husband; but to this rule there are exceptions at law, as well as in equity", "where, from the nature of the inquiry, the information to be expected is peculiarly within the knowledge of the wife, and where to exclude such evidence would occasion insecurity to that relation in society which it is the object of the rule to protect."

—*Bach v. Parmely*, 35 W. 238, 240.

61. "No good reason is perceived why the husband may not testify to acts as the agent of his wife (the plaintiff), done by him in her presence, as well as in her absence".

62. Where "the plaintiff offered her husband to prove by him that he did not act as her agent in collecting" a mortgage, "clearly he was not a competent witness for that purpose."

63. Where the husband was offered "as a witness generally", and not specifically as to agency, "it would have been error had the court rejected him without qualification. This was ruled in *Mountain v. Fisher*, 22 W., 93".

—*Menk v. Steinfeld*, 39 W. 370, 375.

64. In case of co-defendants, where the wife of each "was offered as a witness generally in behalf of the other defendant, and questions

were put to each which were pertinent to the issue", held that "the wife of a defendant is not a competent witness for the other defendant, unless there are special circumstances which would render her a competent witness for her husband also—as for example, where she is called to testify to transactions as agent for the party calling her".

65. In a controversy over title to land in which the "wives have inchoate dower rights", they "would be proper parties thereto", and "had they been made parties, a different rule in respect to their competency as witnesses would prevail".

—*Stewart v. Stewart*, 41 W. 624, 626.

66. A married woman who permits her husband to appropriate the income of her separate estate, cannot compel him to account therefor to her. See **MARRIED WOMAN**.

—*Lyon v. Green Bay & M. R. Co.*, 42 W. 548, 553.

67. "Says Dixon, C. J. in *O'Connor v. Hartford F. I. Co.*, 31 W. 160-166: 'It is well settled in this state that the wife, having acted as the agent of the husband, is a competent witness for him to prove, any act done by her or fact transpiring within the scope of such agency'".

68. The husband "when he went from home to be gone three months, he left the farm and everything on the same, including the stock and the cow which was killed, in charge of his wife, with directions for her to take care of everything in the same manner that he would if at home.

69. This shows an express delegation of authority to the wife to take care of the cow, and she could testify to anything done by her in the execution of her agency".

70. "Upon obvious grounds the case is distinguishable from *Meek v. Pierce*, 19 W. 300, where there was no authority, express or implied, given the wife by the husband, which would make her acts binding upon him"; and where it was held that the wife was not a competent witness in his behalf, and that she was not his agent, so as to permit her to authorize a search.

—*Chunot v. Larson*, 43 W. 536, 538.

71. "A wife is not a competent witness for her husband except in respect to matters in which she has acted as his agent;

72. And, whether she has acted in a given transaction, is a question to be determined by the court before her testimony is received".

73. "Probably she is a competent witness to prove the agency, but the agency must be proved before she can properly be admitted to testify in chief".

74. "If the fact of agency exists, it can usually be proved by direct testimony elicited by direct interrogatories", and could in the present case. No indirection "was necessary or justifiable".

75. "She should have been asked whether she acted for her husband and by his authority in some transaction in controversy; and the court,

if satisfied that she did so act, would have admitted her to testify concerning such transaction".
—*Marsh v. Pugh*, 43 W. 597, 600.

76. The husband can, by change of his domicile, free himself of his homestead disability, without his wife's consent. See *HOMESTEAD*.

—*Godfrey v. Thornton*, 46 W. 677, 683.

77. The crops of a farm purchased by the wife on credit, carried on by her husband as agent "without any specific agreement", are not liable for her husband's debts. See *MARRIED WOMAN*.

78. "The doctrine is elementary, that at common law a married woman had capacity to take real and personal estate, by grant, gift or other conveyance, from any person other than her husband.

79. Equity sustained conveyances to the wife direct from her husband, where the rights of creditors did not intervene. *Putnam v. Bicknell*, 18 W. supra; *Pike v. Miles*, 23 W. supra; *Hannan v. Oxley*, id. supra.

80. As to the real property, at common law, where no trust was created, the husband took the rents and profits during coverture, or for life where there was issue of the marriage;

81. While as to the wife's personal property, he became the absolute owner providing he reduced it to possession during coverture.

82. But this rule of the common law in respect to the rights of the husband in the property of the wife was changed by statute more than a quarter of a century ago. See Ch. 44, L. of 1850, (Secs. 2340 and 2341.)."

83. "This statute removed many of the disabilities which a married woman was under at the common law, and secured for her the full use and enjoyment of her separate estate. (Many cases, supra.)."

84. "Where the purchase by the wife is really bona fide, she being the real owner of the property, we do not think the law imputes fraud, or condemns the transaction, from the mere fact that the wife had no separate estate when she made the purchase, and therefore, from necessity, made it wholly on credit."
—*Dayton v. Walsh*, 47 W. 113, 117.

85. Where the husband procured and charged to himself materials used in the improvement of the house, occupied by the husband and wife, but owned by the latter, and no agency is shown, the vendor of the materials cannot establish a mechanic's lien on the house for the value of the materials. (By the later amendment of Ch. 349, L. 1885, to Sec. 3314, such lien would attach where "such improvements are made, such owner having knowledge thereof and consenting thereto." See *Clark v. North*, 131 W. 599).
—*Wright v. Hood*, 49 W. 235.

86. Where the negotiations for the conveyance of the wife's lands "were all between the defendant and the plaintiff's husband and agent," and "she had little or no part in the transactions further than to execute

the conveyance, she is bound therefore, by his acts and the case stands as it would have stood had the husband been the owner of the land in controversy and the plaintiff in the action.”

—*Lavassar v. Washburne*, 50 W. 200, 202.

87. Where the husband and wife carry on a “business” with the wife’s separate estate, she as well as he becomes legally liable. See **MARRIED WOMAN**.

—*Krouskop v. Shontz*, 51 W. 204, 217.

88. To sustain a defense of the wife that she signed a note and mortgage on the homestead and on her separate estate, for the debt of her husband, by reason of undue influence and coercion of her husband, she not having acknowledged the execution, with the proceedings “perfectly regular and fair upon their face, the evidence must be perfectly clear, convincing and satisfactory”.

89. “We feel called upon to say that the wife’s unsupported and uncorroborated testimony alone, however direct, positive and consistent in itself, is generally insufficient to sustain such a defense. We so hold both from reason and authority”.

—*Smith v. Allis*, 52 W. 337, 345.

90. In an action to set aside for fraud, a deed from husband to wife through a third party, by one who became a creditor subsequent to the delivery but before the recording of the deed, it is held that the evidence “is not of that clear and convincing character which alone would justify the court in cancelling the conveyance. *Lavassar v. Washburne*, 50 W. supra.” See also **DELIVERY**.

91. Where the husband in his wife’s presence endorsed his note “to the effect that he was then the owner of” land he had theretofore deeded to his wife, and she did not disclose her ownership thereof, and it was found that neither of them understood “that he was representing himself to be the owner”, it is held, “under such circumstances she was not required to assert her ownership, and is not estopped by her failure to do so”.

—*Le Saulnier v. Loew*, 53 W. 207, 209.

92. “This court held in *Hackett v. Bonnell*, 16 W. 471, that, if husband and wife join in an action affecting only the wife’s separate property, the husband, being a proper party to the action (although not a necessary party and perhaps not a party in interest), is a competent witness for his wife”.

93. In this action, where the husband is only a nominal party under the present statute (sec. 4068), the court “adhere to the rule of *Hackett v. Bonnell*, and hold that the plaintiff husband was a competent witness in the action”.

—*Snell v. Bray*, 56 W. 156; 160.

94. “Her husband alone is liable for the board of” the wife “and child, unless she expressly made the amount chargeable upon her separate estate.”

—*Israel v. Silsbee*, 57 W. 222, 230.

95. "The statute has made no such innovation upon the common law disability and incompetency of husband and wife to testify for or against each other as to allow them to be witnesses in such cases, even in respect to the separate property of the wife, except in one case, viz., when they are parties to the suit. *Hackett v. Bonnell*, 16 W. 471.

96. The courts ex necessitate have made two other exceptions only: First, when either one is charged with personal violence upon the other (*Mills v. U. S.* 1 Pin., 73),

97. And second, when one has acted as the agent of the other, within the scope of such employment. *Birdsall v. Dunn*, 16 W. supra.

98. In all other cases the rule has been held by this court to be uniform in excluding them as witnesses for or against each other." (Approved in *Kraimer v. State*, 117 W. 350, 353).

—*Carney v. Gleissner*, 58 W. 674, 675.

99. The husband, a nominal party to the suit of the wife, "was a competent witness in the case so long as he remained a party to the record". (Cases, supra).

—*Hoverson v. Noker*, 60 W. 511, 515.

100. Husband and wife may each testify when he sues in a representative capacity in behalf of both, though not nominal parties. See PARTIES. —*Strong Admr. v. City of Stevens Point*, 62 W. 255, 262.

101. A voluntary conveyance of realty from husband to wife "is effectual, as between the parties thereto, to pass to the grantee the equitable title to the land therein described. *Putnam v. Bicknell*, 18 W. supra,"

102. "Such conveyance is also effectual as against the creditors of the grantor, unless it was executed with intent to hinder or delay them in the collection of their debts, or unless the grantee has done, or omitted to do, some act which estops her to assert it as against them." *Le Saulnier v. Loew*, 53 W. supra.

103. In this case, there were no creditors at the time, nor for nearly two years thereafter, and it is held there was no "fraudulent intent."

104. "The fact that the deed was not recorded until after the grantor had incurred the obligation is of no significance. The same fact occurred in the *Le Saulnier v. Loew*, supra, and yet the voluntary conveyance to the wife was upheld. It is true, in that case a trustee intervened; but, as we have already seen, that is unimportant in equity".

105. The conveyance being "with an honest intention and purpose", under the facts "the case is not one in which the wife must prove that she paid a valuable consideration for the property in order to hold it as against a subsequent creditor of her husband.

106. Hence, she is not required to show that she had a separate estate out of which she paid for the land. See *Putnam v. Bicknell* and *Le Saulnier v. Loew*, supra".

—*Wheeler & W. Mfg. Co. v. Monahan*, 63 W. 198, 201.

107. "In this state it was settled, even prior to the enactment of sections 2343, 2345, in 1872, "that a married woman, having a separate estate, might deal with her husband respecting the same, loan him money, take a transfer of property from him in payment thereof, and buy property of him, provided the transaction was fair and honest and not in fraud of creditors. (Cases, *supra*)

108. The powers thus possessed by married women are greatly enlarged by the enactment mentioned. (Cases)''.

109. Though the contract with a firm of which her husband was one for boarding men for the firm had no "direct reference to the wife's separate estate", "if she had a separate estate at the time, she could, under the law as settled in this state, contract even with her husband upon the faith and credit of that estate".

—*Brickley v. Walker*, 68 W. 563, 57

110. The homestead right of the wife is held a sufficient consideration for a deed from husband to wife, enforceable in equity. See *Escrow*.

111. A subsequent destruction of the deed by the husband, with reluctant acquiescence "procured by undue influence, if not by coercion of the wife, is held not to have divested the title after valid delivery in escrow.

112. "The only effect it could have would be to estop the wife from giving parol evidence of her title. (Many cases).

113. But to have that effect she, as the grantee, must have consented to such destruction. Moreover, such consent must have been voluntarily given and clearly proved. *Le Saulnier v. Loew*, 53 W. *supra*".

—*Albright v. Albright*, 70 W. 528, 53

114. "On account of this relation, the husband, if he had charge of the wife's business, as he might lawfully, would necessarily have the possession of her property apparently, and would often deal with it as if he were the owner.

115. The business of dealing in horses would require the services of a man to look after them. The husband might perform that service for the wife, and in so doing treat the horses as his own, without her knowledge; but that ought not to estop her from asserting her title to the property as against his creditors". —*Green v. Walker*, 73 W., 548, 55

116. A divorced husband "is a competent witness against the plaintiff (his former wife), as to such facts as came to his knowledge during such marriage by means equally accessible to other persons, and not disclosed to him in conversation with her. (Citations)".

—*Bigelow v. Sickles*, 75 W., 427, 42

117. "The mere fact that a husband happens to get into his hands and custody a note or note and mortgage" executed to and "received by h

wife (since deceased) raises no inference that she has transferred the title to him.”

—*Clark v. Clark*, 76 W., 306, 308.

118. “This is a contest between the creditors of the husband and wife where the wife claims to own property which there are very strong grounds for believing belongs to her husband,” the land being purchased in her name, and the money therefor having been furnished by the husband.

119. “Under the circumstances she is bound to show, by clear and satisfactory evidence, that she purchased and paid for the property out of her separate estate. *Horton v. Dewey*, 53 W., 410; *Fisher v. Shelver*, 53 W., 498; (See *MARRIED WOMAN*, for these two cases); *Wheeler & W. Mfg. Co. v. Monahan*, 63 W., *supra*; *Hooser v. Hunt*, 65 W., 71.

120. It is true this was not a purchase by the wife directly from the husband, as it was in the above cases, but a similar rule as to the nature and degree of the proof as to the purchase by a wife with her own money, should apply. (Rule changed by amdt. by ch. 86, L. 1895, of sec. 2342. *Ripon H. Co. v. Haas*, 157 W. post.)”

—*Gettelmann v. Gitz*, 78 W., 439, 442.

121. Where the equitable title to a lot was in the wife, and she allowed the legal title to remain in her husband ‘because of business conveniences and considerations,’ without “‘thought of defrauding any person,” and the husband had substantially no other property, and having affirmatively obtained credit on the strength of this title, it is held that as to other lots subsequently taken in the wife’s name in exchange for this lot, she could not “‘be heard to assert such ownership against the superior equities of the plaintiffs”, such creditors of the husband.

122. The fact that the husband did not himself assert such ownership, but referred the creditor “to a certain other person for the particulars of his property and financial condition,” who informed the creditor that the husband owned such lot, bound the husband with equal effect. (Cited approvingly, but distinguished by making affirmative statement of ownership and giving credit thereon, the gravamen of the estoppel, in *Marston v. Dresen*, 85 W., 530, 541, post, and *Strong v. Gordon*, 96 W., 476, 480.)

—*Hopkins v. Joyce*, 78 W., 443, 445.

123. “‘By signing a joint note with her husband she clothed him with prima facie evidence of her intention to charge her separate estate,’” and “‘she sought not to be heard now to deny that apparent intention, as against an innocent third party who has advanced money upon the faith thereof.” So held, and personal judgment against the wife ordered. See also *OMISSIONS*.

—*Nelson v. McDonald*, 80 W., 605, 608.

124. A deed directly from husband to wife, "gave her only an equitable title to the land. *Putnam v. Bicknell*, 18 W. supra; *Hanna v. Oxley*, 23 W., supra;" and her grantee obtained no better title.

125. "That deed could not convey to her a separate estate under the statute, for such estate must come from some person other than her husband." The consideration here was merely "natural love and affection.

126. "That deed gave her an equitable interest in the strip as a married woman, leaving the legal title and the possession in the husband. *Stroebe v. Fehl*, 22 W., 337." (But, see amdt. of 1895, changing effect in *Ripon H. Co. v. Haas*, 157 W. post).

—*Kinney v. Dexter*, 81 W., 80, 8

127. "The statute of limitations does not run against a wife, and a presumption of payment by lapse of time does not prevail against her. She ought not to be compelled to treat her husband as a stranger. Another policy would beget disagreement and distrust. *Barnett v. Harbarger*, 105 Ind. 410; *Dice v. Irvin*, 110 Ind., 561."

128. (Discussed and upheld in *Brader v. Brader*, 110 W., post. 1) *Charmley v. Charmley*, 125 W., 297, 307, it is upheld but it is said that "we are constrained not to extend the doctrine thereof so as to cover a cause of action not so arising" "out of a transaction between husband and wife."

129. In a proceeding affecting property transactions between husband and wife, and in fraud of the husband's creditors, decided against the wife by the circuit court, the appellate court says:

130. "It is said M. dealt in and managed all these stocks and not as his own, and not as belonging to his wife. If he did so, it will not affect her title. But he acted as her agent in what he did, and so they understood as between themselves. They were husband and wife, and had the right to keep such a 'family secret', if it was one". And on the testimony of the husband and wife as to her ownership of the property, and "that they had no intent to defraud his creditors," the creditors' claims in subsequent ones, the judgment of the circuit court was reversed.

—*Second Nat. Bank v. Merrill*, 81 W. 151, 15

131. "The power of a married woman to bind herself at law is a restricted one and limited to the making of such contracts and engagements as are necessary or convenient to the use and enjoyment of her separate estate. (Cases supra)".

132. (Explained in *Kriz v. Peege*, 119 W. post, where it is said that "the statute gives them the same freedom to acquire separate estates by their individual contract as it does to unmarried women", going further than the common law, or perhaps than above indicated)".

133. "The wife has not, (therefore), in our judgment, the power to enter into an agreement of partnership with her husband, nor, as for that matter, with anyone else, if she has no separate estate, in respect

to which she can be considered as a feme sole, so as to bind herself at law”.

134. “The principal purpose of the statute (married woman’s) is to give the wife the power and rights of a feme sole as to her separate property, free ‘from the disposal of her husband’ and ‘not liable to his debts’.”

135. Contrary to the common law, “her right to enter into a partnership, if she has a separate estate, with a person other than her husband, is quite generally recognized, and is assumed to exist in Merchants’ Nat. Bank v. Raymond, 27 W. 569;

136. But we are not aware of any case where it has been held, under a statute in substance the same as our own, that she may embark her separate estate in partnership ventures with her husband”. “The view we have taken of the statute is sustained by Lord v. Parker, 3 Allen, 127; (many cases);” and “is not in conflict with Krouskop v. Shontz, 51 W. supra, where the real estate upon which farming was conducted by husband and wife was her sole property, and she was held liable for that reason. No partnership was claimed to exist.”

137. (Distinguished in Good Land Co. v. Cole, 131 W. post, as not extending to a case “in which she and her husband are corporators” in a corporation). —*Fuller & F. Co. v. McHenry*, 83 W. 573, 578.

138. “The money received from Mrs. M’s brother for board must be held to be the money of the husband, it appearing that the husband paid for the provisions and defrayed all household expenses. Hamill v. Henry, 69 Iowa, 752; Barnes v. Moore’s Est., 86 Mich. 585”.

139. They are not “the individual earnings of the wife”, under sec. 2343, and “she could not, as against his creditors, acquire title to them by gift from her husband, unless, indeed, they were exempt moneys”.

—*Bloodgood v. Meissner*, 84 W. 452, 455.

140. “The contest is between one of the husband’s creditors and the wife, where the wife claims to hold the property in question by conveyance direct from her husband, made after the indebtedness occurred.

141. In such case the wife has the burden of showing by clear and satisfactory evidence that she purchased and paid for the property out of her separate estate. Gettelmann v. Gitz, 78 W. supra.”

142. “The alleged release of dower and homestead rights is no consideration, for she cannot make such a release during coverture. Wilber v. Wilber, 52 W. 298 (See DOWER); Leach v. Leach, 65 W. 284 (See WIDOW)”.

143. Nor can money given, without agreement of repayment, twenty years before, “be considered a consideration as against the husband’s creditors”. —*Le Saulnier v. Krueger*, 85 W. 214, 216.

144. A purchaser of land by the husband with the wife's money, creating a resulting trust, and out of the statute of limitations. See IMPLIED TRUSTS.
—*Fawcett v. Fawcett*, 85 W. 332.

145. A husband's creditors are not "entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill, industry, and ability in managing and conducting the business" "as the agent of his wife", especially "where the husband has already been paid for his services, as agreed, by his wife".
—*Mayers v. Kaiser*, 85 W. 382, 394.

146. The case of *Gettelmann v. Gitz*, 78 W. supra, is cited and upheld, as is *Hopkins v. Joyce*, 78 W. supra, and distinguished, the conveyances being there upheld, as "there was no representation made by anyone, and the husband made the conveyance (to his wife) while entirely solvent", though the origin of the wife's separate estate was most "remarkable and exceptionable". —*Marston v. Dresen*, 85 W. 530, 541.

147. Where a wife, as a party, "offered her husband generally as a witness", an objection was properly sustained.

148. "If there was any matter upon which the husband was a competent witness, it should have been stated when the offer was made. *Blabon v. Gilchrist*, 67 W. 38".
—*Hoffman v. Joachim*, 86 W. 188, 189.

149. The husband or wife acting as agent for the other may themselves prove such agency. See PRINCIPAL AND AGENT.
—*Roberts v. Northwestern N. Ins. Co.*, 90 W. 210, 212.

150. Wife's evidence as the book-keeper, but not agent, of her husband relating to a contract entered by her in an account book. See WRITINGS.
—*Hazer v. Streich*, 92 W. 505, 508.

151. Husband and wife of a legatee or heir, in a proceeding to establish a will, is not a competent witness. See PARTIES.
—*In re Valentine's Will*, 93 W. 45, 52.

152. Letters between husband and wife, held privileged. See PRIVILEGED COMMUNICATIONS.
—*Lancot v. State*, 98 W. 136, 138.

153. "When the relation of coverture has ceased, either from divorce or death, either party is a competent witness to such facts as came to his or her knowledge during coverture, even in the presence of the other,

154. If it be not by communication from the other which is confidential or private in its nature. *Crook v. Henry*, 25 W. supra; *Bigelow v. Sickles*, 75 W. supra. Such last named communications are still preserved inviolate on the ground of public policy, but the rule goes no

further. *Williams v. Baldwin*, 7 Vt. 503; *McGuire v. Maloney*, 1 B. Mon. 224."

155. On the question as to a gift of securities by his deceased wife, the husband was permitted to testify to seeing "the securities in a box in the bed chamber occupied by himself and the deceased the day prior to her death", as proper "because his knowledge was not acquired by any confidential or private communication from his wife."

156. There was no confidence reposed in him by the wife by reason of the marital relation, and this seems to be the test".

—*Brown v. Johnson*, 101 W. 661, 662.

157. Where a husband purchased lands in his own name, with his wife's money, as her agent, and reinvested and then conveyed to her, in good faith, it was held valid as an executed resulting trust, as against his creditors. See IMPLIED TRUSTS.

158. The fact that he made large profits for her did not interfere, as "such increment can" not "be reached by the creditors of the husband." *Mayers v. Kaiser*, 85 W., supra; *Ansorge v. Barth*, 88 W., 553."

—*Martin v. Remington*, 100 W., 540, 548.

159. A wife "in purchasing family supplies, was acting as agent of her husband;

160. And hence any contract made by her (in such purchase) was in legal effect her husband's contract, and the rescission thereof could not affect her right in a tort action," resulting from eating diseased meat so purchased.

—*Haberman v. Gasser*, 104 W., 98, 100.

161. While "a husband cannot screen the fruits of his own services and exertions under the mere name of another, be that other wife, son, or any one else, if those fruits of his labor are really his (*Tripp v. Childs*, 14 Barb. 85; *Hyde v. Frey*, 28 Fed. Rep. 819),

162. It has nevertheless been decided many times that if the enterprise is in fact that of the wife he may give or hire to her his skill and services, and the fruits of the enterprise will still be hers;

163. That a man's labor cannot be coerced or controlled by his creditors, but may be disposed of by himself, however insolvent he may be (cases supra; *Aldridge v. Muirhead*, 101 U. S. 397). These authorities insist on good faith".

—*Kendall v. Beaudry*, 107 W., 180, 184.

164. "An agreement for voluntary separation is distinctly against such (legislative) policy, and for that reason must be held to be absolutely void."

165. An oral agreement, partly executed, by the husband, to assign an insurance policy to the wife, as part of an agreement to separate, "is contrary to the legal policy of this state, and will not be enforced".

—*Baum v. Baum*, 109 W., 47, 55.

166. The rule of *Second Nat. Bank v. Merrill*, 81 W., *supra*, that the statute of limitations does not run against the wife is upheld, as a rule of property.
—*Brader v. Brader*, 110 W., 423, 427.

167. "From early times the law has recognized the necessity of accepting the wife's testimony to prove personal assaults upon her by the husband, as an exception to the general rule excluding the wife from testifying for or against her husband. (Cases)".

—*Goodwin v. State*, 114 W., 318, 320.

168. Conveyance by an insolvent husband of realty and personalty to his wife, in consideration of the withdrawal of the wife's action for divorce, as not being "a valuable consideration paid out of her separate estate", held void as to creditors. (Overruled in *Ripon H. Co. v. Haas*, 157 W., *post*, as having overlooked the *amdt.* by ch. 86, L. 1895 to sec. 2342).
—*Oppenheimer v. Collins*, 115 W. 283, 286.

169. Where a husband and wife "purchased the mortgaged premises, and in the deed to them covenanted and agreed to assume and pay the mortgage as a part of the purchase price," it is held, that under amendments embodied in the statutes of 1878 as secs. 2340 and 2342, such agreement "is binding upon them, and that they are liable for any deficiency that may arise upon the foreclosure sale of the premises.

170. This is in harmony with the rule that a married woman without any separate estate may acquire land by purchase from a stranger entirely on credit, and bind herself for the payment of the purchase price. *Dayton v. Walsh*, 47 W., *supra*." See also JOINT TENANCY.

—*Citizens' L. & T. Co. v. Witte*, 116 W., 60, 62.

171. "The objection" as to the competency of a husband as a witness, is held "not tenable, because the wife was defending in a representative capacity only. *Strong v. Stevens Point*, 62 W., *supra*."

—*Gordon v. Sullivan*, 116 W., 543, 547.

172. Conveyance by husband without wife's knowledge, "is not per se fraudulent". See FRAUD.
—*Richmond v. Smith*, 117 W. 290, 293.

173. Land "was occupied, managed, and operated by her husband as the head of the family consisting of them and their children, as a part of the farm on which they resided.

174. Such conduct by a husband with reference to real estate, the ostensible legal title to which is in the wife, must be referred to her title and be considered as her possession, in the absence of a showing to the contrary. (Cases)".
—*Hatch v. Lusignan*, 117 W. 428, 433.

175. "The rule that neither husband nor wife can testify for or against the other", is "confined to where the testimony, if given, would

be by one directly for or against the other, such other being a party to the litigation".

—*State v. West*, 118 W., 469, 471.

176. As to a married woman without estate, acquiring an interest in a lease with her husband, for his benefit only. See *MARRIED WOMAN*.

—*Kriz v. Peege*, 119 W. 105, 120.

177. Where a husband "knowingly took", for debts owing to himself, "notes and mortgages in his wife's name", under sec. 2077, they "vested in" her and this "precludes him from recovering the debt as his". (Cases).

—*Meier v. Bell*, 119 W., 482, 486.

178. The defendant being executrix of her father's will, held, that the testimony of her husband was properly excluded, he being, "offered as a witness generally in the case, and not as the agent of his wife".

—*Currie v. Michie*, 123 W. 120, 127.

179. Where a husband and wife signed a negotiable note, and executed a mortgage to secure the same, partly on her property and partly on his, the money being for the husband's use, and used by him in his business,

180. While "under her statutory power to contract with reference to her separate estate, she could make a perfectly valid mortgage thereon to secure this or any other debt, she could not bind herself to a legal liability by the mere promise to pay. (Cases)".

181. And "she is under no such liability for the indebtedness represented by this note, and the plaintiff is not entitled to any personal judgment against her for any deficiency".

—*Loizeaux v. Fremder*, 123 W. 193, 200.

182. "Prima facie, a woman living separate and apart from her husband has no power to bind him,

183. And it is incumbent upon the person furnishing necessities to a wife so living apart from her husband to show that she is so living for justifiable cause. (Citation)". So held here, as to wife's physician bill.

184. "The general rule is that the testimony of the wife is admissible in an action brought against the husband to recover for necessities furnished her."

—*Morgenroth v. Spencer*, 124 W. 564, 566.

185. "We are not aware of any statute varying the common-law liability of a husband to support his wife".

186. "The liability of a husband for the support of his wife by common-law rules only requires him to do so in the matrimonial home, selected by him,—acting reasonably,—

187. Unless she is compelled to seek or accept support elsewhere because of his willful neglect or refusal to perform his duty or her living apart from him by his consent.

188. Generally speaking, the duty of the husband for the maintenance of his wife does not extend to the support of her while she is away from his home. (Cases)'’.

189. Held, that a husband is not liable for the support of his wife, when taken "by due process of law" and confined in an asylum for the insane. (Subsequently changed by amdt. of Ch. 376 L. 1905 to secs. 604e and 604q.).
—*Richardson v. Stuesser*, 125 W. 66, 71.

190. "When the marital status has terminated, the former wife is under no disqualification merely because her former husband or his estate is party to the suit. (Cases).

191. Her competency is only limited by secs. 4069, 4072; the former excluding testimony of a party as to transactions with the deceased in certain cases, and the latter prohibiting disclosure of confidential communications—

192. Probably, also, an opinion based wholly on such excluded transactions or communications. In *re Hunt's Will*, 122 W. 460 (See PRIVILEGED COMMUNICATIONS).

193. But defendant (wife and executrix of her husband's estate) could have testified to acts, conduct, or transactions had by the deceased within her observation, if wholly unparticipated in and uninfluenced by her. (Many cases).

194. After narrating such acts, conduct, or conversation, she could have testified to her mental impressions as to decedent's competency derived therefrom. (Cases).'’ —*Schultz v. Culbertson*, 125 W. 169, 172.

195. As to payment of mortgage on homestead by wife, and repayment being barred as not a transaction between husband and wife. See CLAIMS. LIMITATION OF ACTIONS.

—*Charmley v. Charmley*, 125 W. 297, 303.

196. "In any situation, where an evidentiary fact is material as regards a party to an action, and the wife of such party acted as his agent in regard to the matter, her acts within the scope of her agency may be testified to by her. (Citations)'’.

—*Schwantes v. State*, 127 W. 160, 185.

197. "When a wife contracts an indebtedness on her own credit, then the mere promise of the husband to pay it is of no greater dignity than any promise without consideration to answer for the debt of another."

198. If the "wife, assuming to act as his agent, ordered the books from respondent and received them, and he subsequently, with knowledge of the facts, adopted her act as his own by promising to pay for the property, or by accepting the benefit of the transaction, or in any other way, he thereby became liable for the indebtedness'’.

199. "If the wife signed the appellant's (husband's) name, assuming to act as his agent, and he afterwards adopted her act, the contract became, in legal effect, his from the beginning and was enforceable as such".

200. A 'set of Stoddard's Lectures' are held "not necessities".

—*Schuman v. Steinel*, 129 W. 422, 426.

201. "The term 'adult persons' as used in sec. 1771, includes a married woman," and "she has the right to be a corporator of a corporation".

"The fact that" she "was a corporator", even though her husband was also one, "does not affect its legal existence".

—*Good Land Co. v. Cole*, 131 W., 467, 471.

202. Husband is bound to support the wife, and cannot recover therefor on express or implied contract. See MARRIAGE CONTRACT.

—*Ryan v. Dockery*, 134 W., 431, 434.

203. A claim by the husband "that he paid off a lien (mortgage) and expended other moneys for the benefit of his wife's property during her life and supposed he was a joint owner", "constitutes no claim, legal or equitable, against the real estate in question", it being "presumed to be expended for her benefit. (Citations)".

—*Scheiner v. Arnold*, 142 W. 564, 569.

204. A wife is a competent witness for a co-defendant of her husband who has merely a representative or nominal interest. See also PARTIES.

—*Robinson v. McGinnis*, 145 W. 476, 477.

205. "In the case of *Stickney v. Stickney*, 131 U. S., 227, the rule is well stated:" "We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent,

206. He must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him." Followed, as to money. —*Harter v. Holman*, 152 W., 463, 464.

207. "The general rule that the wife cannot testify on her husband's behalf, except as to matters in which she acted as his agent", "has been laid down and followed by this court since a very early day. (Cases)".

208. "The introduction of competent evidence by the defendant as to his interviews with the wife (of plaintiff) can make no difference with the rule", nor make her evidence thereof competent.

209. A contract between the husband and defendant to pay the latter to aid the former in a reconciliation with his wife "was a perfectly legal contract" and "laudable",

210. And the fact that defendant with the husband, practiced "deceit" as to the amount of the husband's property, as an "inducement for reconciliation", could not "deprive the defendant of the fruit of his labors".
—*Kiepert v. Nugent*, 153 W. 127, 129

211. The words 'living together', as to husband and wife, under the industrial commission act, "was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary".

212. "There must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together'".

213. So held as to an Austrian who had been here three years, leaving his wife in Austria, to whose support he had been contributing.

—*Northwestern I. Co. v. Ind. Com.*, 154 W. 97, 102.

214. The rule of *Harter v. Holman*, 152 W. supra, as to implied trust in the husband of his wife's property received by him, is followed as to moneys received "in various ways".

215. "As applied to personal property it has a very general application, but trusts in real estate are of course all subject to the provisions of the statute", secs. 2077-79, and held not to apply to a joint deed.

216. "Trusts in personalty may be created by parol and are not affected by the statute of uses and trusts. (Citations)". See also JOINT TENANCY.
—*Friedrich v. Huth*, 155 W. 196, 200.

217. The rule of *Horton v. Dewey*, 53 W. 410 (See MARRIED WOMAN), and other cases prior to the amendment, that "a deed from a husband to his wife of real estate was void because the wife could not take by gift or grant from her husband",

218. Was changed by the amdt. of ch. 86, L. 1895 to sec. 2342, which "not only removes the disability formerly existing and allows married women to take by gift or grant from their husbands,

219. But with regard to a conveyance, transfer, or lien executed by the husband to the wife makes the same valid to the same extent as between other persons".

220. And it now makes "the question of fraud in a conveyance from husband to wife one of fact and not of law. Sec. 2323; *Hyde v. Chapman*, 33 W. 391".
—*Ripon H. Co. v. Haas*, 157 W. 466, 470.

221. Where the husband "was on his own behalf making the contract to do the work with the help of his wife", though when he "made the contract he spoke of both, he and his wife, doing the work," and "both were present when the contract was made and the talk was that 'they'", "would stay with the deceased and take care of him",—it is held:

222. That he "should be compensated for the services rendered by his wife", and that the money for her services "was not the individual

earnings of the wife (under sec. 2343), but belonged to her husband under his contract with deceased R. Emerson-Talcott Co. v. Knapp, 90 W. 34".

—*Rockwell v. Est. of Robinson*, 158 W. 319, 321.

223. "That a wife may take title to property from her husband and hold it as her sole and separate estate is provided by sec. 2342".

—*Pfingston v. Pfingston*, 164 W. 308, 311.

224. "Upon assuming the relationship of husband and wife the law requires the husband to support and provide for his wife, such requirement being grounded upon principles of public policy, and the husband cannot shirk it even by an express contract with his wife. (Cases)."

225. "While it is true that the wife may lawfully employ her husband as agent or servant in the management of her separate property,

226. Yet where, as here, such contract would necessarily include so much of that which the husband is required by law to do for his wife without compensation, there ought to be a very substantial showing of any such agreement subsequent to marriage". See also SERVICES.

—*Est. of Simonson*, 164 W. 590, 594.

HYPOTHETICAL CASE.

See EXPERT TESTIMONY.

ILLEGAL CONTRACTS.

See UNLAWFUL CONTRACTS.

ILLEGITIMACY.

See LEGITIMACY.

IMBECILE.

See INCOMPETENTS.

IMPEACHMENT OF WITNESSES. CREDIBILITY.

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- Not liable to question, 21.

1. Party swearing to his own account books, under sec. 4186, cannot be impeached. (See also approval in *Winner v. Bauman*, 28 W. 563, 566, under ACCOUNT BOOKS).

—*Winne v. Nickerson*, 1 W. 1.

2. A witness "had stated that he knew his (a witness's) general reputation for truth, among his neighbors, and that his general character was bad." Held that having so testified he should have been permitted to answer whether "he would believe him under oath".

—*Wilson v. State*, 3 W. 798, 804.

3. Judgment cannot be impeached collaterally if there had been jurisdiction originally. See JUDGMENT.

—*Woodward v. Hill*, 6 W. 143, 148.

4. An order cannot be impeached collaterally merely because "made improvidently, or in a manner not warranted by law, etc.", if jurisdiction was had. See COLLATERALLY.

—*Tallman v. McCarty*, 11 W. 401, 406.

5. In the impeachment of a witness, "the interrogatory propounded to the impeaching witness should have been restricted to the general reputation for truth and veracity of the witness sought to be impeached."

6. "Greenleaf, * says that the regular mode in such cases is, to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. It is understood that the latter part of the question is not admissible unless the witness testify that he is acquainted with such reputation".

7. But it is held that the question "is still an open one here", and indicated that "the interrogatory put to an impeaching witness should be restricted to the general reputation for truth and veracity of the witness sought to be impeached". —*Wilson v. Young*, 31 W. 574, 577.

8. "The general rule doubtless is, that a party calling a witness to prove his case, will not be permitted, because the witness gives testimony adverse to him, to show that the witness's general reputation for truth is bad".

9. But it is held, as an exception, according to "Greenleaf: 'It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified;

10. And this is not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief". 1 Greenleaf, Ev. Sec. 443". —*Smith v. Ehanert*, 43 W. 181, 182.

11. "The credit of a witness may be impeached by showing that he has made statements out of court contrary to what he had testified to at the trial". "All text writers treat of it as one of the established methods of impeaching the credibility of the testimony of the witness. (Citations)".

12. "The unsworn statements of a mere witness in the case, given in evidence to impeach his credibility, are not received as evidence to prove either side of the issues in the case, but to cast doubt and suspicion upon the truthfulness of the contradictory statement made by the witness under oath;"

13. But when the witness "is also a party to the action, such unsworn statements are received, not only for the purpose of attacking the credibility of the sworn statements of the party, but for the purpose of establishing the truth of the unsworn contradictory statements themselves". —*Warder v. Fisher*, 48 W. 338, 344.

14. The rule, "that when a witness is questioned as to a matter which is not material as evidence tending to prove the issues in the case, his statements as to such matter cannot be contradicted by way of impeaching the credibility of the witness, is undoubtedly the true rule. 3 Wait's Pr. 140, and cases cited". —*Kaime v. Trustees of Omro*, 49 W. 371, 373.

15. The statements of parties, especially where "in some material particulars they are contradicted by other witnesses", "are not necessarily verities in the case".

16. "They are most deeply interested in the result of the litigation, and their testimony may be more or less influenced thereby. It is a circumstance to be considered".

17. "Their credibility is to be determined; and no tribunal is so competent to determine it as the trial court before which they, and all of the witnesses, gave their testimony in person".

—*Stewart v. Stewart*, 50 W. 445, 448.

18. "It was not sought to prove a conviction of an infamous crime to impeach the witness, and a charge of crime is not in itself impeaching evidence", though such charge is of record in a court.

—*McKesson v. Sherman*, 51 W. 303, 311.

19. A "witness should not be discredited merely because" of his "avocation, if it be a lawful one". See WITNESSES.

—*Connolly v. Straw*, 53 W. 645, 651.

20. An impeaching witness is competent to testify as to the truth or veracity, without living in the neighborhood of the witness to be impeached.

—*Wallis v. White*, 58 W. 26, 29.

21. "Testimony which is uncontradicted, and from a witness unimpeached, and which is not liable to any question by any of the rules or tests of credibility known to the law", cannot be rejected and ignored.

—*Engmann v. Est. of Immel*, 59 W. 249, 252.

22. The rule is "well settled that you may impeach the credibility of a witness by showing that he has made statements out of court different from those made by him on the stand as a witness,

23. When the witness is interrogated as to such statements while on the stand as a witness, so as to enable him to explain, if he can, why such statements were made, or to deny the fact that they were made".

—*Welch, Admr. v. Abbot*, 72 W. 512, 515.

24. Counsel asked a witness "if he was ever arrested for fast driving at B., and then offered to prove that the witness pleaded guilty to the violation of an ordinance of that city against fast driving, before a justice of the peace, on the fourth day of January, 1889." "The question asked was not a sufficient foundation for the introduction of the record to contradict the witness."

25. To impeach the witness, "it was necessary to lay the foundation for such a contradiction by first asking the witness if such an event occurred at a certain time and place, and the particulars thereof, so as to apprise the witness of just what they ought to show.

26. If he then denies it, it may be proved precisely as it is stated in the question, and not otherwise. The witness should have the privilege

of admitting it just as it occurred. The rule is a familiar one, and unquestionable. *Hinton v. C. C. R. Co.*, 65 W. 323; 1 Greenl. Ev., sec. 462.”
—*Sieber v. Amunson*, 78 W. 679, 681.

27. A witness can “not be impeached by showing that he made statements out of court in conflict with his testimony in court, without laying the foundation therefor by pertinent questions to” him. *Welch v. Abbot*, 72 W., supra.

28. “So stringent is this rule that it extends even to the declarations of an agent not constituting a part of the *res gestae*. *Stone v. N. W. Sleigh Co.*, 70 W., 585.

29. But it is firmly established, and in fact elementary, that no foundation need be laid for proof of the admissions of a party against his own interest. *Wis. Planing Mill Co. v. Schuda*, 72 W., 277”.

—*Hunter v. Gibbs*, 79 W. 70, 72.

30. The scrivener, being a subscribing witness and executor named in the will, was held to have impeached his own testimony. See TESTAMENTARY CAPACITY.
—*Loughney v. Loughney*, 87 W. 92, 101.

31. “The consideration that the witness was produced by one party rather than the other was never deemed a criterion of the credibility of his testimony or the weight to which it is entitled.

32. It does not bear on the question of the credibility of his testimony that the party who produces him is held, for another purpose, to represent him as a witness whose testimony is entitled to credence.

33. The purpose of the rule is to protect the independence of the witness. It prevents the party producing the witness from impeaching a witness whose testimony disappoints his expectation.

34. But the credit which is due to his testimony depends on his character and intelligence, on his relation to and interest in the case, on his manner of giving his testimony, and on those considerations generally which are applied to determine the proper credit due to the testimony of witnesses, and not at all upon the consideration which party may produce him”.

35. “The party producing the witness may always show the fact to be different from the statement of the witness.

36. And the rule as to holding out of the witness as one worthy of credit does not apply in its full rigor where the adversary party is the witness called.” So applied. *Newman, J.*

—*Garney v. Katz*, 89 W. 230, 231.

37. “There is no such rule of law as that one who has previously made a statement, even purposely false, but out of court, of the matter in controversy, shall not be believed when he testifies, under oath and in court, to a different version of the same matter. It is considered that

some element of credibility is imparted to the statement of the witness by the confirmation of his oath”.

38. “No witness is, as a matter of law, altogether discredited because several witnesses have testified to a version of the affair which is inconsistent with his testimony. The preponderance of the proof may be with the one witness. Preponderance may not go with numbers. This has often been held”. —*O’Brien v. C. & N. W. R. Co.*, 92 W. 340, 343.

39. “While a party may show that the testimony of his own witness is incorrect or false in a matter material to the issue,

40. He cannot be allowed to impeach such witness by direct testimony either of his bad reputation or veracity, or that he testifies to one thing in court and asserts the falsity of it out of court. This rule is elementary.” *Richards v. State*, 82 W. 172, 180.

—*Collins v. Hoehle*, 99 W. 639, 647.

41. “Intoxication naturally tends to stupefaction,—impairing the mental faculties, including the memory,—and may exist to such a degree as necessarily to affect a man’s capacity for business or his credibility as a witness. *Gore v. Gilison*, 13 Mees. & W. 623; *Matthews v. Baxter*, L. R. 8 Exch. 132; 2 Greenl. Ev. 300, 374; *Terrill v. State*, 74 W. 286, 287”.

—*Kuenster v. Woodhouse*, 101 W. 216, 219.

42. “Admitted facts are sometimes just as potential to impeach a witness as positive testimony.

43. A court is not bound to accept a statement as true because there is no direct testimony contradicting it.

44. It may be inherently improbable, or it may be impeached by the attendant circumstances. Courts are never bound to accept the statement of a witness which is against all reasonable probability. *Roth v. Barrett, Mfg. Co.*, 96 W. 615; *Groesbeck v. C. M. St. P. Ry. Co.*, 93 W. 505.”

—*Zimmerman v. Bannon*, 101 W. 407, 412.

45. “The fact of a woman’s illegitimate pregnancy or of her making complaint for bastardy is” not “admissible as bearing upon her credibility” as a witness, under sec. 4073 or otherwise. (Citations).

—*Goodwin v. State*, 114 W., 318, 323.

46. “We cannot doubt that a general reputation established and existing twenty-two months before is not so remote as to be inadmissible on that ground alone”. (Many cases).

47. Nor is it inadmissible merely because of “the intervention of the subsequent residence, and establishment of a provable reputation there”.

—*State v. Knight*, 118 W., 473, 477.

48. “It is never admissible to attempt to impeach a witness by showing contradictory statements out of court, having no relevancy to any

of the issues in the case. (Citations.)” So held, on the question of credibility of the witness. —*Barton v. Bruley*, 119 W., 326, 327.

49. “It is not reversible error to rule out a question asked to lay the foundation for impeachment when it refers to immaterial matter. (Citations). ”

50. Every such question, upon objection being made, presents for consideration whether the statement suggested thereby to have been made and to be inconsistent with one made on the trial, is material.”

51. “Of course, if the subject of the interrogatory is material”, the trial judge “has no discretion as to whether or not to permit the foundation for impeachment to be laid,—it is a matter of absolute right, not a mere privilege. Jones Ev. 855.”

—*Ill. S. Co. v. Jeka*, 123 W. 419, 431.

52. The testimony of a notary “to falsify his own official certificate”, held admissible, but to “receive little weight”. See *UNDUE INFLUENCE*.

—*Winn v. Itzel*, 125 W. 19, 25.

53. As to cross-examination to discredit a party, not being different than as to other witness. Questions as to conviction of crime. See *CROSS-EXAMINATION*.

—*Schwantes v. State*, 127 W. 160, 182.

54. As to a physician subscribing witness impeaching himself. See *TESTAMENTARY CAPACITY*. —*Will of Muellenschlager*, 128 W. 364, 372.

55. Held that “there was no error in the ruling”, allowing counsel “to ask impeaching questions” of an adverse witness called by him for examination under sec. 4068,—the question here being as to his evidence on the former trial.

—*Sadowski v. Thomas F. Co.*, 161 W. 86, 89.

56. Testimony that a witness “made a remark indicating personal animosity against” a party, “was admissible for purposes of impeachment only,

57. And not then unless the foundation for it had been already laid by calling the attention of the witness sought to be impeached to the particular statement claimed to have been made and asking him whether he made it. *Ferguson v. Truax*, 136 W. 637”.

—*Pfeiffer v. C. & M. E. R. Co.*, 163 W. 317, 321.

IMPLIED TRUSTS.

See also *TRUSTS*.

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Innocent persons; dealing, 20.

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Voidable trust, 11.

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Institute in county court, 23.

Legal claim; to establish trust, 22.

Pending administration, 22.

1. "The provisions of the statute of frauds do not apply to implied trusts, or those which are raised or created by operation of law, and not from the agreements or contracts of the parties, which would render the trusts express. The latter come within the intention and words of the statute which requires that all such agreements shall be in writing, but the former are not affected by the statute".

—*Whiting v. Gould*, 2 W., 552, 585.

2. Where a husband purchased land with his wife's money, took a deed in his own name contrary to her directions, which she discovered the next year and at once requested that the title be vested in her, but he neglected so to do, and they together occupied the land as a homestead until his death more than twenty years thereafter, and he in his will gave his property in general terms to his widow and heirs, and it does not appear that he ever asserted his or denied her ownership of this land, it is held,—

3. That, "under the circumstances", laches should not be imputed to her, and that "she is entitled to enforce a resulting trust in the land", and had the absolute title.

4. "The heirs of her husband have no greater equities against the enforcement of the trust than her husband would have had".

5. "It is now thoroughly well settled," "that as between a trustee of an express trust cognizable only in a court of equity, and his cestui que trust, concerning matters connected with the trust relation, no statute of limitations, nor any bar of analogy thereto, can be relied upon to defeat the execution of the trust, unless the full period of limitation has elapsed since the denial or repudiation by the trustee of the trust obligation".

6. As this, as "stated by Mr. Justice Gray in *Speidel v. Henrici*, 120

U. S. 377, 386", is 'because the possession of the trustee is presumed to be the possession of the cestui que trust', hence "to set the statute running against such a trust a surrender of the trust property is essential" to make a repudiation effectual.

7. "We find in this resulting trust every element which operates to take an express trust out of the statutes of limitation", and it is logically so held.

8. (In *Merton v. O'Brien*, 117 W. 437, 440 (See LIMITATION OF ACTIONS) after citing this and many other cases, the court concludes that,—“It must therefore be considered as settled in this state that a trust which is to be held exempt from the operation of the statute must be (1) an express trust and (2) a technical and continuing trust, cognizable only in a court of equity”). See also *LACHES*.

—*Fawcett v. Fawcett*, 85 W. 332, 335-7.

9. Where the husband as her agent purchased lands with his wife's money; taking title in his own name, and sold and reinvested in other lands, which investments became very valuable, and then conveyed the same to the wife, it is said,—

10. "That thereby there arose a resulting trust in her favor in all the property to which her husband had record title, which trust, though not enforceable under our statutes (sec. 2077), has now been fully executed by the husband without fraud, and forms a good consideration for the conveyances". (Cases).

11. "It is true that such trusts are abolished by sec. 2077; but it is still held that if the trustee voluntarily carries out and executes the voidable trust by conveying the property, as he is morally bound to do, such conveyance will be founded upon a sufficient consideration, and, in the absence of fraud, will be valid even as against creditors of the trustee. *Hyde v. Chapman*, 33 W. 391; *Begole v. Hazzard*, 81 W. 274 (see *PAROL*)". So held, here, as against the husband's creditors.

—*Martin v. Remington*, 100 W. 540, 546.

12. On the facts, including "that she (the wife) was engaged in an effort to assist her husband in evading his creditors", "and to obtain a fictitious basis of credit", the wife is held estopped from claiming title by reason of a trust on account of money furnished by her.

13. *Martin v. Remington*, 100 W., supra, "was an exxtreme case, and the rule stated therein was carried as far as the court is disposed to go".

—*VanDusen v. Hinz*, 108 W., 178, 180.

14. Where the heir induced decedent to refrain from disposing of one half of her property to a third party, and to make a different ineffective attempt at such disposal, it is held that the land,—descending to such heir in view of intestacy and of such failure by reason of "fraud in preventing decedent from effectuating" such transfer,—may be impressed

with "a trust on the property of her estate" in favor of the intended beneficiary. *Brook v. Chappell*, 34 W., 405 (See TRUSTS).

15. "The creation of such a trust and its establishment by parol evidence" is "not in violation of the rules of law providing for the transfer of an interest in property in writing". *Hoge v. Hoge*, 1 Watts. (Pa.) 163.

16. "'It must always appear that the decedent relied upon the promise of the heir or devisee as an effective arrangement for the future disposition of his property.' 'If the decedent did not rely upon the promise there is no fraud and the trust fails.' " *Whitehouse v. Bolster*, 95 Me., 458.
—*Tyler v. Stitt*, 132 W., 656, 660.

17. An implied trust is created in favor of the wife, where the husband uses her separate estate, "with or without her consent". See HUSBAND AND WIFE.
—*Harter v. Holman*, 152 W., 463, 464.

18. "It is a familiar principle that if a person has money of another and, without the consent of such other, invests such money in property and takes title in his own name, such property is impressed with a trust, denominated an implied or constructive trust, in favor of such other,

19. And money so fraudulent used can be recovered out of such property, subject only to the condition that it must be clearly traced thereinto,

20. And that the rights of the persons who may have dealt with the property in good faith and without fault, supposing such person to have had, in fact, the relation thereto which he assumed to have, must be deemed paramount to the rights of such other.

21. The statute, sec. 2079, expressly excepts such common-law trusts from the terms of the written law on the subject of uses and trusts. (Cases)''.

22. In an action by a widow against her husband's executor, pending administration, for both a legal claim and to establish such trust in the property of the deceased derived from the use of her funds, it is held,—

23. That such proceeding should have been instituted in the county court, where all having interests therein "are parties to the proceedings to settle the estate,"

24. And that "all matters involved are within the jurisdiction of the county court and there are no very good reasons why that court should not deal with them as part of the administration of the estate''. See also JURISDICTION.
—*Wisdom v. Wisdom*, 155 W., 434, 437.

IMPROVEMENTS.

See PERMANENT IMPROVEMENTS.

INCHOATE DOWER.

See DOWER.

INCOME.

See RENTS AND PROFITS. TRUST FUNDS.

INCOMPETENTS.

See also ACCOUNTS OF GUARDIANS. GUARDIAN AND WARD. INCOMPETENTS' SALE OF REALTY. INSANE PERSONS. TESTAMENTARY CAPACITY.

Adverse party:

Proposed guardian is not, 23.

Aggrieved person:

Guardian ad litem is, 38.

Proposed guardian is not, 23.

Relative or friend who petitioned, 50.

Son with contested transfer, 38.

Costs and expenses:

Adjusted by county court, 14.

Costs against ward, improper, 14.

Incurred in the three courts, 14.

Out of estate; attorneys' fees, 14.

Evidence:

Adjudication of unsoundness, 18.

Direct evidence, 18.

How admissible as to prior, 20.

No evidence of prior thereto, 19.

Presumptive, subsequently, 18.

Ward's evidence prior to, 21.

Affecting transfer, 21.

Expert, weak and inconclusive, 46.

Not against direct evidence, 48.

Though positive, dogmatic, 47.

Ill treatment of subject, 28.

Premature finding as to contract, 39.

Undue influence to obtain deed, 28.

Vendor's, as to vendee's title, 22.

Ward's charge of wife unchaste, 10.

Gen'l reputation of wife, 11.

Husband's knowledge thereof, 12.

Wife's evidence; not party, 13.

Guardianship rules:

Care of health and person, 45.

Experts, weak and inconclusive, 46.

Not against direct evidence, 48.

Though positive, dogmatic, 47.

Guardianship upheld, 43.

Incapability, satisfied statute, 34.

Insane hallucinations, 45.

"Mentally incompetent," means, 31, 44.

Not for physical, but mental, 53.

Not imbecility or insanity, 30, 33, 34.

Guardianship rules—continued

Prior decisions given effect, 41.

Reversal rule stated, 42.

Statutory conditions, exist, 29.

Substantially total, must be, 32.

Insane: action in own name, 40.

Intoxicants exclusively:

Contracts as in insanity, 52.

"Drunkenness," legally defined, 51.

May yet convey property, 26.

Mentally unsound at time, 27.

Jurisdiction:

Attend at court, if able, 36.

Guardianship proc. statutory, 3.

Must show; fact of proc., 4.

Notice, children custodian, 36.

Petition and verification signed, 5.

Amend after judgment, 6.

Jurat not signed, 5.

Nunc pro tunc, invalid, 6.

Petition insufficient, 5.

Statute strictly construed, 3, 36.

Otherwise proc. void, 3.

What petition should state, 1, 35.

Held sufficient without, 2, 35.

Very general petition upheld, 1.

Pauper incompetent:

Father to handle money, 15.

Petition. See also Jurisdiction.

Application of friend, 7, 49.

Friend, conditions, when, 7.

Relatives should apply, 8, 49.

Property of aged people:

Clear evidence of inability, 25.

Courts hesitate to interfere, 24.

Inadequate farm rental, 25.

Ward, appear and defend, 9, 37.

Guardian ad litem, when, 37.

Weak-minded adult:

Child treated as a minor, 16.

Control of father; at home, 17.

Father must care for, 17.

Owes service to father, 17.

1. While the petition for guardianship, though very general, is held sufficient, it is said: "We think it would be the better practice to require the petitioner, in all cases of this kind, to state fully the name of the person with whom the supposed insane or incompetent person is living, if living with anyone; who are his relatives, if he have any living; what his estate consists of, and who has charge of it; so that the county court may act with a full knowledge of those interested in his welfare and estate, and may cause notice to be given to them of the application, if it shall deem such notice necessary or proper.

2. But we are not prepared to say that a petition which fails to contain these matters is not sufficient under the statute to give the court jurisdiction to proceed in the matter."

3. "The proceeding, so far as the jurisdiction of the county court is concerned, is purely statutory; and as it is one involving the rights of both person and property, according to all rules of law applicable to such proceedings, the statute must be strictly followed, or the court or officer exercising the authority will not obtain jurisdiction, and the proceedings will be void."

4. "The rule in such cases is, that the requirements of the statute must appear to have been strictly complied with upon the face of the proceedings; and no inferences are indulged in in support of the proceedings."

5. In this case where the petition was properly signed by the petitioner, who also signed the verification, but "the jurat not being signed by any person, the presumption of law is that it was not sworn to", and the petition was held insufficient to give jurisdiction.

6. Where the county judge, after judgment, signed the jurat *nunc pro tunc* and added a memorandum that the petition was sworn to before him at its date but that by inadvertence he "omitted to sign the jurat at that time," he so amending "without any application by either party", it is said: "We think it would be unsafe to allow courts of limited and special jurisdiction to so amend their proceedings", and neither the county court so obtained jurisdiction nor the circuit court thereafter on appeal.

7. The court is "inclined to think that under the statute the county court should not proceed to the appointment of a guardian", "when there are near relatives of the person, with whom he resides, or who have the care of him, on the application of a friend, unless it appears from the petition that there is some good reason why the application is not made by such relatives.

8. The statute, we think, contemplates that the relatives shall make the application, when there are any in the immediate vicinity of the insane or incompetent person; and this should be so, especially when the court proceeds to appoint a guardian of the person of one insane or incompetent." p. 624.

9. "We can see no reason why a man who is proceeded against as an insane or incompetent person, under the statute, is not the proper person to defend against the proceeding; and until he is finally adjudged to be

insane or incompetent, he may appear by his attorneys as any other person. *Cunio v. Bessoni*, 63 Ind. 524."

—*Appeal of Royston*, 53 W. 612, 618.

10. On the evidence, it was held that the ward had no sufficient grounds for promiscuously charging that his wife was unchaste and "that he was the victim of insane delusion."

11. In the contest on guardianship, "the learned circuit judge properly excluded all testimony of the general reputation" of the wife,

12. "But admitted all testimony offered of everything her husband knew or had ever heard concerning her chastity".

13. In this case the supreme court say that "whatever the rule may be, we have disregarded the testimony of" the wife, but says that "it would be a cruel rule which seals the lips of a wife when her chastity is impeached, merely because her husband happens to be a party to the proceeding in which she is assailed, while (s)he is not".

14. "The county court, on a proper showing, should adjust the reasonable expenses of both contestants in that court, in the circuit court, and in this court (which includes services of attorneys) and will direct the guardian to pay the same out of the estate of his ward", and no costs should have been taxed against the ward in circuit court. p. 607.

—*Barbo v. Rider*, 67 W. 598, 602.

15. The father of an incompetent pauper is held the proper person to handle money for the support of such pauper. See PAUPERS.

—*Ettrick v. T. of Bangor*, 84 W., 256, 261.

16. In considering a weak-minded child, thirty-four years old, never manumitted by the father, it is said, that "the law treats such a child over the age of twenty-one years as a minor, because she is incapable of emancipation from imbecility.

17. The father must take care of such a child; and such a child, to the extent of its mental and physical capacity, owes service to the father like a minor. 17, Am. & Eng. Ency. of Law, 380; *Lavery v. Crooke*, 52 W., 612. So long as she remains at home or under the control of the father, he can sue for the loss of her services." *Lipe v. Eisenlerd*, 39 N. Y. 229.

—*Hahn v. Cooper*, 84 W., 629, 632.

18. "The general rule is, that an adjudication as to mental soundness is direct evidence of the fact at the time of the adjudication, and presumptive evidence of the condition of the subject at a subsequent time, upon the theory that a condition of mind once shown to exist is presumed to continue.

19. It is not evidence of itself of the mental soundness of the subject at any time prior to the adjudication.

20. In the absence of independent evidence showing that the same condition of mind existed at the prior time as at the time of the adjudication

and had been continuous in the meantime, it is not admissible at all in a controversy as to such condition at such prior time". *Burnham v. Mitchell*, 34 W. 117 (See *INSANE PERSONS*), and *Giles v. Hodge*, 74 W. 360 (See *TESTAMENTARY CAPACITY*), cited and discussed as of like effect.

21. The evidence of the (now deceased) subject, taken at the time of the adjudication of incompetency and guardianship, as to his incompetency relating back four and one-half months to the time of the alleged fraudulent transfer in question, "was clearly incompetent" to support the admission of the adjudication,

22. And in violation of "the well-known rule that the admissions of a vendor or transferrer of property, subsequently made, are not admissible in evidence to affect the vendee's or transferee's title. That principle is elementary. *Grant v. Lewis*, 14 W. 487; *Selsby v. Redlon*, 19 W. 17".
—*Small v. Champeny*, 102 W. 61, 63.

23. Until a guardian appointed, qualified by giving bond, "he was no fit person to represent" the adverse interests in an appeal and obviously "was in no sense an adverse party". See also *APPEAL*.

24. "Only with great hesitation should courts interfere with the discretion of elderly people, owing no legal duty of support to any one, in devoting the property accumulated by them to their own comfort according to their own taste".

25. The county court found that W., an octagenarian, "by reason of his extreme old age, failing health, and mental inability" was incompetent to manage his property, and the circuit court's and a jury's finding to the contrary, affirmed. Because he let his farm providing for his care and comfort thereon, for an inadequate monetary consideration,—should not subject him to "be interfered with without very clear evidence of mental incompetency to carry" out such plan. See also *COSTS AND FEES*. *EXPERT TESTIMONY*.
—*In re Gdnsp. of Welch*, 108 W., 387, 390.

26. "A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and convey property,

27. Unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed. *Johnson v. Harmon*, 94 U. S. 371; (other cases)".
—*Burnham v. Burnham*, 119 W. 509, 514.

28. Evidence "as to undue influence" exercised to obtain a deed of the property of a mother 85 years of age, and as to ill treatment of her, was held proper on the question whether she was "mentally incompetent to have the charge and management of her property. Sec. 3976".

29. "Unless the statutory conditions" as to guardianship, exist, "the court is powerless to act, however clear it may appear by proof that the subject for whom a guardian is sought is not capable of caring for his property judiciously.

30. But such conditions do not call for imbecility or insanity in a

technical sense. It is sufficient if the subject is as incapable of managing his affairs as if he were insane”.

31. “The term ‘mentally incompetent to have the charge and management of his property’ means mental incapacity to do so. In *re Leonard’s est.*, 95 Mich, 295.

32. True, the incapability must be” “substantially total, as in case of imbecility or insanity; not that partial incapability often seen in persons so intellectually weak that they are capable of managing their affairs with very little judgment.

33. Nevertheless, the subject need not be necessarily classed as either insane or an idiot in the ordinary meaning of those terms”.

34. While the evidence shows she was not “insane or imbecile”, “it pretty clearly shows that she might as well be either the one or the other as regards capability to have the charge and management of her property. That satisfies, clearly, the very letter of the statute”. A guardian held properly appointed. —*In re Streiff*, 119 W. 566, 569.

35. While it is “the better practice” to state the facts in the petition for guardianship as set forth in *Appeal of Royston*, 53 W. supra, yet a petition is held to be sufficient and to give jurisdiction though it “failed to state the names of the persons” affected, or “with whom the alleged incompetent resided, and who was in possession of her property”.

36. It is held that “the requirements of the statute seem to have been fully complied with” to give “jurisdiction”, as to notice, etc., though the order for hearing “failed to require personal service upon the person having control of her person and property, and her children”, though “no such service was ever made”, and though “the order did not require that the alleged incompetent, if able, attend before the court at the hearing”. “It moreover appears” that she “was personally present in court during such hearing”.

37. The county court having appointed a guardian ad litem at the hearing, held he “was properly appointed” “if E. was at the time under disability, as adjudged by the county court”. (Nevertheless, par. 9, supra. is here approvingly quoted).

38. Such guardian ad litem, and also a son who had a contested transfer of property from his mother, are held “aggrieved persons,” entitled to appeal from the county court’s order adjudging incompetency and guardianship.

39. On the facts, the circuit court’s judgment of competency mainly on a premature finding of the validity and binding effect of a previous contract and agreement made with the subject,—is reversed and the order of the county court as to incompetency, affirmed.

—*Ziegler v. Bark*, 121 W. 533, 539.

40. An insane person may properly commence and prosecute an action in his own name. See ACTIONS.

—*Wiesmann v. Donald*, 125 W. 600, 602.

41. "Giving full force and effect to the decision of this court in *In re Streiff*, 119 W. supra, and that in *In re Welch*, 108 W. supra,

42. And having in mind the rule that the findings of fact of the court below will not be reversed in this court unless contrary to the clear weight of proof, (cases)',—

43. On the facts, the appointment of a guardian by the county court, of D. a woman 73 years of age, with a large amount of property, is sustained, and the circuit court to the contrary, is reversed.

44. "The mental incapacity described by the statute (sec. 3976) relates more to the competence of the person with reference to the care and conservation of property,

45. And the care of her own health and person, than it does to insane hallucinations, which are often consistent with thrift and industry.

46. The opinions of experts, especially of those who form their opinion from a single interview had for the purpose of qualifying them as witnesses, are necessarily very weak and inconclusive evidence upon such a question.

47. They do not necessarily gain in probative force because of positive or dogmatic form of expression."

48. "The opinion evidence should not have been allowed to prevail against the undisputed facts and circumstances" as to failure to care for her person and property. —*In re Deeglise*, 134 W. 41, 42, 51.

49. While "even a relative or a friend of the alleged incompetent, irrespective of any pecuniary or other legal interest," may petition for guardianship,

50. "It does not follow" "that the determination reached by the county court", "shall be subject to appeal by persons having no legal interest to justify their further interference. (Cases)." See also AGGRIEVED PERSONS. —*Sanborn v. Carpenter*, 140 W., 572, 573.

51. "'Drunkenness,' says Tiedeman, 'is, in legal contemplation, an aberration of mind similar in its effect upon the reasoning faculties as temporary insanity.

52. Hence we find that the legal effect of contracts made by one in a state of intoxication is affected in the same way by the intoxication of the contractor as they are by his insanity'. Com. Paper sec. 57". See also PROMISSORY NOTES, ETC. —*Green v. Gunsten*, 154 W. 69, 73.

53. Where the record shows the appointment "because of physical and not mental disabilities", "no guardian should have been appointed on the showing made". See also TESTAMENTARY CAPACITY.

—*Est. of Bean*, 159 W. 67, 82.

INCOMPETENTS' SALE OF REALTY.

See also INFANTS' SALE OF REALTY. SALE OF REALTY.

Bond of guardian:

Defective; invalid sale, 14.

Sureties liable on sale bond, 19.

Mortgage agreement, 19.

Wards remedy on, 13.

Homestead; support of ward, 20.

Jurisdiction:

Meager petition, sufficient, 1, 6.

Matters left out of it, 1.

Notice required to validate, 2, 12.

Question reconsidered, 18.

Represented by guardian, 10, 11.

U. S. Decision different, 7, 10.

Valid as to ward without, 12.

Notice; See also Jurisdiction:

Necessary in executor's sale, 9.

Not to ward, incompetents, 10, 12.

Petition. See jurisdiction.

Sale: indirectly to guardian, 15.

Heirs of deceased ward, 16.

Not estopped by accounting, 17.

Inadequate price, 15.

Laches; time begins at decease, 18.

Nominally to third person, 15.

Summary proceeding for sale, 21.

Ward after competent:

Attacking void, gdns. sale, 3, 4.

Paying for improvements, 4.

Refund purchase money, etc., 4.

Use and occupation, 5.

Left to remedy on the bond, 13.

Purchase in good faith, 13.

Settlement with guardian, 3.

Not estopped otherwise, 3.

Waiver by guardian:

None specified in sec. 3919, 14.

1. A petition to sell real estate of an insane person was held "sufficient in substance to call into exercise the power of the court", though it "did not state the amount of personal property which had come to the guardian's hands, nor how much of it remained undisposed of, nor did it specify the items of indebtedness, nor state the condition or value of the several pieces of land mentioned, etc.," as provided by the statute in force.

2. But the proceedings were held fatally defective, with no jurisdiction to grant the license, and the sale thereunder void, because "the required notice was not given of the hearing of the application for a license", to the insane person as well as others interested, on the same principle as decided in the case of administrators' and executors' sales. (Overruled in *Mohr v. Porter*, 51 W. post.)

3. After recovering his sanity the plaintiff is not "estopped by the settlement (he made) with his guardian from attacking the validity of the sale". He is concluded only "as to those transactions and accounts embraced in the settlement".

4. In recovering lands so sold in a void guardian's sale to a purchaser "in good faith, for a valuable consideration, without notice of any irregularities or defects in the proceedings," "the plaintiff (the late incompetent) cannot recover the land without refunding the purchase money with interest, and all sums paid for taxes, and paying for all permanent improvements.

5. Of course the plaintiff is to be allowed for the use and occupation of the premises, excluding the value of the use of the improvements".

—*Mohr v. Tulip*, 40 W. 66, 76.

6. The guardian's "petition, although somewhat imperfect", held valid in *Mohr v. Tulip*, supra, for the sale of realty is "sufficient to give the probate court jurisdiction to proceed in the matter", this case involving "another part of the lands sold", under the same proceedings.

7. "In the case of *Mohr v. Manierre*, 101 U. S. 417", covering another parcel sold to a non-resident at the same sale, "that court held the sale valid, and that the want of statutory notice did not render the same void", being contrary to the opinion in *Mohr v. Tulip*, 40 W. supra.

8. "This conflict of opinion between this court and the supreme court of the United States, which has led to this peculiar result, which makes the title to real estate situated in this state depend upon the residence of the party in possession, has induced us to reconsider the question at issue between the two courts, with a view of determining, if we can, which of the two courts is right". p. 490.

9. The court adheres to the rule that due notice to the adverse parties is, necessary to give jurisdiction of the person in the case of a license to an executor or administrator; while "the petition and proof of the facts confer jurisdiction of the subject matter"; yet "probate proceedings, like other legal proceedings, bind those who have notice or appear or consent to the same, although there may be others who were proper parties who had no notice, and who did not appear nor consent thereto, and who were not bound by such proceedings. *O'Dell v. Rogers*, 44 W. 136, 172" (Cited under NOTICE). p. 493.

10. "The question arises in this case, as it did in the case of *Mohr v. Tulip*, whether *Mohr* was represented by his guardian in the proceedings in question, so that, being so represented, he cannot avoid the same, as was held by the supreme court of the United States in *Mohr v. Manierre*, supra." p. 495.

11. "That in these proceedings the guardian represents his ward and acts for him, is sustained very generally by the authorities we have been able to find bearing upon the subject in other courts; and we find no decision of this court which holds the contrary, unless it be the one of *Mohr v. Tulip*."

12. For these reasons, we think, the case of *Mohr v. Tulip*, so far as it holds the sale in this case void as against the ward himself, must be overruled". p. 497.

13. "When the purchaser is guilty of no fault and buys in good faith, there is every reason why he should be protected and the ward left to his remedy upon his guardian's bond, if he has been guilty of any misconduct in his guardianship". p. 505.

—*Mohr v. Porter*, 51 W. 487, 489.

14. A defective bond or other defect cited in sec. 3919, is fatal to a valid sale, and "none of those proceedings can be waived by the guardian". See INFANT SALE OF REALTY.

—*Weld v. Johnson Mfg. Co.*, 84 W., 537, 543.

15. "A guardian of an insane person sells his ward's real estate for an inadequate price, nominally to a third person, but really to himself", "causing the title to be conveyed to his sons".

16. In an action brought by heirs some five months after the ward's decease, about twelve years later, "to set aside the transaction as fraudulent and void", it is so determined, and the guardian required to account for the rents and profits.

17. The heirs are not estopped, because "the guardian has accounted for the price" paid, and paid it over "to the administrator of the" ward's estate;

18. And "the plaintiffs could not be charged with laches until they had some title or interest in the land which they could enforce by action", which was not until the ward's decease.

—*Heyl v. Goelz*, 97 W. 327, 331.

19. The sureties were held not liable on the sale bond, for the guardian's failure to pay a mortgage, which he agreed to pay, but was not ordered to pay. See SURETIES.

—*Evison v. Hallock*, 108 W., 249, 251.

20. The proceeds of the homestead of an insane ward, held liable for his support by the county. See INSANE PERSONS.

—*Johnson v. Door Co.*, 158 W. 10, 17.

21. (As to summary proceedings for sale of realty of persons under disability, under secs. 3503, et. al., see INFANTS' SALE OF REALTY).

INDORSER.

See PROMISSORY NOTES, ETC.

INFANTS.

See also ACCOUNTS OF GUARDIAN. ADOPTION. CUSTODY AND COMMITMENT. GUARDIAN AND WARD. INFANTS' SALE OF REALTY. MAJORITY. NECESSARIES. PARENT AND CHILD.

Action concerning:

- At common law; next friend, 26.
- By or against the minor, 23.
- Express contract of guardian, 24, 25.
- Guardian ad litem at trial, 12.
- Proceeding without guardian, 12.
- Represented by grdn. at litem, 23.
- Title of action; complaint, 25.

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Administration:

- Parents or grdn.; not bind, 66.
- Guardian ad litem, 66.
- Age declaration; fraud, 28.
- Contracts: voidable, 3.
- Beneficial to himself, 52.
- Actual discretion attained, 53.
- Actual express fraud, 52.

Contracts—continued

Beneficial, etc.—continued

Equitable estoppel, 52.

Not conduct or silence, 54.

Between infant and servant, 69.

Executed contracts, also, 39.

Executory or express; not liable, 44.

Father also not liable, 46.

Written guarantee; consid., 47.

Implied. See *Necessaries*.

Judicial aid to avoid, 40, 43.

Offered to make good, 40, 43.

Restoration at trial, 42.

Waiver of formal offer, 41.

Not beneficial to him, 55.

Surety or accommodation, 56.

Valid upon adults, 3.

Void or voidable; option, 50.

Capable of restoration, 51.

Crime capacity:

Presumption; under fourteen, 30.

Rebuttable, over seven, 30, 31.

Custody of infant, 27.

Neglected infant, 35.

Damages: injuries to person, 5.

Employer liable for injury, 74.

Contributory negligence, 75.

Illegally employed, 73.

Release; county court approval, 39, 82.

Infant, 18 months of age, 9.

Liable for torts as adults, 62.

Degree of care; rule, 64.

Guilty of negligence, 63.

Recovery by parents, 5.

Deceased infant:

Realty; common ancestor, 15.

Disaffirmance of contracts, 17.

After majority, 17.

Guarantor still bound, 70.

Emancipated infant:

Make gift to infant sister, 22.

May acquire property, 22.

Estoppel doctrine, 67.

Equitable, when, 52.

General guardian:

Appeal; failure of gdn. ad litem, 11.

Judgment by default:

Avoided by appeal for error, 58.

Or other direct proceeding, 59.

Cannot always be vacated, 60.

No substantial injustice, 61.

Judgment, etc.—continued

Collateral attack: service, 57.

No guardian ad litem, 57.

Vacated; guardian ad litem, 49.

Laches in an adult, 48.

Mortgage: purchase money, 19.

Conditions of avoiding, 19.

Given for precedent debt, 20.

Mortgagee; infant's vendee, 21.

Surety for purchase money, 21.

Necessaries:

Bound by implied contract, 36.

Executory contract for, 37, 44.

Express contract; not liable, 38, 44.

Personal needs of infant, 68.

Alleged servant of, 69.

When actually furnished, 45.

Note given in infancy, 1.

Ratification after age, 1.

Notice: distribution, 7, 8.

Partition; non-resident, 10.

Guardian ad litem later, 10.

Ratification after age:

Any recognition of promise, 1.

Beneficial; possession retained, 13, 14.

Release by guardian, 78.

Not approved; county court, 79.

Services: quantum meruit, 6.

Adopted; same rules, 16.

Service upon infant, 18.

Seven years of age:

Highway; travel and play, 29.

Less degree of care, 29.

Injury damages, negligence, 9.

Trespass; compens., damages, 4.

Testimony of child:

After four years of age, 32.

Conviction sustained, 34.

Discretion of court, 34.

Intelligence, factor, 33.

Title in own name for infant, 2.

Assumed protector; in trust, 2.

Workmen's compensation act:

Guardian not essential, 71.

Same plane as adult, 65.

When not legally employed, 72.

Act does not apply, 73.

Contributory negligence, 75.

Employer liable for injury, 74.

Misrepresenting age, 76.

Release held not binding, 78.

Approval; county court, 79.

1. A note given in infancy is voidable but may be confirmed at full age. Any recognition of the promise after age as binding is a ratification of it.

—*Stokes v. Brown*, 3 Pin. 311.

2. An assumed protector taking title in his own name for an infant, holds the same in trust. See *PRINCIPAL AND AGENT*.

—*Roller v. Spilmore*, 13 W. 26, 30.

3. "Though their deeds or contracts are voidable as to themselves, they are binding upon persons of full age", at common law and at this time, regardless of the "apprentice" statutes.

—*Davies v. Turton*, 13 W. 185.

4. "The suit is brought to recover damages for trespass committed by him (an infant under seven years of age); not vindictive punitive damages, but compensation; and for that he is clearly liable".

—*Huchting v. Engel*, 17 W. 230, 232.

5. Damages for injuries to the person of a minor (11 yrs. old) resulting in death are recoverable under the statute "in substance the same as Lord Campbell's Act, 9 and 10 Vic. Ch. 93", "as the jury might deem fair and just in reference to the pecuniary injury resulting from the death of the daughter, B., to her parents" during minority; and afterward only on proof of probable dependence on her. "Vindictive damages are not to be given".

—*Potter v. C. & N. W. Ry.*, 21 W. 372, 374.

6. Recovery sustained quantum meruit, in an action by an orphan infant received into the family of defendant for eight years and not "standing in loco parentis", with no express agreement for wages, the services being "rendered under such circumstances that the law would imply a promise to pay what they were reasonably worth".

—*Mountain v. Fisher*, 22 W. 93, 97.

7. Where minor heirs or their guardian have no notice of the order of distribution, they are not bound by the order.

8. "In order to bind these minor heirs by the order of distribution, it should at least appear that they were before the county court, or had notice of the proceedings".

—*Bresee v. Stiles*; 22 W. 120, 126.

9. Judgment for \$8000, for loss of the right arm of an infant of eighteen months, injured on a railroad track, the company being negligent for failure to erect a fence, the parents being free from negligence, approved, and held "that negligence cannot be imputed to the conduct of an infant of such tender years," and that "all that is demanded in such cases is, a degree of care or diligence equal to the capacity of the child".

—*Schmidt, infant v. M. & St. P. Ry. Co.*, 23 W. 186, 190.

10. Where the circuit court in partition action failed "to acquire jurisdiction over" a non resident infant appellant, "all subsequent pro-

ceedings against him, including the appointment of a guardian ad litem, were coram non judice".

11. Where such guardian ad litem failed to do so, "it was competent and proper for the general guardian to act for the infant" in the appeal.

—*Foster v. Hammond*, 37 W. 185, 187.

12. The infancy of plaintiff developing at the trial, against objection a guardian ad litem was then appointed to prosecute the suit. Held proper, and "had she proceeded without leave, the judgment could not be reversed on that ground".

—*Sabine v. Fisher*, 37 W. 376, 377.

13. Where infant husband and wife gave note and mortgage "beneficial" to them, and elected to affirm the same "by retaining the possession of the premises and claiming them as their own", after arriving at majority, it was held to be a ratification.

14. "It would be most inequitable to allow them to repudiate the notes and mortgage given for a part of the purchase money and also to keep the land".

—*Callis v. Day*, 38 W. 643, 647.

15. Real estate of a deceased infant received from a common ancestor, descends to the brothers and sisters, from such ancestor. See DESCENT AND DISTRIBUTION.

—*Weisner v. Zaun*, 39 W. 188, 218.

16. An adopted infant is governed by the same rule as to services as a blood relation. See SERVICES.

—*Tyler v. Burrington*, 39 W. 376.

17. "'A minor is bound to disaffirm her contracts within a reasonable time after attaining her majority'. This seems to be the rule in all cases, by the later and better authorities. The limit of such reasonable time depends upon the circumstances of each case. *Hawley v. Cramer*, 4 Cow. 717."

—*O'Dell v. Rogers*, 44 W. 136, 183.

18. Service of summons on infants must be strictly in compliance with the statute. See SERVICE.

—*Helms v. Chadbourne*, 45 W. 60, 69.

19. "As we understand, the law is well settled that an infant who has purchased personal property, and given a mortgage upon it to secure the purchase money, or a part of it, cannot avoid the mortgage under the plea of infancy, without rendering void the sale and losing his rights under it. *Heath v. West*, 28 N. H. 101; *Curtiss v. McDougal*, 26 O. St. 66."

20. "The authorities" "certainly show that an infant may avoid a mortgage given for a precedent debt; but manifestly such a mortgage stands upon very different ground from one given for the purchase money".

21. The plaintiff, "as a surety", "paid a part of the purchase money of the horses. The chattel mortgage was given to him by the minor for the money so paid. It seems to us that the indebtedness so contracted should be treated as it really was, as a debt for a part of the purchase money". "The plaintiff, therefore, is entitled to hold the property as against the defendant, who purchased of the infant with full knowledge of the existence of the mortgage", and took "the property subject to the mortgage".
—*Knaggs v. Green*, 48 W. 601, 604.

22. An infant emancipated by an insolvent father may acquire property and make a gift thereof to his infant sister. See PARENT AND CHILD.
—*Wambold by Gdn. v. Vick*, 50 W. 456, 458.

23. "It is a general rule of law that an action concerning the estate of a minor must be by or against the minor, who, under our statute (Secs. 2613-14), must be represented by guardian ad litem. But to this rule there are many exceptions. 3 Wait's Actions and Defenses, 573.

24. We understand one of these exceptions is where the action is upon an express contract made by the guardian for the benefit of the ward. Such an action may, it seems, be brought by or against the guardian personally. *Thomas v. Bennett*, 56 Barb., 197; *Stevenson v. Bruce*, 10 Ind. 397".

25. In this case, the action is entitled in the name of the ward, "by her guardian B.", but in the complaint the guardian being referred to as "the plaintiff", it is held, "looking at the substance rather than form, we must hold that the guardian, and not the minor, is one of the plaintiffs". And, he having made the contract sued upon, is held properly a party.

26. By the common law, an infant was represented by a "next friend". See WORDS AND PHRASES.
—*McKinney v. Jones*, 55 W. 39, 44.

27. As to custody of infant and construction of "suitable" in favor of the infant. See PARENT AND CHILD.

—*Sheers v. Stein*, 75 W., 44, 51.

28. An infant is held incapable "to estop himself by a fraudulent declaration of his age", in entering a marriage contract. See ESTOPPEL.
—*Eliot v. Eliot*, 81 W., 295, 299.

29. A child seven years of age is held to have the same rights as an adult traveler on highway, and "both for travel and for play," and "the same principles of law" govern. "The only difference is, she ought not to be held to as high a degree of care and responsibility. (Cases)".
—*Reed v. City of Madison*, 83 W., 171, 176.

30. "The presumption of the common law is that a child under fourteen years of age is incapable of committing a crime; but, as applied

to a child over seven years of age, this presumption may be rebutted by evidence. 1 Bish. Crim. Law (6th ed.) sec. 368.

31. The rule recognizes the immaturity of children of such tender years, their lack of judgment and will and concentration of purpose, the existence of which conditions all experience has proved, and fixes the age when the presumption of capacity arises at fourteen years'.

—*Molaske v. Ohio Coal Co.*, 86 W., 220, 226.

32. "It seems to be the settled law that, after four years of age, a child is not incompetent to testify as a witness by reason of any rule of law which excludes him.

33. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court by examination of the child in court.

34. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its discretion". The testimony of a child five years and five months old at the time of trial, as to occurrences when four years and nine months old, with some corroboration, held to sustain a conviction.

—*State v. Juneau*, 88 W. 180, 182.

35. Custody of neglected infant by county judge, and guardian appointed by the circuit court. See CUSTODY AND COMMITMENT.

—*In re Gdnsp. of Klein*, 95 W., 246, 249.

36. "An infant is bound by implied contract to pay reasonably for necessities furnished him".

37. But he is not "liable upon an executory contract to furnish him necessities, as has been uniformly held. *Gregory v. Lee*, 64 Conn. 407.

38. No liability can be created by an infant for necessities by express contract. His liability therefore is wholly a creation of law. (Citation)".

39. "Ordinarily an infant's executed contract is not absolutely void. It is only voidable.

40. He cannot repudiate it and successfully invoke judicial remedies to restore him to his former position till he shall have, so far as he reasonably can, made or offered to make restitution. (Citations)".

41. Where an infant paid for a "scholarship", and sought to recover, "making known his willingness to return the scholarship", the defendant indicating an intention "to retain the money", "that waived any formal tender of the paper. *Potter v. Taggart*, 54 W. 395 (See RESCIS-
SION OF CONTRACT).

42. In such circumstances, of course, it is necessary that restoration should be made upon the trial as a condition of judgment (ib.)", which "was substantially done" by delivery into court at the trial and leaving it there.

—*Jones v. Valentines' Sch. of T.*, 122 W. 318, 320.

43. In *Jones v. Valentines' School*, 122 W., supra, "this court there held that when an infant had contracted in writing for a course of instruction in a school, but had concluded not to take the course and had offered to return what he had received under the contract and to terminate the agreement, no ground of liability existed against him.

44. This conclusion went upon the well-recognized principle that an infant is not liable upon either an executory or an express contract even for necessities:

45. Whatever liability attaches therefor is one wholly created by law, and can only arise when necessities have actually been furnished to him". Followed here.

46. "It would follow that the father also owned nothing" in contesting payment of sums due on such agreement.

47. And, also, the father's written guarantee is held void because it fails "to express the consideration". *Com. Nat. Bank*, 107 W., 574.

—*International T. Co. v. McKone*, 133 W., 200, 203.

48. Where "if he were an adult his laches after service of the summons would justify the refusal to grant relief", on an application to vacate a default judgment,

49. Such order of refusal is reversed in case of a minor defendant who was not but "should be represented by a guardian ad litem".

50. "The contract of a minor, other than for necessities, is either void or voidable at his option, exercised within a reasonable time after his coming of age",

51. "And restoring the former situation as far as he is reasonably capable of doing so".

52. But, "in making a contract beneficial to himself", a minor may "preclude himself, by equitable estoppel, from subsequently avoiding it on the ground of infancy", in case of "actual fraud" by "express representation". (Many cases).

53. This "forms an exception" and "is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion",

54. And does not extend to cases where "by mere conduct or silence when he ought to speak".

55. "A minor cannot, unless in some extreme cases", "even by actual fraud, estop himself from pleading his minority to avoid a contract which is not beneficial to him;

56. As in case of his becoming a mere surety or accommodation maker of a promissory note", as here.

57. Where there is jurisdiction "by proper service", "the judgment is proof against collateral attack", and "is not void", though the minor "is not represented by a guardian ad litem".

58. "It can only be avoided by appeal for error, where the minority appears of record,

59. Or otherwise by motion or other direct proceeding in the action seasonably resorted to”.

60. But such default judgments cannot “always be set aside either during disability or after it has been removed.

61. In case, notwithstanding the irregularity, the minor suffered no substantial injustice, relief is not, necessarily, grantable”.

—*Grauman, M. & C. Co. v. Krienitz*, 142 W. 556, 560.

62. “The rule is well settled that a minor is responsible for compensatory damages resulting from his torts in the same manner as an adult.” (Cases).

63. “Infants may be guilty of actionable negligence, and even though the defendant was engaged in a perfectly lawful occupation he may have conducted himself so negligently as to make himself liable for damages resulting from such negligence”.

64. “A child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child. (Citations)”.

—*Briese v. Maechtle*, 146 W., 89, 90.

65. The provision, sec. 2394-7, subd. 2, ‘for the purposes of’ sec. 2394-8, under the workmen’s compensation act, ch. 50, L. 1911, “which declares that a minor who is legally entitled to work shall have the same power of contracting for service as an adult”, is held valid, and a minor “becomes for the purposes of the act an adult, or at least on the same plane”.

—*Borgnis v. Falk Co.*, 147 W. 327, 364.

66. As to infants in administration proceedings, it is held that parents “had no authority to bind the minors directly or through their general guardians”, they being represented “by their guardian ad litem”,—the point being as to exorbitant and erroneously allowed attorneys and guardian ad litem fees.

67. “The doctrine of estoppel, in the absence of bad faith, as well as the doctrine of waiver, does not apply to such persons. (Citations)”.

See also GUARDIAN AD LITEM. PROBATE OF WILL.

—*Will of Rice*, 150 W. 401, 468-9.

68. “The general rule respecting necessities is that they must be such as to supply the personal needs of the infant. *Tupper v. Cadwell*, 12 Met. 559”.

69. “The question here is whether a valid contract creating the relation of master and servant between the infant and his alleged servant can be made. We think it clear that it cannot”.

—*Covault v. Nevitt*, 157 W. 113, 116.

70. Where an infant "disaffirmed the contract", the guarantor was held nevertheless bound. See also GUARANTY.

—*International T. Co. v. Mabbott*, 159 W. 423, 425.

71. "The Industrial Commission is not a court", but "an administrative body merely", and "a guardian is" held not "jurisdictionally essential to proceedings in behalf of a minor by such a body", nor is there a "statute requiring it".

—*Menomonie B. S. L. Co. v. Ind. Com.*, 162 W. 344, 347.

72. Where an infant, under sixteen, without a statutory permit, was employed on representation of the infant and his father that he was past sixteen years of age, his appearance also so indicating, and upon injury a settlement was effected under the industrial act, and a release given by the guardian,—in an action for damages, it is held:

73. That not being "legally employed", "the provisions of the Workmen's Compensation Law (Secs. 2394-1 to 2394-31) do not govern the rights of the parties";

74. Hence the employer "defendant is liable in damages," being "guilty of a misdemeanor" under sec. 1728h, for violation of sec. 1728a, in employment without permit;

75. That "the defense of contributory negligence is not available", the violation being a criminal offence;

76. That plaintiff is not "estopped" "by misrepresenting his age", as "the object" "of sec. 1728a, is to conserve the health and morals of children in the interest of the general welfare",

77. And the rules of *Grauman M. & C. Co. v. Krienitz*, 142 W. supra, here "necessarily fail because the employment of the plaintiff in violation of the law is obviously not a transaction which can in any light be considered beneficial to the minor".

78. That the guardian's release being "based on the ground that the" claim was "controlled by" "the Workmen's Compensation Law", and not one for "violation of the law", is ineffective;

79. "Furthermore", "it is not binding on plaintiff because it was not approved by the county court as is required by sec. 3982." Recovery sustained.

—*Stetz v. F. Mayer B. & S. Co.*, 163 W. 151, 155.

INFANTS' SALE OF REALTY.

See also INCOMPETENTS' SALE OF REALTY. SALE OF REALTY.

Bond: in summary sale, 5.
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Not affect, sec. 3919, 12.

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Binds the ward, 4.

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Informal examination, 3.

Waiver; not in sec. 3919, 12.

1. As to notice not being necessary to bind the ward where “the guardian represents his ward and acts for him”, in proceedings for the public sale of ward’s realty. See *INCOMPETENTS’ SALE OF REALTY*.

—*Mohr v. Porter*, 51 W., 487, 497.

2. Under the provisions (sec. 3503, et al) for a summary sale of infants’ real estate, a petition signed by the general guardian and married minor ward, setting forth that the ward’s “income was not sufficient for her maintenance, and that it was necessary to sell the lands, and that her interest required and would be substantially promoted by the sale thereof”, but which did “not show that the premises were exposed to waste or dilapidation, or were unproductive, or that the infant was indebted”, is held “sufficient to give jurisdiction”, and “the mere fact of her marriage” was not “a conclusive presumption that the facts stated were untrue”.

3. As the statute provides that “the court or judge ‘may proceed in a summary manner to inquire into the merits’, and if, from such examination, it ‘satisfactorily appears’” necessary and proper that “the sale shall be ordered”, “it dispenses with oral examination and cross examination, and allows affidavits, inspection and other methods of proof, whereby the court or judge may quickly and directly come to a satisfactory conclusion”.

4. In this case, three months after the sale, on application by a guardian ad litem, appointed for that purpose, and of the ward, stating that the sale was unauthorized and void, the circuit court vacated the proceedings, which order was reversed, the court, quoting from *Re Haney*, 14 W. 423, saying,—“If both guardians (general and special) and the court itself could not so represent the infant, in proceedings taken entirely in his own behalf, as to bind him, it is difficult to see how an infant can ever be so represented as to be bound”. p. 678.

—*Shafer v. Luke*, 51 W. 669, 673

5. In infant’s sale of realty (sec. 3503 et al) in case of a defective bond, it is held that “the jurisdiction of the court to grant the license to sell” does not depend “upon the giving of the bond required by the statute”, but that “the fair implication of the statute is the reverse of that”.

6. In this case the general guardian was also appointed special guardian to make the sale, and such appointment is inferentially approved.

—*McKinney v. Jones*, 55 W. 39, 47.

7. The interest of infants, under section 1166, providing for the redemption, of minors' lands sold for taxes, "at any time before such minors come of age, and during one year thereafter", includes "their moral right to become the absolute owners of the fee".

—*Karr v. Washburn*, 56 W. 303, 307.

8. In minor wards' public sale of realty, where a guardian's bond, under sec. 4004, described realty to be sold, as "all the real estate", but failed to describe the realty sold, such defect is held "fatal to the validity of the sale".

9. "There is nothing in the bond to show that the license of sale included" the lands sold, and "the obligation of the surety is strictissimi juris and nothing can be taken against him by intendment or inference. *State v. McFetridge*, 84 W., 473, and cases their cited."

10. The effect of the failure to give the bond in question is clearly indicated in sec. 3919, the plain construction of which "is that, after confirmation of a sale, the same shall be valid as to a bona fide purchaser if there was a legal license, bond, oath, notice of sale, and sale pursuant to the notice, even though irregularities in other particulars may have intervened;

11. But that, failing either of these specific requirements, the sale is invalid, just as it would have been had the statute not been enacted."

12. "The reason of the rule adopted in *Mohr v. Porter*, 51 W., supra, does not extend to defects of procedure in the matters specified in sec. 3919," and "none of those proceedings can be waived by the guardian so as to bind the ward by such waiver, and the latter will always be heard to allege that any of them had been omitted. The *Mohr* cases, above cited, hold nothing to the contrary."

—*Weld v. Johnson Mfg. Co.*, 84 W. 537, 539.

13. "Upon application of the infant for a sale of the land", "after judgment assigning the estate", "the county court could decide whether the infant was the owner of the land sought to be sold for its benefit.

14. In making this decision it must ascertain and decide upon the meaning of the will, at least to this extent.

15. But that court did not have, upon such application the adversary parties before it," as "the doubt as to title arose" "after such assignment." "Neither is the county court authorized to bring in such adversary parties upon such an application.

16. It was therefore proper for the county court to require and for the plaintiff to begin an independent action in the circuit court where all adverse claimants could be made parties. *Gianella v. Bigelow*, 96 W. 185 (See CONCURRENT JURISDICTION). See also CONSTRUCTION OF WILLS.

—*Rowley v. Rowley*, 143 W. 325, 327.

INHERITANCE TAXES.

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1. "A succession tax" "is essentially a tax upon the transmission of estates by devise, bequest, or descent, and not, properly speaking, a tax

upon the property constituting the estate before the same is thus transmitted”.

2. “A succession tax would necessarily be imposed upon the respective parties” succeeding to the residue of the estate.

—*State ex rel Sanderson v. Mann* 76 W. 469, 477.

3. While not determining whether the right to transmit property is but a mere privilege and subject to legislative control, it is held, “that reasonable succession taxes are unobjectionable, provided no constitutional inhibition be violated”.

4. As “recognized in the Sanderson case”, supra, “a succession tax is a tax on the privilege of receiving property, and not a tax upon property”. *Magoun v. Ill. T. & S. Bank*, 170 U. S., 283.

5. Under sec. 1, art. 8, and sec. 1, art. 1, Wis. Const., and the 14th Amendment, U. S. Const., there may be classification “founded upon real differences, affording rational grounds for a distinction”, and there may be a reasonable exemption.

6. “It is well settled that there may justly be classification between lineal descendants, collateral relatives and strangers”; and it may be “a progressive law”, as to different rates on different amounts.

7. “But while classification is proper, there must always be uniformity within the class”, and ch. 355, L. 1899, is held unconstitutional because “unlawful discrimination necessarily results between beneficiaries in the same class”;

8. But “the exemption of all estates under \$10,000 in value” cannot be said to be unreasonable. —*Black v. State*, 113 W. 205, 216.

9. “There is nothing in the statutes (ch. 44, L. 1903, secs. 1087-1, et al, Inheritance Tax Act) authorizing the county court, whether acting as a judicial tribunal or as an appraiser, to compel a third party” “to produce his or its private books, papers, and documents for inspection, and certainly the county court has no such power in the absence of statutory authority”.

10. So held, as to a corporation in which decedent was a stock holder, in a proceeding to determine the value of decedent’s stock.

—*State ex rel Pabst B. Co. v. Carpenter*, 129 W. 180, 189.

11. “The right to take property by inheritance or by will is a natural right protected by the constitution, which cannot be wholly taken away or substantially impaired by the legislature”. So held,

12. Notwithstanding “that the contrary proposition has been stated by the great majority of the courts of this country; including the supreme court of the United States”. (Cases).

13. “Inheritance or succession taxes are very ancient and are said to have had their origin in the Roman law.

14. They have long been in force in the European States, and in England, and her colonies, where they are known as ‘death duties’.

15. They may be fully justified under the power of regulation and taxation of transfers of property”.

16. “A government may levy a tax upon transfers of land or upon business transactions”, and “succession or inheritance taxes may well be sustained upon the same principle; not upon the power to prohibit, but upon the power to reasonably regulate and tax,” “transfers of property”.

17. “Sec. 1, of art. 8,” of the state constitution, as to uniformity of taxation, “is a section governing the taxation of property alone, and not intended to prohibit the taxation of privileges or occupations”.

18. “Taxation of privileges and occupations manifestly cannot be uniform in the sense in which property taxation may be uniform.”

19. As to such “excise taxes” on “occupations, privileges, or property transfers”, “proper classification may be made and a different rate applied to each class. (Citations)”.

20. The Black Case, 113 W. supra, as to classification, exemption, and the progressive feature, is approved and affirmed, and ch. 44, L. 1903 (secs. 1087-1, et al.), is sustained and held constitutional.

21. The county “court, as an incident in the settlement of the estate, simply determines, in a judicial way, certain facts necessary to be ascertained to determine” the tax, and “these duties seem to us as judicial in their character, and very properly entrusted to the county court”.

—*Nunnemacher v. State*, 129 W. 190, 197.

22. “The order of the county court” “fixing the amount of the tax and assessing the same against the estate is” held not “res adjudicata on the question” because of failure to appeal therefrom.

23. While the county court, as to inheritance tax matters, which “are closely connected with the settlement of the estate”, “acts upon them in a judicial manner” (*Nunnemacher v. State*, 129 W. supra),

24. “Still it seems plain that both these acts are really but steps in the enforcement of a tax law of the state rather than judgments in judicial controversies”, “and hence” the plaintiff can properly “prosecute this independent action” to recover payments made under protest.

25. After deciding “to thoroughly re-examine the question and review the former holding” in the *Nnuemacher Case*, supra, “the constitutionality of the inheritance tax law (Ch. 44, L., 1903, secs. 1087-1, et al)” is sustained; and “the points there decided” “now reaffirmed” and “recapitulated”.

26. Specifically, it is held that any apparent failure in secs. 2 and 3 (Secs. 1087-2 and 1087-3) to provide for the taxation “of the first \$25,000 in an estate exceeding that sum”, is provided for by “the language of other sections of the act”, particularly “sec. 4 (sec. 1087-4), which provides for exemptions”, “in all estates”, and also “the first section of the act is quite conclusive” where “the tax is imposed upon any transfer of any property except the exemptions”.

27. While “inheritance taxes are not taxes levied upon property”,

"but are excise taxes levied upon the transfer of property, or, as it is sometimes said, upon the transaction", and,

28. Though "the right to inherit or devise property" is "a natural right" not to "be entirely abrogated",

29. Yet, it "does not follow" that "an inheritance tax must logically be held to be a tax upon a property right and subject to the provision that it must be absolutely uniform."

—*Beals v. State*, 139 W. 544, 551.

30. Reciting questions decided, and approving the *Nunnemacher* and *Beals* cases, *supra*, it is said, that "the provisions of the law are in substance those of the New York transfer tax act;

31. Hence, so far as applicable, the decisions of the courts of that state construing the law are to be resorted to for and in construing the one in question".

32. The "purpose and object" of the law is "that the tax shall be imposed on the transfer at the time of the death of the decedent,

33. And rest as a lien on the property so transferred until paid".

34. The provision as to cases where by reason of contingencies the tax cannot "be ascertained at the time of transfer", "does not operate to postpone the imposition of the tax", but "it operates to postpone payment to the time when it is ascertainable, namely, when the contingency happens" and possession obtained.

35. "Aside from this exception, all taxes are due and payable at the time of the transfer and then accrue."

36. The provisions for discount and interest are upheld as reasonable.

37. The payment of taxes by "the present owners of defeasible estates" is justified, "because provision for re-imbursing them is made".

38. "The law provides a means of calculating the value of the interest of the widow" for "annual payments", and a charge for "maintenance" of a child E. to her twenty-first birthday, "and hence the fair market value of the remainder of the estate and other interests are ascertainable".

39. The words 'in contemplation of death', are discussed, and defined as arising "from such a bodily or mental condition as prompts" disposition of property. Applied here to such transfer about six months before the decease. (Amdt. subsequently, of subd. 3, sec. 1087-1, by ch. 643, L. 1913, provides as to transfers "made within six years prior to the death".)

40. A physician's "death certificate" is held "properly admitted as prima facie evidence of the material facts stated therein".

41. "The facts and circumstances regarding the business of the corporation and its properties, the progress, growth, and general financial results, furnish a basis for valuation" of the stock certificates.

42. Where "uncertainty existed as to when the tax was due and payable", and other tax questions were in doubt, which "accounts for the delays" in the "settlement of the estate", it is held, that,

43. "This litigation is necessary within the contemplation of the inheritance tax law", and "necessarily occasioned unavoidable delays" and "the penalty of ten per cent per annum should not have been imposed". —*State v. Pabst*, 139 W. 561, 583

44. Where decedent had "stocks, bonds, notes" and other securities deposited with a trust company in Chicago at the time of decease, the same never having been in this state, and taxes and inheritance tax having been paid thereon in Illinois,

45. And he had also transferred such and other property in trust to such trust company, but "reserved and enjoyed a life estate in the property transferred", and also "the right to" "control", "and to revoke the trust",—he being a resident here, all such property was held taxable under the inheritance tax act, sec. 1087-1.

46. "This statute was borrowed from New York; therefore the judicial construction given it there is significant in interpreting it here. (Cases)"

47. It was there "held that in respect to personal property not within the state at the time of the resident decedent's death the court will apply the maxim *Mobilia sequuntur personam*. (Cases)."

48. The effect of this rule is to make the legal situs of the property at the domicile of the decedent".

49. We think under the authorities and the established facts in this case that the situs of the property covered by the trust agreement was in the state of Wisconsin", "and was subject to the Wisconsin inheritance tax. (Many cases)".

50. And the trust transfer, having been made several years before decease, the intestate having "locomotor ataxia", it is held "that the transfer was made 'in contemplation of death, within the meaning of the law (*State v. Pabst*, 139 W. *supra*),

51. And was also 'intended to take effect in possession or enjoyment at or after such death'. Sec. 1087-1, subd. 3; (N. Y. cases)". Trust agreement property, held taxable.

52. Held that a life "insurance policy assigned to the trust company", with the wife beneficiary named, and she not having "relinquished her rights therein",—"remained the property of" the wife, and was properly not taxed. (Subsequently, by ch. 253, L. 1915, subd. 7, sec. 1807-1 was created, making life insurance taxable).

53. (In affirming the decision in this case, April 10, 1916, on appeal to the supreme court of the United States it is said: "The supreme court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute", notwithstanding the fund was also taxed in Illinois.

53a. "As the states where the property is situated, if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance.

53b. Therefore the inheritance may be taxed at the place of domicile, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock. (Many cases)". *Bullen v. Wisconsin*, 240 U. S. 625, 631; s. c. 60 Law. Ed. 830, 835.)

—*Est. of Bullen*, 143 W. 512, 520.

54. Where "the deceased was eighty-six years old", "and a year and a half older when" he made large gifts to his daughter, and "he died at the age of ninety-two, being sound and active in mind and body until three months before his death", such gifts and others prior to such "three months",—are held not taxable as not made in contemplation of death.

55. "The burden of proof was upon the plaintiff (the state) to show that the gifts were made in contemplation of death".

56. The facts that (1) "the gifts were substantially in accordance with the will of deceased" then existing, (2) that "they included more than two-thirds of a large estate", and (3) that "he had surrendered the management of his property and business",—"are not very significant", being in effect natural proceedings.

57. "A gift made to a child by an aged parent sound in mind and body is" not "subject to an inheritance tax because the donor was advanced in years when the gift was made".

58. "An act is not done in contemplation of death when the feeling that dissolution is approaching is absent and is not the cause which impels or prompts the doing of the act". *State v. Pabst*, 139 W. supra, approvingly quoted. (Decided before the amdt. of ch. 643, L. 1913, noted in the *Pabst* case, supra, par. 39.).

—*State v. Thompson*, 154 W. 320, 325.

59. An annuity under a will is subject to inheritance tax, and when valued and such tax paid, is exempt from income tax. See also TAXATION OF ESTATES. —*State ex rel Kempsmith v. Widule*, 161 W. 389, 391.

60. The "allowance to the widow for her support and that of the children pending the administration of the estate, under subd. 2 of sec. 3935", "is a transaction upon which the legislature has imposed no inheritance tax on the broad ground that it is neither an inheritance nor a gift from the deceased made in contemplation of death".

61. "The rule",—"that weight should be given to" the "ruling of the department (tax commission) in construing the statute",—

62. "Does not apply where there is no ambiguity in the statute but the provisions are clear".

63. And it "does not apply to the erroneous rulings of inferior tribunals so as to control or affect the decision of the superior tribunal having by law the power and duty to review directly such rulings. *Lawrence Univ. v. Outagamie Co.*, 150 W. 244".

—*Smith v. State*, 161 W. 588, 589.

64. "The inheritance tax, being a tax upon the transfer", "may be properly levied upon a transfer which becomes effective by appointment made after the passage of the law under a power previously created, for the reason that the transfer does not become complete until the appointment is made and at that time the law is in effect. (Cases)". Sec. 1087-1.

65. "The principle just stated applies to a case where, as here, the appointment must be made from a class, as well as to a case where the power is a general one. (Cases).

66. The provision that a transfer resulting from the failure of the donee of the power to appoint shall be deemed to constitute a taxable transfer equally with a transfer resulting from an appointment, is valid because the failure to act equally affects the course of succession, and until such failure is complete the succession is not fully determined. *Burnham v. Treasurer*, 212 Mass. 165.

67. The proviso in sub. (4) of sec. 1087-1, excepting estates vested before the act and contingent interests created by will before the act, does not apply to estates or property created by appointment under sub. (5), because it seems clear that by sub. (5) the legislature intended to deal separately with property or estates created by appointment and to cover that subject completely,

68. Hence that an exception contained in another subsection which has ample scope for operation elsewhere is not to be imported into it".

—*Montague v. State*, 163 W. 58, 61.

INJUNCTION.

Counsel fees, recoverable, 3.
Dissolve; on reference, 3.

Granted without notice, 1.
Issue on bill filed only, 2.

1. "To sustain an injunction granted without notice, the essential allegations must be positively stated in the verified complaint, or they must be otherwise proved". However, in case of notice, "if the allegations on information and belief are not denied, they are taken as true".

—*Dinehart v. Town of LaFayette*, 19 W. 677, 688.

2. "The general rule in courts of equity is, that injunctions can issue only upon bill filed, with proper prayer for the writ". Absolute under the code.

—*Vliet v. Sherwood*, 37 W. 165.

3. Following the rule of *Rose v. Post*, 56 N. Y., 603, it is held that "counsel fees for services rendered on the motion to dissolve the injunction, and also on the reference", are properly recoverable upon the reference for damages. Contra: U. S. Cases.

—*Wis. M. & F. Bank v. Durner*, 114 W., 369, 373.

INSANE PERSONS.

See also INCOMPETENTS. INCOMPETENTS' SALE OF REALTY. SALE OF REALTY. TESTAMENTARY CAPACITY.

Crime Commission:

- Insanity at the trial; jury, 37.
- Not sufficient evidence, 26.
- Suicide commission, 27, 28, 30.
- Also attempted murder, 29.
- Not presumption, 27.

Damages: against petitioners, 48.

- Acted recklessly, wantonly, 55.
- Advice of counsel, defense, 54.
- Discharge by county court, 53.
- Private sanitarium liable, 57, 58.
- Restrain and guard, 57.

Deed, voidable, not void, 44.

Contra: English courts, 44.

Defense must be set up, 5.

Dementia is or may be, 39.

Evidence:

- Adjudication; effect of, 43.
- Comprehension; widow, 11.
- Guardianship proceedings, 12.

Fraud practiced on:

- Foreclosure sale; set aside, 4.
- Knowledge of insanity, 4.
- Proceedings correct in form, 2.
- Restore his property, 3.

Guardian ad litem for, 15.

Insanity indicia:

- Do not reason on the subject, 6.
- Impossible to convince, 7.
- Incapable of making will, 13.
- Limitation statute, 13.
- Indicia; yet be sane, 9.
- Opinion on false reason, 8.
- Subject to sudden changes, 8.

Judgment by default:

- Excusable; set aside, 16.

Lucid interval, 1.

- Act itself is proof of, 32.

Lucid interval—continued

- Burden; party claiming, 1, 31.
- Conveyances held valid, 36.
- Established; burden shifts, 33.
- Little evidence overcome, 34.
- May bind himself in, 49.

Mental capacity:

- Delusion not influence, 24.
- Issue; sufficiency to act, 40.
- Particular subjects, 41.
- Capacity on others, 41.
- Reasonable ability judgment, 42.

Old-age insanity, 56.

Lucid intervals, 56.

Presumption: continuing, 1, 19.

After lucid interval, 33.

In favor of sanity, 25.

Not when intermittent, 20.

Private sanitarium, duty, 57.

Realty sale by guardian, 17.

Notice; not recognized, 18.

Service of process on, 14.

Settlement: by deceased, 10.

Admr. may avoid, 10.

Softening of brain, 38, 39.

Statutory definition, 39.

Support: by county, 45.

Circuit court, improper, 46.

When appropriate, 47.

County court jurisdiction, 45.

Homestead liable for, 50.

Payment on valid claim, 51.

Irregular proceeding, 52.

Test of insanity, 21.

Insane delusion, 21.

Language or acts, 22.

Partial insanity, 23.

Sane, act and talk foolishly, 35.

Unreasonable suspicions, 25.

1. "Lunacy being once established, the burden is on the party claiming through any act of the lunatic, to show that it was done in a lucid interval"; lunacy in this case being shown by testimony of ordinary witnesses, there being no adjudication.

—*Ripley v. Babcock*, 13 W. 425, 439.

2. "Proceedings, however sufficient and correct in form, which are taken for the clearly ascertained purpose of despoiling an insane person or lunatic of his property and estate, are fraudulent".

3. "The true and only ground upon which courts of law as well as equity interfere to protect and restore the property of insane persons, and such as are otherwise non compos mentis, is fraud".

4. "In equity the proceeding was fraudulent and the sale (on foreclosure by advertisement) will be set aside, whether the mortgagee knew of the mortgagor's insanity or not", as the sale was for less than half of the real value, and the parties "can be placed in statu quo".

—*Encking v. Simmons*, 28 W. 272, 280.

5. "We are inclined to hold, if the defendant intended to rely on the defense that he was insane when he entered into the contract with the plaintiff about advancing money for him, that he should have set this up in his answer", under the code. —*Whitman v. Lake*, 32 W. 189, 194.

6. "As a general rule the insane or partially insane do not reason upon the subjects of their hallucinations or delusions".

7. "Generally it is impossible to convince the insane of the absurdity of their delusions by any arguments or actual tests, however conclusive they may be to a person of sound mind."

8. "The really insane are usually subject to sudden changes from one delusion to another. True, this does not always happen, but where the patient is suffering under a settled, long continued delusion, there will seldom be any difficulty in ascertaining whether it is really an insane delusion, or merely an erroneous opinion based upon false reasoning or insufficient reasoning."

9. A testator may have numerous "alleged indicia of insanity", yet other circumstances may so counterbalance them, as to find him of sound mind, as here. See TESTAMENTARY CAPACITY.

—*Chafin Will Case*, 32 W. 557, 566.

10. The administrator in an action at law may show that a settlement made by his intestate was void or voidable by reason of the latter's incompetency. "If he was insane or non compos at that time, then it is very obvious that he could make no valid contract, and the settlement which he attempted to make would not be binding upon him or his administrator."

11. "There was no error in allowing Mrs. F. (the widow) to express her opinion as to whether her husband comprehended the facts of this settlement", she having been his constant attendant and giving reasons for her conclusion.

12. The guardianship proceedings were properly admissible on insanity as "evidence of that fact when this adjudication was made".

13. "If a person is so unsound of mind, or deranged in intellect, that he would be incapable of making a valid will, he should be considered 'insane' within the meaning and intent of the statute of limitations".

—*Burnham v. Mitchell*, 34 W. 117, 128.

14. Service of process was held proper "upon a person insane in fact, although not judicially declared to be insane".

15. "It was the duty of the court" to appoint a guardian ad litem "whenever it was made to appear that the defendant was insane and had interests in the action which required protection".

16. "A judgment by default", "was excusable neglect, if neglect at all", and will be set aside. —*Gerster v. Hilbert*, 38 W. 609, 612.

17. Defective petition in sale of realty by guardian, held valid. Notice, estoppel, and improvements in void sale, also considered. See INCOMPETENTS' SALE OF REALTY. —*Mohr v. Tulip*, 40 W. 66, 76.

18. Notice is not required in sale of real estate where the guardian makes the petition. See INCOMPETENTS' SALE OF REALTY. —*Mohr v. Porter*, 51 W. 487, 497.

19. In general, "when insanity is once proved to exist, it is presumed to exist until the presumption is overcome by contrary or repelling evidence".

20. "The rule does not apply to cases of occasional or intermittent insanity; but it does to all cases of habitual or apparently confirmed insanity, of whatever nature."

21. "Sir John Nicholl says that the true test of the absence or presence of insanity, is the absence or presence of delusion. Insane delusion is insanity, whether partial or general. *Dew v. Clark*, 3 Addams, 79".

22. "It is universally recognized that, except perhaps in cases of total loss of reason, insanity does not always exhibit itself in the language or acts of the insane". —*State v. Wilner*, 40 W. 304, 306.

23. On the testimony of a physician, that "there was no such thing as partial insanity; that a man was either sane or insane", it is said: "This may be true considered in the light of medical science, but it is not true in the law, as is apparent from the decisions of some of the most eminent and distinguished jurists who have adorned the bench in this country and in England.

24. For the testamentary dispositions of monomaniacs have often been sustained in spite of their mental disorder, where the insane delusion did not influence the mind of the testator in disposing of his property". See TESTAMENTARY CAPACITY. —*Will of Blakely*, 48 W. 294, 306.

25. "The legal presumption is in favor of sanity." "Unreasonable suspicions" are not necessarily an "insane delusion". See TESTAMENTARY CAPACITY. —*Will of E. W. Cole*, 49 W. 179, 182.

26. "It is undoubtedly the law that where the only evidence tending to prove insanity is the commission of a given crime, such act of itself is not sufficient to establish insanity.

27. The mere fact that a man commits suicide does not even raise a presumption of insanity at the time.

28. It is, however, a fact which, in connection with other evidence, becomes very pertinent to the issue.

29. Especially is this so where the suicide is immediately preceded by the murder or attempted murder of members of the suicide's family, and the destruction of his property without any apparent motive or even provocation.

30. The rule is elementary, and must exist from the very nature of the question to be determined".

—*Karow v. Continental Ins. Co.* 57, W. 56. 59.

31. It is held "under the rule applied in *Ripley v. Babcock*, 13 W. supra, that when lunacy is once established the burden is on the party claiming through any act of the lunatic, to show that it was done in a lucid interval".

32. "The character of the act of W. in making the deeds", in payment of meritorious obligations, "affords very strong evidence that he had not relapsed into insanity when he did so". "It seems to be well settled that, although the act itself may not be the 'strongest and best' proof, yet it is, or may be, strong proof of a lucid interval".

33. Where "a lucid interval a short time before is established by the evidence, the burden was thereby placed upon the plaintiff to show that he had again become insane".

34. While it appears that little evidence of insanity may overcome 'the presumption of a lucid interval', yet "it does not mean that any and every foolish or absurd remark of the person whose sanity is in issue will, if he has once been insane, demonstrate that he is still insane.

35. Sane people may and do talk foolishly and absurdly without impeachment of their sanity".

36. In this case, one who was several times insane, at times for years, and several times in the asylum, for months and years, who shortly before the execution of deeds was released from an asylum, and afterward again became insane, is held, on the evidence, to have "had sufficient mental ability to know what he was doing, and the nature of the act done", and that the conveyances were valid.

—*Wright v. Jackson*, 59 W. 569, 576.

37. In criminal cases, the accused has no right of trial, as to insanity at the trial, under sec. 4700, by jury. See JURY.

—*Crocker v. State*, 60 W. 553.

38. Where W., over seventy, was "afflicted with softening of brain", "his memory was nearly gone, and he was unfit to do any kind of business," and a physician "testified that he was demented, and gave facts" substantiating such statement, it is said:

39. "Dementia is or may be insanity. It is indisputable that by reason

of the loss of his mental faculties, W. was then entirely incapable of giving testimony in court or any coherent statement of past events. Clearly he was non compos mentis, within the medical signification of the term. Hence he was insane within the statutory definition: 'The words 'insane persons' shall be construed to include, every idiot non compos, lunatic, and distracted person'. Sec. 4971, subd. 7''. And W. was held insane within and under sec. 4069.

—*Whitney v. Traynor*, 74 W., 289, 293.

40. On the issue of insanity with reference to an exchange of benefit certificates, it is said: "The question was not whether he at some time had a delusion upon some subject, nor yet whether he always reasoned wisely or prudently, but, 'when capacity to do a certain act is in issue, the question is whether the alleged insane person had sufficient mental ability to know what he was doing and the nature of the act done'. *Burnham v. Mitchell*, 34 W. supra.

41. 'The law recognizes the fact that there may be derangement of mind as to particular subjects, and yet capacity to act on other subjects.

42. The proof which is necessary to invalidate a man's acts by reason of his insanity must show inability to exercise reasonable judgment in regard to such act'. *Busw. Insan.* 270''. See also EXPERT TESTIMONY.

—*Boorman v. N. W. M. R. Ass'n.* 90 W. 144, 148.

43. As to the rules governing the effect of the adjudication in evidence. See INCOMPETENTS.

—*Small v. Champeny*, 102 W. 61, 63.

44. "There is substantial harmony in the decisions of this country contrary to the law as held by the English courts, that the deed of an insane person (not under guardianship) is voidable, not void". So held.

—*French Lumbering Co. v. Theriault*, 107 W. 627, 644.

45. As sec. 604q makes "specific provision for the examination, settlement, and adjudication of" claims by the county for the support of insane persons under guardianship, it is held,

46. That the circuit court properly refused to entertain jurisdiction of an action for such purpose.

47. Sec. 600 "in no sense provides that this is an independent remedy by an action in the circuit court to the exclusion of the jurisdiction of the county court above pointed out. It prescribes how such a claim may be proceeded on for its collection whenever it is appropriate to proceed in the circuit court". See also CONCURRENT JURISDICTION.

—*Washington Co. v. Schrupp*, 139 W. 219, 222.

48. In an action for damages against petitioners, and others, who instituted "lunacy proceedings" against plaintiff, a verdict for plaintiff is set aside, "the facts and circumstances of which the defendants were informed" being "such as to justify the belief in the mind of a person of

reasonable intelligence and prudence that the plaintiff was mentally afflicted".

—*Scheunert v. Albers*, 140 W., 578.

49. "A person who, in general, is insane, may bind himself by contract made during a lucid interval rendering him capable of appreciating the nature of his acts and exercising judgment in respect thereto."

—*Am. G. Co. v. Kringel*, 156 W., 94, 96.

50. Under secs. 604q, it is held that the entire property, including homestead, is liable for the support and maintenance of an adjudged insane person, on a claim by the county therefor.

51. Where the homestead of an insane ward was sold by his guardian under license, and the entire proceeds paid to the county on a valid claim for such support in a state hospital,

52. The county was held entitled to retain it, and "the fact that the steps pointed out by statute as the proper mode for getting the money into the county treasury were not followed is not material".

—*Johnson v. Door Co.*, 158 W. 10, 17.

53. Where on due petition, appointment of two physicians, examination by them and report of sanity, "the proceeding was dismissed", such "discharge in the county court was prima facie evidence of want of probable cause", and "sufficient basis on which to predicate an action for malicious prosecution". (Cases).

54. The "advice of counsel" would "be a defense if honestly given on a full and fair statement of the facts within the knowledge of a party about to sign such a petition as was here signed".

55. A judgment for damages is upheld, though "the elements of ill will or of a wicked purpose" "probably were absent", where "it seems pretty clear from the evidence that they acted recklessly and wantonly in the matter".

—*Manz v. Klippel*, 158 W. 557, 560.

56. As to "old-age insanity", and probable absence of "lucid intervals". See TESTAMENTARY CAPACITY.

—*Est. of Bean*, 159 W. 67, 79.

57. "Doubtless it is incumbent on the defendant (private sanitarium) and its employees at all times during the treatment of nervous and insane patients to use such means to restrain and guard them as would seem reasonably sufficient to an ordinary prudent man under like circumstances to prevent" escape and injury to others,

58. "And for breach of that duty liability will arise, if such breach proximately causes injury to another. Univ. of L. v. Hammock, 127 Ky. 564". Evidence held insufficient.

—*Torrey v. Riverside Sanitarium*, 163 W. 71, 75.

INSANITY.

See INSANE PERSONS.

INSPECTION OF BOOKS AND PAPERS.

See DISCOVERY. WRITINGS.

INSURANCE.

Benefit of others, except wife:

Assured may dispose of, 23, 38, 50.

Will or otherwise, 2, 38.

Beneficiary dies before assured, 4, 46.

Assured may change, 16, 47.

Benefit certificate, 47.

By will to others, 46, 47.

No successor therein, 4, 15, 46.

Succession provided, 5.

Passes to administrator, 17.

No interest in premiums paid, 37.

Right expectancy; not absolute, 39.

Certificate; against by-law, 13.

Against charter, 14.

Change: incomplete, 9.

Executor; not as guardian, 20.

Same person; immaterial, 21.

Ineffective; notice defect, 19.

Named in will; not making, 9.

Residuary clause in will, 11.

Wife; not change or assign, 22.

Definition; life insurance, 27.

Pay during lifetime, 28.

As to wife; matured, 29, 40, 44.

Surplus to the assured, 30.

Subject to garnishment, 30.

Wife's interest in, 30.

"Friend" designation in will, 12.

Contrary to charter; takes, 14.

Contrary to by-laws; takes, 12, 13.

Manual transfer to fiancée, 25.

Effective; chose in action, 26.

Writings to protect company, 26.

"Mother," includes step-mother, 48.

Stepmother under "heirs," 49.

Payments during lifetime, 28, 30.

Property: proportions, 31.

Accounting by trustees, 31.

Other realty; dower interest, 34.

Widow's share on homestead, 32.

Her insurable interest, 33.

Several beneficiaries:

"Children;" not grandchildren, 18.

Surviving child takes all, 18.

"Family;" each equal share, 10.

Joint, the survivor taking, 7.

Widow and children; equally, 8.

Wife beneficiary:

Assignment by husb. and wife, 35.

Before and after 1891, 35, 36.

Divorce, not divest wife, 55.

Husband control before, 1891, 1, 2.

Not since ch. 376, L. 1891, 3, 50.

Matures in her life; hers, 44.

Unless contrary provision, 45.

Paid-up; after wife's death, 40.

As to law of 1891, 43.

Her sole property, 42.

Husband no claim on, 40.

Premiums, her behalf, 41.

Reserve right to change, 52.

Notice, held ineffectual, 54.

Vested, subject to divest, 53.

Sole and separate property, 22.

Not change or assign, 22.

Not reached by creditors, 23.

Not valid as to past policies, 24,

43, 51.

Unless right reserved, 52.

Surplus in lifetime to assured, 30.

Wife dies before insured, 4, 5.

Nevertheless vested in her, 6.

No successor therein, 4.

1. Prior to the statute of 1891, a husband could dispose of his life insurance by will or otherwise, he surviving his wife the beneficiary named. See HUSBAND AND WIFE.

—*Kerman v. Howard*, 23 W. 108, 111.

2. The doctrine "held in *Clark v. Durand*, 12 W. 223, and again in *Kerman v. Howard*, 23 W. supra, that a person who procures a policy of insurance on his own life for the benefit of another, and pays the

premium thereon, may dispose of it, by will or otherwise, to the exclusion of the beneficiary named in the policy", "must be adhered to by this court".

3. (By Amdt. of Ch. 376, L. 1891 to sec. 2347, this rule is now changed "respecting married women and their children, where there is no person named as beneficiary to take in case the mother does not survive to do so". *Ellison v. Straw*, 116 W. post).

—*Foster v. Gile*, 50 W. 603, 605.

4. The rule laid down in *Foster v. Gile*, 50 W. supra, and here upheld, "is that, unless the policy point out to whom the insurance money shall be paid in case the beneficiary died before the insured, the appointment of the beneficiary is revoked by his death. It was so held in analogy to the rules relating to lapsed legacies.

5. Had the words 'their guardians, exécutors, administrators or assigns', or equivalent words, been omitted from the clause of the policy naming the beneficiaries, the judgment would have been that the administrator of the insured was entitled to the money".

6. It was here held that section 2347, as to insurance for the benefit of a married woman, did not change the rule, and "would not, unless it vested in the original beneficiary S. G., the absolute right to the insurance money as her separate property, or estate". (But see Chapter 376, L. 1891, which subsequently so amended the statute, as here suggested, evidently excepting a married woman in such case, from the rule).

—*Given v. Wis. Odd. F. Ins. Co.*, 71 W. 547, 551.

7. A policy to two beneficiaries, held to be joint; the survivor taking. See JOINT TENANCY. —*Farr v. Trustees A. O. U. W.*, 83 W., 446, 452.

8. As to a life insurance policy, as to beneficiaries, "for the sole use of Maria P. and children of G. P.," being the widow and three children, it is held, "that, in the absence of any designation in the policy of inequality in the shares, all the beneficiaries share equally (cases)," the guardian of the children being chargeable for "three-fourths of the moneys." See also ACCOUNTS OF GUARDIANS.

—*Taylor v. Hill*, 86 W., 99, 105.

9. On application to change the beneficiary to such persons "as he should designate and name in his last will and testament", and the change being made, but no designation by will ever being effected, it is held that the same "remained inchoate and dependent", and on the same principle as in erasures and substitution in a will without re-attestation, was ineffectual, "as though the former certificate had never been returned and surrendered". *Will of Ladd*, 60 W. 193, 200 (See REVOCATION.

—*Grace v. N. W. Mut. Relief Ass'n*, 87 W. 562, 564.

10. In a benefit certificate payable to "the family" of the deceased, the proceeds were held to belong one-seventh to each, the widow and six children, including a child of the deceased by a former marriage.

11. "The great weight of authority, as of reason, is against the inference of any intent to change the already designated beneficiaries of life insurance by a mere residuary clause in a will." So held.

—*Hutson v. Jensen*, 110 W., 26, 37.

12. Where a benefit society issued a certificate of insurance, contrary to its by-laws, or even of its charter, as beneficiary, to the "friend whom he might designate in his last will", such named person by the will is held entitled to recover, by virtue of the certificate, and not under the will or the probate proceedings.

13. "In the absence of fraud the provisions of a certificate or policy of insurance will prevail over any mere by-law with which it may conflict", though the by-laws be expressly a part of the contract;

14. And as to the charter, "the defense of ultra vires cannot be used to defeat a claim against a corporation, unless the contract involved is wholly executory and there are no grounds of equitable estoppel in the way, or it is prohibited by statute or sound public policy". (Many cases). See also POWER.

—*Ledebuhr v. Wis. Trust Co.*, 112 W., 657, 662.

15. "The view that the beneficiary named in a policy, where there is no limitation over in case of the failure of that beneficiary to survive the assured, has a vested right to recover the insurance, which right descends as personal property to his personal representatives, is thoroughly well established in Wisconsin by a line of cases extending from *Foster v. Gile*, 50 W. 603, to *Alvord v. Luckenbach*, 106 W. 537,

16. Subject, it is true, to the contingency as a condition subsequent that the assured, who pays the premiums, may, with the consent of the insurer, change the beneficiary.

17. As a corollary, it would seem to follow that the vested right of action on the death of the beneficiary passes, not like real estate, directly to his heirs at law, but like other personalty, to his administrator or executor. *Foster v. Gile*, 50 W. 609".

18. And where the policy provided for payment to "children", and there was a child, then "neither grandchildren nor representatives of any deceased child should take".

—*Elgar v. Equitable L. A. Soc.*, 113 W. 90, 93.

19. Where a "designation of beneficiaries" for the balance of an insurance policy to minor sons, was ineffective because not "an assignment", and because "no notice thereof was given to the company till after" the insured's death, it is held,—

20. That the "appellant, as executor, is entitled to recover the"

balance "notwithstanding the payment thereof to him as guardian of the children".

21. "S. as guardian is a different person entirely from S. as executor. In the latter capacity he is neither the same party as is the former nor in privity with him. So we are unable to see how the doctrine of estoppel can help respondent".

—*Stoll v. Mutual Benefit L. I. Co.*, 115 W. 558, 564.

22. "The words 'be the sole and separate property of such married woman', and 'free from the control or disposition of her husband,' etc., were added to the statute (sec. 2347) by ch. 376, L. of 1891", and when a married woman is beneficiary, the assured cannot change such beneficiary without her consent, nor can her interest be assigned in any event.

23. Nor can such insurance be reached by her creditors or those of any other person. Sec. 2347 fully discussed and construed.

24. (But, "a vested property right, such as the right of selling, assigning, or willing a policy of insurance", cannot "be taken away from the husband by legislative act", and the attempt in ch. 376, L. 1891, so to do as to "all insurance on lives effected before" its passage" is invalid, "and the holding to the contrary in the Ellison case was withdrawn" in *Canterbury v. N. W. M. L. I. Co.*, 124 W. post. *Boehmer v. Kalk*, 155 W. post).
—*Ellison v. Straw*, 116 W. 207, 213.

25. A transfer manually of a policy of insurance to the fiancée of the insured, whose executors were named as beneficiaries, was held to be valid, the company having paid the money into court;

26. The provision in the policy as to transfer in writing, etc., "at most, is for the benefit and protection of the company, which it may assert as against the claimant of the proceeds of the policy, other than the beneficiary named therein. It does not, however, prevent the insured from transferring it as a chose in action". See also *GIFT*.

—*Opitz v. Karel*, 118 W., 527, 533.

27. "Life insurance is a promise to pay a certain sum upon the death of the assured. (Cases)."

28. When, however, a policy includes "a promise to repay a sum made up from a portion of the premiums and their earnings at a date certain in the lifetime of the assured, we have only a contract, such as a savings bank may as well make. *Uhlman v. New York L. I. Co.*, 109 N. Y. 421.

29. Whether such a fund, if payable to a married woman, is life insurance, within the terms of section 2347, and exempt from debts of either husband or wife, in absence of intent to defraud creditors, we need not decide, nor perhaps question, in this case. See *Talcott v. Field*, 34 Neb. 611".

30. But under a policy providing for payment of accumulated surplus to the insured, "without the consent of any other person named within

as beneficiary", the beneficiary being the wife, such surplus when payable "was nothing in the nature of life insurance, but, on the contrary," "an agreement to pay" the assured "a computable sum", and subject to garnishment.

—*Ellison v. Straw*, 119 W. 502, 508.

31. Where trustees, having had charge of the property, were to account to the widow "precisely" as though she had "made her election to take the interest in her husband's estate which belonged to her by law", and,

32. "As to the homestead in which plaintiff (widow) had a contingent interest as to the whole, and otherwise a dower interest, the entire expense of keeping up the insurance was charged to her". This was held error, and,

33. That her share of such expense was, "only the reasonable cost of protecting her insurable interest, which was limited to the value of her contingent and dower rights" (cases); and she was chargeable only "to such proportion of the total expense of insuring the property as the value of her interest then bore to the entire value".

34. And "as to other insurable real property than the homestead", the charge to her of "one-third of the expense thereof", was held error, and that "her insurable interest was limited "to the value of her life estate in one-third of the property, and, obviously," "that is the limit of credit allowance to the trustee in that regard".

—*Ludington v. Patton*, 121 W. 649, 655.

35. The assignment by husband and wife, of policies issued prior to 1891 on the husband's life, with the wife as beneficiary, her representatives, 'or assigns', was held valid,

36. And, it seems, "the assignability of such a policy", issued subsequently to the act of 1891, is also upheld by a divided court. (But see also *Ellison v. Straw*, 116 W. supra, and notation thereto).

—*Canterbury v. N. M. L. Ins. Co.*, 124 W. 169, 195.

37. It is held that beneficiaries named in a policy, being son and daughter, "have no interest whatever in the sums paid as premiums by the insured to secure a benefit to those entitled to the proceeds of the policy upon maturity."

38. "In this state the right of the insured to dispose of the policy by assignment, will, or gift, without the consent of the beneficiaries, has been recognized from the time of the decision in *Clark v. Durand*, 12 W., 223, to the present day. (Cases.)"

39. "While such a right (of beneficiaries) is a vested one it is in its nature a mere 'expectancy', which is subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured".

—*Slocum v. N. W. Nat. L. Ins. Co.*, 135 W., 288, 291.

40. In a paid-up policy on the husband's life, in which the wife is beneficiary, it is held that "the husband had no valid claim upon the policy or the proceeds after the death of his wife," by virtue of the policy,

41. For the reason, first, that as to the premiums, "the payments were made by her or on her behalf",

42. And, second, "that this paid-up policy had become the sole and separate property of" the wife, because "all the premiums had been paid",

43. And, third, because ch. 376, L. 1891, "applied to all insurance on life theretofore enacted", and made it the wife's 'sole' property. (But, in *Boehmer v. Kalk*, 155 W., post, it is said, that this third reason "was not necessary to the decision," of no force, and it is held that the law of 1891, was ineffective as to policies "which existed prior to the act".)

—*Perkinson v. Clarke*, 135 W., 584, 588.

44. While "under sec. 2347, as construed by this court in *Ellison v. Straw*, 116 W., and *Canterbury v. N. W. Mut. L. Ins. Co.*, 124 W., supra, if a married man takes out a policy" with his wife the beneficiary, "it is her property to the extent that in case of maturity of the contract during her lifetime the proceeds will belong to her",

45. Yet, where the policy provides that on surrender the 'beneficiary hereunder shall have no claim whatever upon said company', "the right to mature a claim for a surrender value is personal to respondent" husband.

—*Hilliard v. Wis. L. Ins. Co.*, 137 W., 208, 214.

46. Where the beneficiary in a benefit certificate of the M. W. A., predeceased the insured, and no other beneficiary was substituted, the disposition by will of the insured to nephews and nieces, not his heirs, is upheld, there being nothing in the contract "to indicate that the certificate holder is deprived of the right to dispose of the proceeds by will".

47. "The right to so dispose of the proceeds of an insurance contract has been recognized in the decisions of this court when the insured has paid the premiums and kept control of the contract". (Cases).

—*Armstrong v. Blanchard*, 150 W. 31, 37.

48. Under a benefit certificate of the Firemen's Relief Ass'n, it is held that "a mother who can be named includes a mother by affinity (stepmother here) who is a member of the family",

49. "Whether a mother by affinity and a member of the family, though not named, could take under the designation of 'heirs'", we "do not decide".

—*Jones v. Mangan*, 151 W., 215, 223.

50. While since ch. 376, L. 1891, amending sec. 2347, the rule that an insured who pays the premiums may dispose of and control the policy

without the consent of the beneficiary, has been changed as to policies in favor of a married woman.

51. Such act does not affect policies taken out prior to the act going into effect, the assured having "a vested property right". Cases, *supra*, discussed and distinguished as indicated.

—*Boehmer v. Kalk*, 155 W. 156, 162.

52. The points decided in cases *supra* as to married women are restated, and following *Hilliard v. Wis. L. Ins. Co.*, 137 W. *supra*, it is held, "that sec. 2347, should be held to permit the insured, where the right to change the beneficiary is reserved, to change the beneficiary though a married woman, in conformity with the terms of the reservation, but not otherwise."

—*Natl. L. Ins. Co. v. Brautigam*, 163 W. 270, 274.

53. "Under the provisions of sec. 2347, and the construction given it on the rehearing in *Natl. L. Ins. Co. v. Brautigam*, 163 W. *supra*, when the insured made his wife the beneficiary she took a vested interest in the policy, subject to be divested in the manner reserved in the policy contract and not otherwise".

54. Where the only reservation "was by written notice to the company", and "the insured sought to dispose of the policy by will", without other notice,—this is held ineffectual.

55. Since her "interest could be divested only in the manner reserved in the policy", "the policy would still belong to her because her interest therein had not been effectually divested" by reason of a "divorce" granted to her.

—*Christman v. Christman*, 163 W. 433, 434.

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1. "Legal interest may as well mean that which is legal by contract, as that which is legal in the absence of a contract. And where the context shows clearly that" the words "were used in the former sense they ought not to be construed in the latter".

—*Towslee v. Durkee*, 12 W. 480, 486.

2. "There is an implied agreement of the parties that the rate of interest fixed by the contract is presumed to be the one the parties intended should be paid so long as the money is held or detained by the borrower", and that such "interest should be charged on the debt after maturity, the same as before". The court so holds notwithstanding they state they "are aware that the case of *Brewster v. Wakeford*, 22 How. U. S." holds to the contrary "that after default the general statute should apply and reduce that rate".

—*Spencer v. Maxfield*, 16 W., 178, 180.

3. The rate in the contract is to continue until paid; so held on denial of motion for rehearing. —*Spencer v. Maxfield*, 16 W. 541.

4. On proof of a usage to pay ten per cent, the legal rate of seven per cent was allowed. See USAGE. —*Lamb v. Kraus*, 30 W., 94, 101.

5. "We shall only hold, as a rule governing this case and as a general rule, that an open, unliquidated demand for goods or services, or both, where no account has been rendered and no demand of payment made, does not carry interest".

6. "Where there is no agreement for interest, express or implied, it is allowed by law, as a rule, only by way of damages for breach of contract".

7. "Hence at common law, where no time of payment was fixed, a demand and refusal of payment was generally necessary to the recovery of interest.

8. And it was not allowed on unliquidated demands. This rule has been modified in some particulars".

9. "But the better rule sanctioned by modern authorities is, that in the absence of agreement for interest, an open, unliquidated demand for goods or services, does not carry interest".

—*Marsh v. Fraser*, 37 W. 149, 152.

10. Where on an allowance quantum meruit for services, interest was allowed only from the verdict, it is said:

11. "As between individuals, the better rule of law is, that when the right of the party to recover his compensation under the contract is doubtful, and is contested on reasonable grounds, and the amount due him requires to be adjusted by proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of the recovery, have been determined".

12. (However, in *Laycock v. Parker*, 103 W., post, the court, quoting the foregoing, says,—“we think, notwithstanding these two cases (*Shipman v. State*, here, and *State v. Warner*, 55 W. 271), that the great weight of authority is in favor of a rule substantially such as that adopted in New York”, that the allowance of interest “is extended to actions to recover damages for breach of contract, ‘if the means are accessible to the party sought to be charged of ascertaining the amount by computation or otherwise, to which the other party is entitled’,” quoting from *Mansfield v. N. Y. C. & H. Ry. Co.*, 114 N. Y. 331).

—*Shipman v. State*, 44 W. 458, 462.

13. "The interest is a mere incident to the debt," and a failure to pay it when due does not dishonor the note. See PROMISSORY NOTES.

—*Kelley v. Whitney*, 45 W. 110, 115.

14. In a suit on a bond "interest was properly allowed on the amount of moneys found to be due. Such amount being ascertainable by com-

putation, could scarcely be called unliquidated; but, if it could be, the rule that interest is not allowable on an unliquidated account for goods or services, is not applicable to this case. *Marsh v. Fraser*, 37 W. *supra*”.

—*School Dist. v. Dreutzer*, 51 W. 153, 156.

15. Interest on monthly balances of wages payable monthly, is allowed. See SERVICES. —*Butler v. Kirby*, 53 W. 188, 192.

16. In an action to recover the value of farming implements sold, it was held that “interest was properly allowed on the real value of the property sold and delivered, from the commencement of the suit;

17. And it makes no difference that such value had to be ascertained by evidence. 2 Sedg. on Dam. 173; *Vaughan v. Howe*, 20 W. 497”.

—*Gammon v. Abrams, Admr.*, 53 W. 323, 328.

18. On the allowance of a claim on a note bearing ten per cent interest, it bears only the legal rate of interest after such judgment, even as to a joint maker. See CLAIMS. —*Jameson v. Barber*, 56 W. 630, 632.

19. Rules for computing interest in guardians’ accounts, with annual rests. See ACCOUNTS OF GUARDIANS.

—*In re Gdnsp. of Thurston*, 57 W. 104, 109.

20. “Interest upon interest” is not favored, and “courts refused to enforce such a contract on grounds of public policy. *Mosher v. Chapin*, 12 W. 453”.

21. Yet “where it appears that the parties have adjusted their accounts, have agreed that interest due shall be turned into principal and draw interest, this court has adhered to the doctrine that such a transaction is not illegal or wrong. *Austin v. Bacon*, 28 W. 416”.

22. While “our statute declares that in the computation of interest upon any bond, note, or other agreement the interest shall not be compounded, nor shall interest thereon be construed to bear interest”;

23. “But this, we apprehend, does not prevent parties from making settlements of their mutual accounts which include compound interest. The case then stands on the footing of an executed contract”.

24. In stating accounts, the “rule has been adopted in this court”, as to interest when partial payments have been made, as stated in *Hill v. Durand*, 58 W. post.

25. “Under this rule no compound interest should be allowed. It is true, the plaintiff claims that he was to have interest on all his indebtedness at the rate of ten per cent computed annually.

26. But we are not disposed to enforce the agreement for compound interest further than it has been acted upon by the parties in their settlements”.

—*Case v. Fish*, 58 W. 56, 109.

27. “In *Connecticut v. Jackson*, 1 Johns. Ch. 17, the chancellor states the rule for computing interest as follows: ‘When partial payments

have been made, the payment is to apply in the first place to the discharge of the interest then due.

28. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due.

29. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and the interest is to be computed on the balance.

30. It will be seen that the court below in effect adopted this rule in stating the account, and we think it was correct. See *Green v. Wescott*, 13 W. 606; *Reed v. Jones*, 15 W. 41."

—*Hill v. Durand*, 58 W. 160, 169.

31. Where the damages exceed the penalty of a guardian's bond, and when interest commences. See BONDS.

—*Clark, Gdn. v. Wilkinson*, 59 W. 543.

32. On an unliquidated claim for services "resting in quantum meruit," "no interest could be recovered until from and after the commencement of the suit. *Marsh v. Fraser*, 37 W., supra," and other cases.

—*Tucker v. Grover*, 60 W. 240, 245.

33. On a ten-year note where "the interest was made payable annually, and if such interest was not paid when due it became a part of the principal, and drew the same rate of interest as the principal", and "on failure to pay interest when due, the principal to become due", it is held: "By the contract the mortgagees might avail themselves of the condition which made the principal due on failure to pay the interest, or they might let the note run on with compound interest".

—*Zwickey v. Haney*, 63 W. 464, 467.

34. "The principal debt having ceased to exist (being barred by the statute), the claim for interest accruing upon it thereafter cannot be maintained.

35. The interest is only an incident of the debt, and must necessarily fall with it".

—*Jones, Admr. v. Orton, Admr.*, 65 W. 9, 13.

36. Where a "claim for extra work" was presented by bill to defendant "and the latter promised to pay it the next Saturday", "the plaintiff was entitled to interest from that time".

—*Morawetz v. McGovern*, 68 W. 312, 316.

37. A "guardian should be charged with interest on the balance of the estate in his hands." See ACCOUNTS OF GUARDIAN.

—*Olsen v. Thompson*, 77 W., 666, 672.

38. A legacy is held to bear interest from the end of the year limited for its payment. See LEGACIES. —*Evans v. Foster*, 80 W., 509, 515.

39. "The claim was unliquidated. No demand was made nor account rendered until December, 1889. Interest did not begin to run until demand was made. *Marsh v. Fraser*, 37 W., supra; *Tucker v. Grover*, 60 W., supra. It does not appear by the evidence upon what exact day in December, 1889, the plaintiff's bill was rendered. Interest therefore, will be reckoned from January 1st, 1890." The judgment for reasonable value of services reckoning interest from "the time when the services were rendered", reversed. (Explained in *Laycock v. Parker*, 103 W., post; See rule in *Shipman v. State*, 44 W., supra).

—*Farr v. Semple*, 81 W. 230, 232.

40. Where interest on a claim quantum meruit for services was allowed from the date of the decease, instead of from the time of filing the claim, it is indicated that the latter date was the proper one, but that the question was not raised by a specific exception. See also SERVICES.

—*Estate of Kessler*, 87 W. 660, 668.

41. The rules of interest applicable to wards' funds stated and applied. See ACCOUNTS OF GUARDIANS.

—*Taylor v. Hill*, 87 W. 669, 671.

42. "On a contract which stipulates for interest, interest at the agreed rate, or, in the absence of an agreed rate, at the rate prescribed by the law at the date of the contract, will be the rate recoverable until the repayment of the principal sum. *Spencer v. Maxfield*, 16 W. supra."

43. "Where the contract is silent upon the subject", "the law assumes, for want of a more certain datum, that interest at the legal rate during the period through which the money has been withheld is a fair measure of such loss",—"the rate in force during the period, as varied by legislation". So held.

—*State v. Guenther*, 87 W. 673, 675.

44. In an action on an open running account, there was no interest claimed in the complaint, but there was evidence "that the goods were sold on sixty days' time", and a verdict was directed "with interest on the monthly balances"; held:

45. "No interest should have been allowed except from the time of the commencement of the action. There had been no demand for payment, and the statements of account sent by the plaintiff at regular intervals, and kept by the defendant, in which no interest was ever claimed, constituted accounts stated, binding on both parties, in the absence of fraud and mistake. *Cobb v. Arundell*, 26 W. 553; *Chandler v. People's S. Bank*, 61 Cal. 401".

—*Ryan Drug Co. v. Hvambsohl*, 92 W. 62, 63.

46. "This court has gone so far as to hold that interest coupons attached to a note or bond bear interest, upon default in payment when due. *Mills v. Jefferson*, 20 W. 50; *Cleveland v. Burnham*, 64 W. 361; *Nash v. Meggett*, 89 W. 493, 494. We certainly cannot extend the rule thus announced".

47. And where a mortgagee elected to declare the whole indebtedness due, upon a default in payment of two coupon notes, "we perceive no rule of law authorizing interest upon interest which subsequently matured".
—*Stubbings v. O'Connor*, 102 W. 352, 363.

48. "Anciently interest, called usury, was an abhorrence to the law, and a contract therefor was not only not enforceable, but, criminal. *Adrianee v. Brooks*, 13 Texas, 279, 281".

49. The statute of "New York about 1829, which is practically identical with our own existing statute (secs. 1688-9) originally adopted" in 1858, was theretofore adjudicated in *Van Rensselaer v. Jewett*, 2 N. Y. 135, and "the principle of this case has been reaffirmed in New York many times (many cases)",—

50. "And the rule in that state may be stated to be that interest is allowable upon a demand, the amount of which could be ascertained by computation,

51. Together with a reference to reasonably well-established market values, because such values in many cases are so nearly certain that it would be possible for the debtor to obtain some approximate knowledge of how much he was to pay;

52. Or, to quote from *Mansfield v. N. Y. Cent. & H. R. Co.*, 114 N. Y. 331, it is extended to actions to recover damages for breach of contract, "if the means are accessible to the party sought to be charged of ascertaining the amount, by computation or otherwise, to which the other party is entitled".

53. This general rule has received approval from many other courts as well. *Spalding v. Mason*, 161 U. S. 375, 396; *Kuhn v. McKay*, (Wyo.) 51 Pac. Rep. 205". "In Wisconsin, without perhaps so carefully laying down general rules, the court has in a large measure followed the lines of the New York decisions".

54. And after discussing many individual cases, and indicating disapproval of *Shipman v. State*, 44 W. supra, and *State v. Warner*, 55 W. 271, it is said: "We think, notwithstanding these two individual cases, that the great weight of authority is in favor of a rule substantially such as that adopted in New York as above stated.

55. The true principle, which is based on the sense of justice in the business community and on our statute, is that he who retains money which he ought to pay to another should be charged interest on it."

56. And interest is held chargeable not only on a contract price, but on extras for labor and material, "proved to have a reasonably certain

market value", and "from the time of such demand", "before the suit was commenced".

57. When stated in decisions that "interest on unliquidated (but liquidable) claims and open accounts should commence, to-wit, the commencement of the suit", it is indicated that this date "is only significant because in and of itself it constitutes a demand", and that a prior demand entitles interest therefrom. —*Laycock v. Parker*, 103 W. 161, 179-189.

58. Recoverable against sureties when the interest is recoverable against the principal, on a penalty bond. See BONDS.

—*Whereatt v. Ellis*, 103 W., 348, 352.

59. While "interest, as such, is recoverable" according to "the holding in a recent case of *Laycock v. Parker*, 103 W., supra, yet,

60. "There are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury.

61. In such cases interest is not allowed, as such, but simply as compensation for the delay, and in order that the plaintiff may be fully remunerated for his injury". So allowed in a breach of warranty in the sale of chattels. (Cases). (Followed in *Bagnall v. Milwaukee*, 156 W., 642, 649). —*J. I. Case Plow Works v. Niles & S. Co.*, 107 W. 9, 17.

62. Where "neither at the time of making such loan (of \$1,000) nor at any other time was there any agreement or understanding that the defendant would pay any interest thereon", interest was held not chargeable prior to demand for repayment. *Laycock v. Parker*, 103 W., supra.

—*Ehrlich v. Brucker*, 121 W., 495, 503.

63. "The right of the legislature to prescribe a maximum rate of interest for the forbearance, use, or loan of money, and to attach penalties for the violation of such provisions, has been recognized and exercised by governments from the time the relation of borrower and lender developed in the affairs of life".

64. Sec. 1691, as amended by Ch. 278, L. of 1905, providing treble damages, and making a misdemeanor, taking of usurious interest of more than ten per cent, held reasonable and constitutional.

—*State ex rel. Ornstone v. Cary*, 126 W. 135, 138.

65. Contract interest of ten per cent. on matured principal and interest payments, was allowed, except to the extent that it exceeded "ten per cent. per annum simple interest permitted by sec. 1689". See also MORTGAGES.

—*Ogden v. Bradshaw*, 161 W. 49, 54.

66. As to interest on legacies long delayed in payment. See LEGACIES.

—*Will of Brandon*, 164 W. 387, 391.

INTERPLEADER.

Bill of; defined, 1.

Equity of bill, 2.

Executor, will construction, 4.

Champion of legatees, 6.

Distinction explained, 5.

Executor, etc.—continued

Nature of interpleader, 4.

Filing not encouraged, 3.

Notice to co-defendants, 6.

1. "A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt or duty; but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.

2. The equity is, that the conflicting claimants should litigate the matter among themselves without involving the stakeholder in their dispute. *Adams' Eq. 202*".

3. "The filing of bills of interpleader ought not to be encouraged; and they should never be brought except in cases where the complainant can in no other way protect himself from an unjust litigation in which he has no interest. *Ch. Walworth, in Bedell v. Hoffman, 2 Paige 200*".

—*McDonald v. Allen, 37 W. 108, 111.*

4. "While an action brought by an executor to obtain construction of a will is not strictly an action of interpleader, yet it is ordinarily in the nature of an action in interpleader. (*Redfield and Story cited.*) This is so when the executor merely sets out in his complaint the will, or the doubtful clauses thereof, states the adverse claims of the parties interested, and asks the court to determine the true construction of the will".

5. "But for the fact that the legal interest of the executor in the personalty disposed of by the will, and which is the subject of the controversy, is something more than that of a mere stakeholder, such a complaint would be purely a complaint of interpleader. *2 Story's Eq. Jur., § 807*".

6. Where however "the executors have constituted themselves the champions of the residuary legatees", the action is not such interpleader, and co-defendants are not such "adverse parties" as to be entitled to notice of appeal from other appealing defendants.

—*Wheeler v. Hartshorn, 40 W. 83, 95.*

INTERPRETATION OF CONTRACTS, ETC.

See CONSTRUCTION, ETC.

INTERPRETER.

"Interpreter's fees are taxable as a necessary and proper disbursement".

—*Meyer v. Foster, 16 W. 294, 296.*

INTERROGATORIES.

See DEPOSITIONS.

INVENTORY AND APPRAISAL.

Administrator's own debts, 3.

How chargeable; inventoried, 6.

Included in inventory, 3.

Defense here, improper, 4.

Not estopped to deny, 3.

Not relieved; creditors, 5.

Not required to pay, 5.

Appraisers:

Change; persons or result, 2.

Named in the will, 2.

Gift, stricken from, 7.

Motion of claimant, 7.

Inventory not conclusive, 1.

1. The "inventory, is not conclusive either for or against the administrator, but is open to denial or explanation".

—*Cameron v. Cameron*, 15 W. 1, 6.

2. "To change the arbitrators or appraisers named in the will (as made by the appraisers of the estate), or to set aside their appraisement, a want of mental capacity in the appraisers, or their bad faith, fraud, or mistake, or undue influence over them in making their appraisement or award, must be shown. 2 Story's Eq. Jur., 1456; Baasen v. Baehr, 7 W. 516".

—*Mullen v. Mullen*, 62 W. 45, 48.

3. Where the executor inventoried "choses in action, or property of the estate" which were claims against him, and which "it was the clear duty of the executor to include (them) in the inventory, whether he recognized them as valid claims or not" "he did not thereby admit that he owed the estate anything on account of either, or estop himself to deny his present indebtedness thereon".

4. "A defense to these claims has no proper place in the inventory. Whether he was the debtor of the estate on either account (note or rent) could only be determined in some legal proceeding appropriate to that end".

5. And it was held error to require him by summary order, to pay an adjudged claim by reason of such inventory, there having been no accounting on his debt. (So far as this case may relieve the executor from the payment of such debt, where there are creditors, or where the will does not relieve him, it is disapproved in estate of Robinson v. Hodgkin, 99 W. post. See also Finch v. Houghton, 19 W. 149, 157, cited under EXTRS. & ADMRS.).

—*Lynch v. Divan, Extr.* 66 W. 490, 492.

6. Executor's own debt to deceased, when and how chargeable and inventoried. See EXTRS. & ADMRS.

—*Est. of Robinson v. Hodgkin*, 99 W. 327, 330.

7. Personalty claimed by the son as a gift, was on his petition stricken from the inventory, and such order sustained. See also GIFT.

—*Horn v. Horn*, 152 W., 482, 486.

INVESTMENTS OF GUARDIANS, TRUSTEES, ETC.

See ACCOUNTS OF GUARDIANS. GUARDIAN AND WARD. TRUSTEES. TRUST FUNDS.

JOINT OBLIGATIONS.

See also JOINT TENANCY.

Agreement not to sue one, 10, 20, 24.
 Bar as to him alone, 10.
 Partial satisfaction, only, 25.
 Settling own matter only, 20.
 Contribution, right of, 19.
 Deceased joint obligor:
 Common law; survivor only, 2.
 Judgment, separate, 23.
 Not jointly with others, 1.
 Revived against admr., 1.
 Judgment against one, 8.
 Against executor, separate, 23.
 Agreement not to sue, 10.
 Bar as to the others, 8, 9.
 Partnership contract, 22.
 Mortgage, several notes, 3.
 Notes separately; parties, 3.
 Security in common, 3.
 Adverse title against, 6.
 Bound to each other, 5.
 Community of interest, 7.

Mortgage, etc.—continued
 Security, etc.—continued
 Relation of trust, 4.
 Oral agreement, buy jointly, 26.
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 Payment received from one, 11.
 Bar as to the others, 11, 17.
 Direction from other to pay, 21.
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 Limitation statute, 18.
 Payment by one, not bar, 18.
 Partial, bar pro tanto, 15.
 Release under seal, 12.
 Right of contribution, 19.
 Show full compensation, 12.
 Release under seal of one, 12.
 Bar as to the others, 13.
 Parol evidence, not control, 14.
 Singular number, expressed, 16.
 Joint and several, 16.

1. "In *Jones v. Estate of Keep*, 23 W. 45 (See CLAIMS), this court, following the rule laid down in *The Union Bank v. Mott*, 27 N. Y., 633, decided that where one of the several defendants in an action upon a joint and several obligation dies, the action may be revived against his personal representatives separately, but not against them jointly with the other defendants."

2. But at common law, "in case one joint debtor died, the remedy at law could only be had against the survivor; the remedy against the estate of the deceased being in equity. This rule was applied to the case of a deceased partner. (Cases)."

—*Sherman v. Kreul*, Admr. 42 W. 33, 38.

3. Where a "mortgage secured three promissory notes maturing at different times" and held by different parties, although the mortgagees "held the notes secured by it in severalty, they held the security in common."

4. "This established, quoad the mortgage, a community of interest, a relation of trust and confidence between them, to support the common security in all proper ways, and to do nothing to divert or impair it.

This equitable rule of good faith, we take to be as well recognized in mercantile ethics as in courts of equity."

5. "And, whether or not the covenant of further assurance in the first mortgage (this joint one) could have been specifically enforced, the mortgagees were equitably bound to each other, if not actively to insist upon its performance, certainly to do nothing to defeat it".

6. "These parties were entitled in common," "and neither of them can be tolerated in acquiring an adverse title against his co-tenants".

7. "The rule rests, not upon the strict relation of joint tenants, or tenants in common, but upon a community of interest in a common title, creating such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the others. *Rothwell v. Dewees*, 2 Black. 613." See also *CHATTEL MORTGAGE*.
—*Hunter v. Bosworth*, 43 W. 583, 592.

8. "It is perfectly well settled, that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment thereon against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action.

9. This is so because the joint debt is merged in the judgment against the debtor first sued, and, being indivisible, it cannot be merged or cancelled as to one, and existing and operative as to another joint debtor. *Bowen v. Hastings*, 47 W. 232, and cases cited."

—*Lauer v. Bandow*, 48 W. 638, 639.

10. "Although an agreement not to sue one or more of several joint and several contractors or joint wrong doers, made upon a sufficient consideration, is not a technical release or discharge of the debt due or of the damages sustained, yet, to avoid circuity of actions, the party with whom the agreement has been made may set it up as a bar to an action brought against him alone for such debt or damages. *Lacy v. Kynaston*, 2 Salkeld, 575; 1 Pars. on Con. 28."

11. When "the injured party received a full compensation in fact from one of two or more joint wrong doers, or when he enters into such a contract with one that the law raises a presumption that he has received such full compensation from him, such receipt of compensation, or such agreement, is a bar to an action against the other wrong doers.

12. To bar the action of the injured party it must be shown either that he has received full compensation for his injuries, or what was intended as a full compensation, or that he has released one or more of the wrong-doers by technical release, under seal.

13. When a technical release, under seal, is given by the injured party to one of several joint wrong-doers, the courts have quite uniformly held this to release all, and that it is a good bar to an action against those not named in the release. The reason of this rule is based upon the nature of the release under seal.

14. The release being under seal, and absolute, its meaning cannot be controlled by parol evidence, and the law raises a conclusive presumption and that it was given in full satisfaction in fact for the injury, and upon a sufficient consideration”.

15. “When the contract is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the court or jury, whether what he has received of the one wrong-doer was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only pro tanto a bar to an action against the other wrong-doers”.

—*Ellis v. Esson*, 50 W. 138, 145.

16. A contract of guaranty, expressed in the body in the singular number, but executed by two or more persons, “is a joint as well as several contract. See *Dart v. Sherwood*, 7 W. 523” (cited under PROMISSORY NOTES). —*Fond du Lac H. Co. v. Haskins*, 51 W. 135, 137.

17. “In the absence of any statute to the contrary, payment by one joint debtor will remove the bar of the statute as to all, on the ground that each joint debtor is the agent of all the rest for making a payment which all are bound to make. This is the law by a clear weight of authority.”

18. “But by our statute (sec. 4248), ‘no one of them shall lose the benefit of’ ” the limitation statutes “‘so as to be chargeable, by reason only of any payment made by other or others of them’.” And it is held, on the evidence, of two joint debtors each agreeing to make and making a payment on one of two joint debts, that such payment by the one on the note in suit was “in law a payment by both”, and “stopped the running” of the statute as to both.

—*Nat. Bk. v. Cotton, Admr.*, 53 W. 31, 34.

19. Payment by one joint and several maker discharges all as to the holder, but such payor has a right of contribution against his co-maker. See CLAIMS.

—*Jameson v. Barber*, 56 W. 630, 635.

20. Following *Ellis v. Esson*, 50 W. supra, it is held that “the receipt of money from one” joint tort-feasor, “with an agreement not to prosecute him”, discharges only him, where it is not “even pretended to settle anything but his own matters”.

—*Pogel v. Meilke*, 60 W. 248, 250.

21. “It seems that if a joint debtor, on being called on for payment, refers the person calling on him to his co-debtor for payment, this amounts to a direction to the latter to make payment for him, and if he does so the payment will be held to continue the debt from that date as to both. *Cleveland v. Harrison*, 15 W., 670; *National Bank v. Cotton*,

53 W., *supra*." Here the note was "barred unless taken out of the statute by the payment". —*Coleman v. Ward*, 85 W., 328, 331.

22. A partnership contract being joint, a judgment against one releases the others. See SURVIVING PARTNER.

—*Keith Bros. & Co. v. Stiles*, 92 W. 15, 17.

23. Where one of two wrongdoers dies, judgment against his executor should be separate. See BOND FOR MAINTENANCE.

—*Borchert v. Borchert*, 141 W., 142, 145.

24. Approving, "the doctrine of *Ellis v. Esson*, 50 W., *supra*," as now "the general rule",

25. It is held that where a release to one "showed on its face that it was given in partial satisfaction only of the claim," it is construed "as a covenant not to sue" and as such does not release a joint wrong-doer.

—*Kropidowski v. Pfister & V. L. Co.*, 149 W., 421, 425.

26. "An oral agreement to buy jointly" is held not within the statute of frauds, nor nudum pactum. See SALE OF PERSONALTY.

—*Stack v. Roth Bros. Co.*, 162 W. 281, 287.

JOINT TENANCY.

See also JOINT OBLIGATIONS.

Definition; Bl. Comm., 7.
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Husband not alienate, 2.
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Hold as at common law, 3.
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Husband, etc.—continued
Severed by deed from wife, 20, 28.
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Grantee holds in common, 20.
Insurance benefit certificate, 4.
Mother, daughter, one dies, 4.
Survivor takes the whole, 8.
Legacies; without indication, 10.
Within common law, 9.
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Personalities, joint, 6.
As at common law, 5, 8.
Nature, as realty, 5.
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Act of the parties, 13.
Severance; to common, 20, 23.
As by alienation, 24.
Devise by one inoperative, 25, 29, 31.
Trust estates: in solido, 11.

1. At common law the husband and wife took by an entireties, and the survivor took the whole.

—*Ketchum v. Walsworth*, 5 W. 95.

2. "This court held in *Ketchum v. Walsworth*, 5 W. supra, that where an estate is granted to husband and wife they take by entireties, and not by moieties; and that the husband could not alienate or encumber the estate so as to prevent the wife, after his death, from taking the whole as survivor."

3. "We are of opinion that lands granted or conveyed to husband and wife are held by them as at common law" and the statute "was not intended to apply to estates of this kind. We must therefore hold that the husband's interest, at least his life estate, is subject to execution, except such part as may be exempt as a homestead". (Subsequently changed by statute. See *Citizens' L. & T. Co. v. Witte*, 116 W. post).

—*Bennett v. Child*, 19 W. 362, 364.

4. In a mutual benefit insurance certificate, "the whole insurance of \$2,000 is made payable to both" the named wife and daughter of the insured, "as an entirety", and the wife having died prior to the insured, and he having deceased without making any change in the beneficiaries, and there being then no regulation of the association thereto, the question is "whether this benefit insurance is made payable to the wife and daughter as an entirety or in severalty as tenants in common or as joint tenants".

5. "It must be determined by its analogy to the terms 'tenancy in common' and 'joint tenancy' in respect to realty and at common law. They may be said to have the same nature and incidents.

6. There may be joint tenancy of personalities, and, like the properties of a joint estate, they are derived from its unity, which is fourfold,—of interest, title, time, and possession. Each of the joint tenants must have the entire possession as well of every parcel as of the whole. Where a horse is given to two persons, they are joint tenants. *Martin v. Smith*, 5 Bin. 16, 6 Amer. Dec. 395.

7. 'A joint tenancy is where they have the same interest, arising from the same conveyance, commencing at the same time, and held by one and the same undivided possession. On the death of one, the entire tenancy remains to the surviving co-tenants, and not to the heirs of the deceased'. 2 Bl. Comm. 180.

8. This insurance, payable to two persons, has all the essential characteristics of a joint tenancy, without any words or reasons appearing to indicate an intention to make it payable in severalty, or to have it go to the heirs, or to revert to the assured or to his estate, on the death of one of the beneficiaries." So held, and that the surviving daughter takes the whole. (Distinguished in *Wallace v. St. John*, 119 W. 585, 596, the court saying that "the question of husband and wife was not involved, and the severance was not involved").

9. Referring to our statute (sec. 2068) as to devises concerning joint tenancies, it is said, that "on the principle of analogy, if devises to joint tenants with the *jus accrescendi* are lawful, so are legacies of personal-

ties. They are substantially alike, and within the same reason, and they have been decided to be within the doctrine of the common law. *Jackson v. Roberts*, 14 Gray, 546; *Stires v. Van Renssalaer*, 2 Bradf. Sur. 172; 2 Redf. Wills, 175.

10. We may say, therefore, that legacies come within the exceptions of our statute, and that, when made to two joint legatees, without any words to indicate a severance of their interests, if one die, the survivor takes the whole legacy".

—*Farr v. Trustees, A. O. U. W.*, 83 W. 446, 451.

11. The exception of trust estates (sec. 2069), is applicable only in devises "to two or more persons in solido". See CONSTRUCTION OF WILLS.

—*Saxton v. Webber*, 83 W. 617, 624.

12. It is indicated that joint tenancy, as to realty, where it might otherwise apply, did not apply where "they took by descent, and not by purchase, as by grant or devise".

13. "The creation of an estate in joint tenancy, it is said, 'depends on the wording of the deed or devise by which the tenants claim title, for this estate can only arise by purchase or grant,—that is, by the act of the parties,—and never by the mere act of law'. 2 Chit. Bl. 180". See also DESCENT AND DISTRIBUTION.

—*Brown v. City of Baraboo*, 90 W. 151, 155.

14. Citing and following cases, *supra*, it is held that a note and mortgage running to the husband and wife, partial proceeds of the husband's farm, the wife's name being included in consideration of her release of dower and homestead rights, were held by them in joint tenancy, and upon the death of the husband, went to the wife as the survivor, and not to the executor of the husband for the payment of debts.

—*Fiedler v. Howard*, 99 W. 388, 393.

15. "Undoubtedly, at common law the same words of conveyance which would make two other persons joint tenants would make the husband and wife tenants of the entirety (citations)",—"that is to say, the husband and wife did not take the title properly as joint tenants, nor tenants in common, but both were seized of the entirety, and the survivor * entitled to the whole estate. (Citations)".

16. But notwithstanding that secs. 2067-2069 as to joint tenancy, did not change the rule as to husband and wife, the subsequent changes in 1878, by secs. 2340 and 2342, "to obviate the effect of" *Bennett v. Child*, 19 W., *supra*, enlarged "the rights of married women" and changed the common-law rule,

17. So as to "treat the estate by a deed running to husband and wife, as in the case at bar, as an estate 'held in joint tenancy', instead of being held as tenants of the entirety, as at common law." See also HUSBAND AND WIFE.

—*Citizens' L. & T. Co. v. Witte*, 116 W., 60, 63.

18. After reviewing cases *supra*, and indicating that *Ketchum v. Walsworth*, 5 W. *supra*, "is of no significance here, except as it reiterates certain rules of the common law", that *Brown v. Baraboo*, 90 W. *supra*, "furnishes no aid in construing the" statutes here involved, that *Bennett v. Child*, 19 W. *supra*, decided that at least the husband's "life estate in such lands" was subject to execution,—It is held:

19. That under the subsequent revision of 1878, the joint tenancy statutes, secs. 2067-69, now included application of the married woman statutes, secs. 2340 et al., as held also in *Citizens' L. & T. Co. v. Witte*, 116 W. *supra*, and that,

20. "The deeds in question" to husband and wife, after 1878, "made them joint tenants and that such tenancy was severed by the deed from the wife, A. to the defendant S.", and that defendant and the husband "hold all the lands in question as tenants in common". In the cases of *Farr v. Trustees, A. O. U. W.*, 83 W., and *Feidler v. Howard*, 99 W., *supra*, "there was no question of severance of such joint tenancy involved".
—*Wallace v. St. John*, 119 W. 585, 590.

21. "A joint tenancy at common law" has "the four unities: unity of interest, unity of title, unity of time, and unity of possession.

22. The special significant incident of joint tenancy is the right of survivorship, by which on the death of any tenant his interest goes to his survivors.

23. Anything which destroys the unity of title or interest without affecting the unity of possession will turn the interest severed from the others into a tenancy in common as regards the remaining joint tenants. (Citations).

24. The most familiar method of so severing the interest of one joint tenant from the interests of others is by alienation.

25. As such severance to be effective is required to occur during the lifetime of the joint tenant, a devise by such tenant is inoperative." (Citation).

26. The statute, sec. 2068, "abolishes joint tenancies", except by sec. 2069, as "to husband and wife". "So circumstances that will create a joint tenancy generally at common law will create one between husband and wife under the statutes".

27. At common law, what would "create a joint tenancy only", would as to husband and wife, make "them tenants by the entirety, as to which there could be no severance by partition or alienation. (Citation)".

28. But "since the revision of 1878, circumstances which prior thereto made the husband and wife tenants by entirety subsequently had made them joint tenants with the common-law characteristics thereof". (Cases, *supra*).

29. Held, that as to a husband and wife joint tenancy, "she was under a disability, the same as he was, to pass her interest or to in any way

incumber it by will. Her attempt to do so did not affect his right of survivorship", or his title to "the whole property" upon her death.

—*Bassler v. Rewodlinski*, 130 W. 26, 28.

30. "It is well settled in this state that where lands are deeded to husband and wife a joint tenancy is thereby created,

31. And that the right of survivorship exists in such case as at common law, which cannot be defeated by devise of the property made by the joint tenant who first died. (Last case, *supra*)".

32. Where the wife "consented" that her "separate estate" received from her mother's estate, "be conveyed to herself and husband as joint tenants", there being "no fraud or mistake of fact", upon her decease the whole title remained in the husband. See also HUSBAND AND WIFE.

—*Friedrich v. Huth*, 155 W. 196, 198.

JUDGE OF COUNTY OR PROBATE COURT.

See COUNTY JUDGE.

JUDGMENTS.

See also DESCENT AND DISTRIBUTION. FOREIGN JUDGMENTS. FRAUDULENT ORDERS. MISTAKE. ORDERS. SETTLEMENT. VACATING JUDGMENTS.

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1. "The judgment of a court of competent jurisdiction is conclusive upon all the world, and until such judgment shall be reversed by the proper superior tribunal, cannot be questioned or impeached in any collateral issue". Syl. Relating to administrator's sale, real estate, etc. (Affirmed on appeal. *Grignon's Lessee v. Astor*, 2 How. 319. Re-affirmed in *Comstock v. Crawford*, 3 Wall. 396. Rule specifically applied to probate and county courts.)

—*Jackson v. Astor*, 1 Pin. 137.

2. Judgment by default "against executors and administrators is not an admission of assets".

—*Chouteau v. Hooe*, 1 Pin. 663, 666.

3. "The judgment of a court of competent jurisdiction is final and conclusive upon the rights of the parties, touching the subject matter of the suit, and" "cannot be impeached collaterally, or by a counter action."
—*Woodward v. Hill*, 6 W. 143, 148.

4. Judgment by default, after personal service, on non-resident within the state, will not be set aside on application a year thereafter, there being no fraud,—reasonable diligence being required.

—*Sanderson v. Dox*, 6 W. 164.

5. Jurisdiction of foreign judgments may be questioned and inquired into. See FOREIGN JUDGMENTS.

—*Rape v. Heaton*, 9 W. 328, 332.

6. An entry properly signed and reading "ordered judgment, etc.", is not a final judgment, but an order for judgment, and execution cannot be issued thereon.

—*Lincoln v. Cross*, 11 W. 91, 95.

7. The allowance of a claim has "all the force and effect of a judgment." See also CLAIMS.

—*Price v. Dietrich*, 12 W. 626.

8. Where "orally given and judgment thereon perfected" the judgment may, subsequently to the time limitation after the term, be "reduced to writing and directed to be filed, nunc pro tunc".

—*Williams v. Ely*, 13 W. 1, 3.

9. The final decree of the county court, "at most only ascertained and declared the shares or parts of the estate to which the several heirs or their representatives or assigns were entitled", but "did not purport to affect or transfer the legal title to any estate or lands".

10. "This was the extent of the authority conferred upon the county court, and the utmost effect which can be given to such decree with regard to the lands in question, is that, as between the plaintiff and the other heirs and the trustee, it may be conclusive of the extent of their respective equitable rights and interests."

—*Gillett v. Treganza*, 13 W. 472, 477.

11. The assignees of a judgment take it "subject to the equities between the parties".

—*Blakesley v. Johnson*, 13 W. 530.

12. "The decree of the probate court as to matters within its jurisdiction, is as conclusive and final as the judgment of any other court".

—*Barker v. Barker*, 14 W. 131, 147.

13. The court may vacate or correct at a subsequent term under common law rules, as well as under the statute, for irregularities, etc. See VACATING JUDGMENT.

—*Ætna Life Ins. Co. v. McCormick*, 20 W. 265.

14. Order of distribution is not binding upon minor heirs having no notice. See *INFANTS*.
—*Bresee v. Stiles*, 22 W. 120, 126.

15. "A judgment of dismissal, after a hearing upon the merits, is, as we understand it, conclusive upon the complainant as to all facts involved in the issue."

16. "The prayer of the answer, that the complaint might be dismissed, did not preclude the court from adjudicating specially upon every fact set up in the answer as the ground of such relief".

—*Amory v. Amory*, 26 W. 152, 161.

17. "Judgments are binding not only upon the parties but upon privies in interest, law or estate".

—*Finney v. Boyd*, 26 W. 366, 370.

18. "The general rule of law is, that all persons having an interest in the subject matter of an action, when the same is commenced, should be made parties thereto, and that none but parties and privies are concluded by the adjudication.

19. This rule is so eminently reasonable and just, that no exception should be made to it unless clearly created by law".

—*McCoy v. Quick*, 30 W. 521, 527.

20. According to the Code, "a judgment is there defined to be 'the final determination of the rights of the parties to the action' (sec. 2882), while every direction of a court made or entered in writing and not included in a judgment is denominated an order.

21. There is no such thing now as an interlocutory judgment in a case; the only judgment authorized being one that finally disposes of and determines the rights of the parties". (Since 1898, allowed, sec. 2883).

—*Sellers v. Union L. Co.*, 36 W. 398, 401.

22. The real party, who pays may bring an action to recover. See *PARTIES*. *VACATING JUDGMENT*.

—*Mann v. Aetna Ins. Co.*, 38 W. 114, 117.

23. "The question whether the judgment (of the county court) assigning the property, when regularly made, upon proper notice to all concerned, is binding and conclusive upon all the parties in interest until reversed, is very important, and will be left undecided in this case. Should it again arise, it will be treated as an open question".

24. In this case the heirs, excluded under the will, resided in Germany, and the statutory notice by publication "for hearing and examining the final account" only, apparently, was had, and the circuit court "found that no notice, either actual or constructive, was ever served

upon them or either of them, of the proceeding for the distribution or assignment of the estate, prior to the time of the making of the order.

25. We fully agree with the circuit court that such a notice was essential, and that the want of it deprived the probate court of jurisdiction to enter an order or judgment assigning the estate to the defendants (devisees), which would effect the rights of the plaintiff (heirs)."

26. "Failure to give the notice was not an irregularity or error merely, but it went to the jurisdiction of the court. It is a fundamental principle in the administration of justice, that no one shall be deprived of his property without his day in court, and having an opportunity to be heard".

27. "In *Bresee v. Stiles*, 22 W. supra, it was decided that an order of the probate court distributing an estate binds only the parties who have notice of the proceeding".

28. "In certain matters these orders and judgments (of probate courts) are conclusive upon the questions adjudicated".

29. The probate courts "are limited strictly and precisely to the powers conferred by statute, and what is irregularity and error merely in a court of general jurisdiction, to be corrected on error or appeal, becomes with them in many cases defect of jurisdiction, and renders their judgments void".

30. "For certain purposes the order of judgment of distribution may be deemed conclusive and final. In *Loring, admr., v. Steineman*, 1 Metc. 204, the court held that "a decree of distribution made by a probate court, after such notice as the court, in its discretion, shall think proper to order, is so far conclusive as to protect an administrator acting in good faith, in conforming to it." *Kellogg v. Johnson*, 38 Conn. 269, states the same doctrine. We do not find it necessary to question the soundness of these decisions".

31. The court is "unwilling to sanction" the doctrine that by the statutory notice "of the application for the probate of the will", the "heir is concluded in respect to the title of real estate under the final order of distribution". —*Ruth v. Oberbrunner*, 40 W. 238, 269.

32. A court of equity will not interfere, at the instance of an administrator, to prevent the collection by execution of a judgment obtained against the intestate in his lifetime, and not filed as a claim against the estate. —*Jilsun, Admr. v. Stebbins*, 41 W. 235, 241.

33. The decree in probate proceedings is "void only as to such persons in interest as did not appear or assent thereto", in case of failure of the statutory notice. See JURISDICTION.

—*O'Dell v. Rogers*, 44 W. 136, 172.

34. The allowance of a claim in county court is a judgment for all purposes, except as to execution. See CLAIMS.

—*Jameson v. Barber*, 56 W. 630, 633.

35. The judgment in form in a proper case should "be against the party as administrator, trustee, etc." to be chargeable on the estate, and "such direction should be inserted in the judgment itself". See also COSTS AND FEES.

—*Hei v. Heller*, 53 W. 415, 420.

36. On appeal from a final judgment of distribution, it should be set aside only so far as necessary to adjust the rights of the parties to the appeal.

—*Baker v. Baker*, *Extr.* 57 W. 382.

37. Judgment for deficiency in foreclosure cannot be had against heirs or devisees, made parties after the decease of the original parties, but such deficiency "should have been certified to the probate court, to be paid with the other debts of the deceased."

—*Reinig v. Hecht*, 58 W. 212, 215.

38. In *Hei v. Heller*, 53 W. supra, construing sec. 2932, it is "held that in the cases mentioned in the statute, although the judgment should be in form against the party prosecuting or defending as administrator or trustee, yet to make the estate or person represented liable therefor, the judgment itself must contain a direction to that effect". (Followed in *Bogue v. Laughlin*, 149 W. post).

39. "We are not willing to disturb the rule thus definitely established. This judgment contains no direction making it chargeable upon the estate of plaintiff's intestate. It is therefore a judgment *de bonis propriis*. The court can probably give such a judgment only in a case where the administrator or trustee has been guilty of mismanagement or bad faith. Sec. 2932.

40. The record before us contains no suggestion that the plaintiff had thus rendered himself chargeable with the costs. The presumption is that he had not.

True, he failed to appear when the case was called for trial, but that, of itself, raises no inference either of mismanagement or bad faith".

—*Ladd v. Anderson*, 58 W. 591, 592.

41. Final judgment, including advancements, is held "conclusive on all the world," on publication notice only. See also ADVANCEMENTS.

42. Where in an intestate estate, the judgment recited that the heirs gave to the widow "a quitclaim deed of all their estate" and title, and the judgment accordingly assigned the whole estate to the widow, it was assumed proper, the court saying that "Sec. 3945 provides that the distribution may be made to the grantees of the heirs".

—*Liginger v. Field*, 78 W. 367, 372.

43. A judgment "prematurely entered," is an irregularity merely, and can be avoided, if waived, only because "unjust or inequitable." See JURISDICTION.

—*Marshall I. Bank v. Milwaukee W. M.*, 84 W., 23, 26.

44. As to sec. 3940, "the effect of such order or judgment of distribution is not to transfer the title, but to determine the persons entitled to the property, and their respective interests therein. *Gillett v. Treganza*, 13 W., supra.

45. But even such order or judgment is not conclusive as against those claiming under the will, without notice or opportunity of being heard. *Bresee v. Stiles*, 22 W., supra; (other cases.)" (Cited and followed in *Smith v. Smith*, 140 W., 599, 601. See *HEIRS*).

—*Jones v. Roberts*, 84 W. 465, 471.

46. Order on settlement of guardian's account is conclusive. See ACCOUNTS OF GUARDIANS. —*O'Connor v. Decker*, 95 W., 202, 204.

47. On a proceeding ten years after, to set aside the final order of the county court assigning real estate, fraud not being proven, and the court having jurisdiction of the estate, it was held, that the court also had jurisdiction, "upon the conclusion of the settlement of the estate, to make a final order distributing the remaining personalty, if any, and assigning the real estate in accordance with the provisions of the will":

48. "True it is that title to real estate passes by the will (when duly probated), and not by the decree of the court; but this argues nothing against the power and jurisdiction of the court to make the order.

49. What the effect of this order may be, whether conclusive or only prima facie proof of title as between the parties to the proceeding; is a matter which it is unnecessary to discuss or decide in this case".

50. The final order, here, was made,—some years after the decease of the executrix, and of a subsequent administrator de bonis non, neither having concluded the estate, the personalty having been used for debts and expense, but the latter, at least, filed no account,—on the application by the daughter and heir of a devisee and her assignee.

—*Will of Hess*, 97 W. 244, 249.

51. Judgment assigning estate differently from oral judgment, corrected twelve years later. See *MISTAKE*.

52. "Whether title to land so vested (on the testator's decease) in a devisee by the plain and unambiguous language of a will can be subsequently divested by an order of the county court, under sec. 3940", is not determined. See *Jones v. Roberts*, 84 W. supra; *Will of Hess*, 97 W. supra.

—*Hall v. Hall*, 98 W. 193, 200.

53. "The general rule is that when a court has jurisdiction to render a judgment, every proposition assumed or decided, leading up to the final result, the order or judgment, is included within it,

54. And till reversed on appeal or set aside in some direct proceeding for that purpose it is conclusive for the purposes of that case or proceeding upon all parties thereto, in that and all courts. (Many cases)

55. This familiar rule applies to all courts to the extent of their jurisdiction. Probate courts are as much within the rule as any other. *Barker v. Barker*, 14 W. supra, and *Cody v. Cody*, 98 W. post." See also CLAIMS.

—*Roberts v. Weadock*, 98 W. 400, 405.

56. "A judgment may be procured by the grossest fraud, and yet be within the undoubted jurisdiction of the court which renders it. Upon collateral attack, the question is not whether the judgment was obtained by fraud, but whether it was rendered without jurisdiction".

—*Cody v. Cody*, 98 W. 445, 452.

57. A final judgment of the county court, in which infant heirs were ignored, and were not represented by a guardian or guardian ad litem, alleged to have been obtained by fraud, in an action to remove cloud of title, "in so far as it inferentially attempts to affect the title of the plaintiffs (such infants), must on this demurrer, be regarded as a nullity. *O'Dell v. Rogers*, 44 W. supra; (other cases).

58. Upon the facts stated, such judgment and decree of the county court was a mere cloud upon the title of the plaintiffs".

—*Kruczynski v. Neuendorf*, 99 W. 264, 271.

59. A judgment "must be given conclusive effect, it not having been appealed from nor attacked, and having attained a stage precluding its modification by either method."

—*Welsher v. Libby M. & L.*, 107 W., 47, 48.

59a. In an ejectment action, the prior unappealed final decree of the county "court having complete jurisdiction of the matter of the proceedings, and of the several persons interested", is held conclusive on the question of legitimacy of a child of the testator;

59b. In an ejectment action, the prior unappealed final decree of the three courts, ten years later, to have such decree set aside it is said: "We must regard the judgment and decree of the county court as res adjudicata. (Cases)." (And see also *Will of Durkee*, 164 W. 41, 43, under JURISDICTION). —*Huebschmann v. Cotzhausen*, 107 W. 64, 72.

60. The conclusiveness of a judgment extends to "the facts established or assumed upon which it is based", as to parties and privies.

61. "While a judgment in an action in personem is binding only on the parties of record and those claiming under them,

62. A judgment in rem renders the subject on which it operates 'what it declares it to be' and is consequently binding upon the world. Every person is supposed to be concerned in such an adjudication and to be constructively before the court". This does not include actions as to private rights only to property, as to enforce liens, attachments, etc., "rights in which the public generally are not interested".

—*State ex rel. Atkinson v. McDonald*, 108 W. 8, 14.

63. As to effect of recitals and findings in the judgment not required by the statute, sec. 3940, not being conclusive on subsequent settlement among the heirs. See SETTLEMENT.

—*Maldaner v. Beurhaus*, 108 W. 25, 31.

64. Final judgment, after a will contest adjudicated by stipulation, entered accordingly, and held not to thwart the will. See TRUST VARIATIONS.

—*In re Luscombe's Will*, 109 W., 186, 198.

65. "The principle is" "well settled in this state that if the court pronounces judgment from the bench,

66. And all that remains to be done is the clerical duty of reducing the judgment to writing or entering the same, or both, the judicial act is complete.

67. So far as the court is concerned, judgment has been rendered notwithstanding the fact that the clerical acts necessary to preserve the evidence of the judgment have not been performed. (Cases); *Zahorka v. Geith*, 129 W. 498 (See NUNC PRO TUNC).

68. In the present case the court filed findings and ordered the entry of judgment" at the February term, and the clerk failing to "enter the judgment as ordered", a "motion to set aside the findings" "returnable" at the May term, was "denied" at such May hearing,

69. And the court then "ordered the clerk to sign and enter a judgment in accordance with the findings (signed Mar. 14) as of the last named date nunc pro tunc",—and such order is affirmed. See also JURISDICTION.

—*Comstock v. Boyle*, 134 W. 613, 617.

70. A "judgment of the circuit court standing unreversed against the executor" is held properly allowed by the county court, even after claims become barred. See also MORTGAGES.

—*Pereles v. Leiser*, 138 W. 401, 403.

71. "The judgment of the county court assigning the homestead pursuant to the will did not transfer title to or in any way alter the disposition of the property made by the will. *Smith v. Smith*, 140 W. 599 (See HEIRS), and cases; *Williams v. Williams*, 135 W. 60 (See VESTING OF ESTATES), and cases". See also INFANTS' SALE OF REALTY.

—*Rowley v. Rowley*, 143 W. 325, 327.

72. "The title to the real estate owned by the deceased at the time of her death immediately vested in the devisees named in the will,

73. Subject to the rights of her creditors to have their claims paid out of such real estate if the personal property available for such purposes was insufficient. (Cases); *Williams v. Williams*, 135 W., 60 (See VESTING OF ESTATES, ETC.).

74. The county court had the power to construe the will and deter-

mine what distribution was intended by it, and" "its judgment until reversed would be binding on all persons in interest who were parties to the proceeding and properly before the court. Appeal of Schaeffner, 41 W., 260 (See CONSTRUCTION OF WILLS.); (other cases); Perkins v. Owen, 123 W., 238 (See ADMINISTRATION.)."

75. The final "decree of the county court could only determine the respective interests of the parties to such title as the decedent had at the time of her death.

76. It could not adjust equities as between the devisees and persons who had acquired rights in the property from the testatrix during her life time. Gillett v. Treganza, 13 W., supra; (citation).

77. It follows from what has been said that the county court had no jurisdiction to adjudicate the rights of" a lessee for life "under her lease and therefore the judgment could not affect such rights".

—*Triba v. Lass*, 146 W., 202, 203.

78. It "is immaterial under our system of pleading and practice"; that a "counterclaim (against plaintiff executors) asks judgment against the plaintiff—apparently a personal judgment.

79. A judgment de bonis testatoris is a proper judgment in all cases where the executor is a party and the estate of decedent is liable for the debt. (Citations)". See also TAXATION OF ESTATES.

—*Bogue v. Laughlin*, 149 W., 271, 286.

80. When an executor "presents a matter for adjudication" on due notice, the court's decision "whether embodied in a formal order or merely minuted on the court record", "unless challenged seasonably for correction in the same court or on appeal, it is conclusive".

81. "As a rule, all ordinary judicial advisory directions, within the range of reason, in the business matter of administering a trust, made upon presentation of the facts with due care,

82. Though without notice to the parties interested, and acted upon in good faith, protect all parties concerned". Harrigan v. Gilchrist, 121 W., 127, 384. See also APPEAL. PROBATE OF WILLS.

—*Will of Rice*, 150 W., 401, 458.

83. As to oral announcement of judgment, being such, and "the written judgment" "merely the evidence thereof". See RECORDS.

—*Wehr v. Gimbél Bros.*, 161 W. 485, 488.

84. Established rules of vacation, entry, and amendment of judgments, restated. See VACATING JUDGMENTS.

—*Fischbeck v. Mielenz*, 162 W. 12, 15.

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- Reversal, fact question, 22.
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- Illogical footsteps, 31.
- Trial court's; after affirmed, 3, 4.
- Cannot be disturbed, 3, 4.
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1. As to a different application of facts in *Stinson v. Leary*, 69 W. 269, than the instant case, on the question of termination of guardianship, it is said: "This is an apt illustration of the importance of the rule stated by Marshall C. J., in *Ogden v. Saunders*, 12 Wheat. 213, and often cited with approval by this court: 'It is a general rule that the positive authority of a decision is co-extensive only with the facts on which it is made'". Marshall, J. See also *GUARDIAN AND WARD*.

—*Paine v. Jones*, 93 W. 70, 78.

2. "It must be remembered that nothing is being decided in any case, for the purposes of future cases, but the questions upon which the decision turns".

—*Peninsular Lead & C. W. v. Union O. & P. Co.*, 100 W. 488, 496.

3. "A judgment of the trial court, when affirmed on appeal, becomes the judgment of this court, and the trial court has no jurisdiction whatever thereafter to open it, set it aside, or modify it, or do anything in regard thereto except to enforce it".

—*Crowns v. Forest Land Co.*, 100 W. 554, 555.

4. A judgment of the court below, affirmed by the supreme court, is held, in effect a judgment of the latter court and cannot be disturbed or vacated by the lower court. Sec. 2832 does "not apply to judgments of this court". Nor, apparently, can a judgment be disturbed under sec. 4719, the case of *State ex rel. Turner v. Circuit Court for Ozaukee Co.*, 71 W. 595, contra, being now questioned and, in effect, overruled.

—*Ean v. C. M. & St. P. R. Co.*, 101 W. 166, 168.

5. "It is a mistaken opinion that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and considered, and deliberately decided by the court, leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. *Trustees of Sch. Dist. v. Stocker*, 42 N. J. L. 115.

6. The judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it. *Quackenbush v. W. & M. R. Co.*, 71 W. 472; *Pray v. Hegeman*, 98 N. Y. 351.

7. Nothing is obiter, strictly so called, except matters not within the questions presented—mere statements or observations by the judge in writing the opinion, the result of turning aside for the time to some collateral matter by way of illustration. *Buchner v. C. M. & N. W. R. Co.*, 60 Wis. 264 (See RULES of PRACTICE); (other cases)".

—*Brown v. C. & N. W. R. Co.*, 102 W. 137, 154.

8. "It is a fundamental principle at the foundation of our judiciary system that courts sit only to decide actual controversies, and not to answer moot questions of law or fact, nor to declare abstract principles or rules of law not applicable to issues or controversies actually before them. (U. S. cases;) *Plainfield v. Plainfield*, 67 W., 525.

9. No less thoroughly established is it that the appellate jurisdiction of this court cannot be successfully invoked unless rights of the appellant are substantially prejudiced by the acts appealed from. (Cases).

10. Further, it has often been held in Wisconsin that an error in the court below will receive no attention on appeal where it has been corrected by the voluntary act of the favored party before the appeal was perfected. (Cases)". —*Hogan v. C. of La Crosse*, 104 W., 106, 107.

11. "The most weighty responsibility incident to the judicial office in trial courts, in civil matters, is that involved in the proper determination of questions of fact upon evidence,

12. Because, unlike a wrong decision on a question of law, one on a question of fact may be safe against challenge in an appellate court because of the presumed superiority of opportunity of the former over the latter, which may not, probably does not, in all cases, exist, for separating the right from the wrong."

—*Minnesota S. Co. v. McCrossen*, 110 W., 316, 324.

13. Where "after the trial the court files a written opinion, which he indorses 'Decision'", which "was followed by formal findings" which are "silent upon the issue of fact", and judgment is entered thereon,— "the so-called decision, duly signed 'by the court', must be taken as declaring the judicial conclusion upon the facts, so far as any is stated therein". —*Duncan v. Duncan*, 111 W., 75, 76.

14. "The opinion of this court is not a mere statement of reasons, like an opinion of the trial court, but constitutes the findings of fact and conclusions of law upon which this court bases its judgment;

15. It is a decision as well as an opinion, and is the only paper from which it can be ascertained what are the conclusions of this court either upon the facts or upon the law." —*T. of Fulton v. Pomeroy*, 111 W., 663, 668.

16. "It cannot properly be said that the conclusion of a court upon a minor point is mere judicial dicta because the ultimate decision arrived at might have been bottomed upon some other minor conclusion or conclusions also reached in the case."

17. "The general rule is that every proposition assumed or decided, leading up to the final conclusion reached in the case, and upon which such conclusion is based, whether it be the sole or only one of several independent and sufficient grounds for such final conclusion, is as effectually passed upon as the ultimate question solved. Case v. Hoffman, 100 W., 334; (other cases)". —*Becker v. Chester*, 115 W., 90, 127.

18. "This court would unquestionably be bound to follow the holding of the supreme court of the United States as to the powers of national banks—this is strictly a federal question—

19. But on the other hand, upon the question of the effect or application of such holding as a defense in a given case properly brought in the state court, this court may properly follow its own decisions, even when differing from the decisions of the federal courts. Such questions are not federal questions". —*Security Nat. Bank v. St. Croix P. Co.*, 117 W., 211, 217.

20. "Unless the situation be involved", "as where the earlier pronouncement was mere obiter dictum, or when conflicting decisions have already been made by inadvertence or otherwise, and the position of the court is already uncertain", "a rule of law adopted and long adhered to" by the court should be adhered to, and "courts should ordinarily bow to the considerations that certainty of the law is more essential to justice than absolute correctness". —*Lonstorf v. Lonstorf*, 118 W. 159, 160.

21. Where, "what was said" as to an important legal proposition "had no relation to anything in fact decided," and "did not in any

wise lead to nor support the conclusion reached by the court," it "cannot be given the weight of authoritative precedent, or warrant hesitation in following the settled rule of decision, if we find such exists."

—*Danforth v. Oshkosh*, 119 W., 262, 267.

22. "The ordinary rule that the conclusion of the trial court should not be overruled unless it appears to have been clearly wrong on the question of fact does not apply" when "the court's conclusion was reached by applying a wrong rule of law".

—*Chase v. Woodruff*, 133 W. 555, 559.

23. Where there is a contrariety of opinion among the justices on an appeal from a judgment, "the view which we adopt is that a majority must agree on some one specific ground of error fatal to the judgment or it must be affirmed".

—*Will of McNaughton*, 138 W. 179, 191.

24. "As experience shows, and from the very nature of things, justice is much more likely to be done by leaning pretty strongly upon the initial determination than by endeavoring to treat a disputed matter from an original standpoint.

25. Hence the rule that there must not only be a preponderance of evidence against such determination, but there must be a clear preponderance."

26. "Manifestly", "a clear preponderance", "requires the preponderance to be so apparent as to manifestly outweigh any probable legitimate influence upon the triers of those advantages for discovering the truth which the reviewing tribunal cannot have". (Cases). See also

REFERENCE. —*Ott v. Boring*, 139 W. 403, 407.

27. While "the conclusiveness" of "repeated" statements of law not "necessarily involved", "is perhaps open to debate",

28. Yet "when the court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in presence of conflicting decisions in other jurisdictions, such declarations amount to adoption of the views of those courts approving the rule".

—*Will of Hawkinson*, 143 W. 136, 139.

29. "If the judgment be right",—"right on facts found, expressly or inferentially, or both, or not found but appearing clearly from the evidence,—it must be sustained.

30. The real right of the matter is the end to be attained in our own system of jurisprudence.

31. That being clear and having been arrived at without substantial prejudice to the adverse party, justice is satisfied however irregularly or illogically the judicial footsteps may have moved in reaching that goal".

—*Est. of Koch*, 148 W. 548, 562.

32. The oral "announcement from the bench is the judgment in fact and" "the written judgment" "merely the evidence thereof". See also RECORDS.
—*Wehr v. Gimbel Bros.*, 161 W. 485, 488.

33. As to when the rule "that weight should be given to" the "ruling of the department" having charge of the subject, in construing statutes, does not apply. See INHERITANCE TAXES.

—*Smith v. State*, 161 W. 588, 590.

34. "Where there is competent evidence sufficient to support the finding, this court will presume, in the absence of an affirmative showing to the contrary, that that finding rests upon the competent evidence solely".
—*Hilton v. Rahr*, 161 W. 619, 623.

35. The opinion of the trial court filed, "is of little consequence except as explanatory of the findings. It was an unnecessary effort.

36. The findings which, in contemplation of the written law, were made by the trial judge, and in the opinion of the writer (Marshall J.) should always be so made in fact, must be taken as the judicial conclusion in the case both as to matters of fact and of law."

—*Becker v. Beaver Mfg. Co.*, 158 W. 471, 474.

JUDICIAL NOTICE.

Acts of Congress, 9.

Administrator, same estate, 3.

City is a corporation, 6

Date was on Sunday, 8.

Divisions of state, 5.

Distances therein, 5.

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Judgment or proceeding, 12.

In same action in court, 12.

Not of other actions, 11, 12.

Nature, use, of "air-gun," 7.

As of "beer," "gas" and "car," 7.

Pleading of matters, 6, 10.

Practicing attorneys, 4.

1. "Courts will take judicial notice of the government surveys, and the legal subdivisions of the public lands;

2. And as the parties to this contract all reside in this state, will presume that the land referred to is situated in this state, at least until something to the contrary appears," oral testimony to identify being proper to supply the omitted county and state.

—*Atwater v. Schenck*, 9 W. 160, 164.

3. "The probate court takes judicial notice of the appointment," of an administrator previously appointed in the same estate.

—*Frederick v. Pacquette*, 19 W. 541, 552.

4. The court was not "bound to take judicial notice of who were practicing attorneys in this state, and who were not." See also BONDS.

—*Cothren v. Connaughton*, 24 W. 134, 137.

5. The court will take "notice of the geographical divisions of the state" and of distances therein. See DEPOSITION.

—*Hinckley v. Beckwith*, 23 W. 328, 332.

6. "The courts of this state take judicial notice of the fact that the defendant city is a corporation created by the laws of the state, and it would be idle to require that fact to be stated in a pleading", notwithstanding a statute (sec. 3205) requiring corporate character to be pleaded, the statute probably relating "to private corporations alone".

—*Smith v. Janesville*, 52 W. 680, 681.

7. "This court can take judicial knowledge of the nature and uses of this air-gun, as it can of 'beer' (*Briffitt v. State*, 58 W., 39), or of 'gas' (*Shepard v. Mil. G. L. Co.*, 6 W., 539), or of an express or freight 'car' (*Nicholls v. State*, 68 W., 416)".

—*Harris v. Cameron*, 81 W., 239, 242.

8. The publication "dates appearing, the court was bound to take judicial notice that such publications were on Sunday".

—*Sentinel Co. v. A. D. Meiselbach M. W. Co.*, 144 W. 224, 228.

9. "Acts of Congress are not foreign laws and state courts take judicial notice of them. (Citations).

10. Ordinarily if the facts alleged bring the cause of action within the terms of the federal statute, this is sufficient" pleading.

—*Rowlands v. C. & N. W. R. Co.*, 149 W. 51, 54.

11. The trial judge cannot "take judicial notice of a judgment, merely because of its having been rendered in the court in which he was presiding.

12. A court may take such notice in an action of any order, judgment, or proceeding in such action in such court; but that rule does not extend to any other action". (Citations).

—*State ex rel. Mengel v. Steber*, 158 W. 309, 311.

JUDICIAL RULES.

See JUDICIAL DECISIONS. RULES OF PRACTICE.

JURAT.

See VERIFICATION.

JURISDICTION.

See also APPEARANCE. CONCURRENT JURISDICTION. CIRCUIT COURT. EQUITY. FOREIGN JURISDICTION. INCOMPETENTS. NOTICE. PUBLICATION.

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1. The jurisdiction of probate courts is not entirely statutory, but such courts are "the offspring of the common law".

2. Probate courts may "revoke or reverse orders entered in the course of probate proceedings."

3. Administration irregularly granted upon the petition of strangers, without notice, is held voidable, but not "entirely void". See ADMINISTRATION.
—*Brunson v. Burnett*, 2 Pin., 185, 188.

4. "Consent as a general thing, cannot give jurisdiction of the subject matter of the action. But consent can and does give jurisdiction of the parties to an action."
—*Walker v. Rogan*, 1 W. 597, 626.

5. Jurisdiction as to foreign judgments may be inquired into. See FOREIGN JUDGMENTS.
—*Rape v. Heaton*, 9 W. 328, 334.

6. If the court had jurisdiction, an order or judgment cannot be impeached collaterally. See COLLATERALLY.

—*Tallman v. McCarty*, 11 W. 401, 406.

7. "Courts of probate have a very extensive jurisdiction over the estates of deceased persons * in order to secure a prompt and faithful settlement of such estates".
—*In re Campbell*, 12 W. 369, 370.

8. The remedy on claims in county court "is exclusive in its character". See also CLAIMS.
—*Price v. Dietrich*, 12 W. 626.

9. "The power to hear and determine a cause is jurisdiction; it is coram judice whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction".

10. "Jurisdiction is the lawful authority to hear and determine the cause upon the allegations made. And the best test is * that the allegations should be sufficient on their face to warrant the court to

act." However if the "facts appear of record in the same estate," the record may be treated "as a representation of those facts" in connection with the petition.
—*Sitzman v. Pacquette*, 13 W. 291, 302.

11. "If the facts upon which the supposed jurisdiction was assumed are recited in the record, and they appear from it to have been insufficient and not such as in law would confer such jurisdiction, then the party is not bound by it", the judgment.

—*Pollard v. Wegener*, 13 W. 569, 575.

12. "It is * established that the records of probate courts must show jurisdiction in order to sustain their proceedings".

—*Gibbs v. Shaw*, 17 W. 197, 202.

13. "The whole record of the probate court" is a continuous one, and after the appointment of an administrator "in all subsequent proceedings in the settlement and administration of the estate, the probate court takes judicial notice of the appointment". See also RECORD.

14. The probate court takes judicial notice of the appointment previously in the same estate, of an administrator.

—*Frederick v. Pacquette*, 19 W. 541, 551.

15. The county court has "undoubted jurisdiction" to allow a claim for "the amount due upon a land contract" and "it is quite immaterial what reason the county court gave for its decision" to the contrary. See also CLAIMS.

—*Gale v. Best*, 20 W. 44, 47.

16. Jurisdiction is not affected by failure to give the value of personal property in the petition for sale. See also SALE OF REAL ESTATE.

—*Reynolds v. Schmidt*, 20 W. 374.

17. "A court of equity should not entertain jurisdiction where a complete, adequate and full remedy can be obtained from the county court".

—*Batchelder v. Batchelder*, 20 W. 452, 454.

18. The jurisdiction of circuit courts over guardians of infants is concurrent with that of county court. See also CIRCUIT COURT.

—*Glasscott v. Warner*, 20 W. 654, 656.

19. "Courts of chancery formerly had no original jurisdiction over probate of wills, whether of real or of personal estate".

20. Ecclesiastical courts had such jurisdiction "whose decree or sentence in respect to the validity or invalidity of the will was conclusive, so far as the personalty was concerned".

21. "But the probate was inoperative so far as the will related to real estate, the validity of the will in respect to it being solely cognizable by the courts of common law in the ordinary forms of suits".

22. "In this country, however, the probate of wills, both of real and of personal estate, is generally confided to courts of special jurisdiction, under the various names of the court of probate, county court, register's court, orphan's court, the court of the ordinary, and the surrogate's court (2 Kent 410); and their modes of procedure are very much regulated by statute".

23. "In this state the jurisdiction concerning the probate of wills and the administration and settlement of estates is vested in the county courts. The decisions of those courts upon the question of the validity or invalidity of the will is conclusive, unless an appeal is taken therefrom".
—*Will of Jackman*, 26 W. 104, 107.

24. A probate court is "a court of limited jurisdiction, and hence, at common law, no presumption could be indulged in support of its jurisdiction where its records failed to show it".

25. Yet, it seems, that by virtue of the statute (Sec. 3906) in sales of real estate, by virtue of any order or license, "such court and its records stand upon precisely the same footing, in respect to presumptions in favor of jurisdiction, as though it was a court of general jurisdiction." Constitutionality is left undetermined.

26. "It is only where the record is silent in relation thereto, that the existence of facts is presumed in favor of jurisdiction".

27. "If the want of jurisdiction appears affirmatively by the record, it is fatal to the proceedings. In such case there is no room for presumptions". See also SALE OF REALTY.

—*Blodgett v. Hitt*, 29 W. 169, 177.

28. By virtue of the statute (Sec. 3906), the "presumption of jurisdiction" and of the validity of the probate court proceedings in sale of realty, is the same as in "courts of general jurisdiction". See also SALE OF REALTY.

—*Farrington v. Wilson*, 29 W. 383, 398.

29. "The county courts have plenary jurisdiction in all matters of the administration, settlement and distribution of the estates of deceased persons, and much of this jurisdiction is of an equitable character and is necessarily concurrent with that of courts of equity".

30. The county court has jurisdiction to determine "whether a sum of money which has come to the hands of the executors as an asset of the estate of Mrs. T. is really such asset to be distributed to her heirs or legatees, or whether it is an asset of the estate of her deceased husband, which should be distributed to his heirs."

—*Tryon v. Farnsworth*, 30 W. 577, 581.

31. An appearance by motion to set aside proceedings on account of other irregularity in addition to defect of serving process, is a "waiver of jurisdictional defect". See APPEARANCE.

—*Alderson v. White*, 32 W. 308, 312.

32. Where there is no personal estate and no "debts or claims chargeable against or due to the estate", and an administrator was appointed, Lyon J., says: "I am strongly inclined to think that such appointment was absolutely null and void", but the court does not decide the question. (Otherwise determined in *Barlass v. Barlass*, 143 W. post).

—*Flood, Admr., v. Pilgrim*, 32 W. 376, 378.

33. Where the defendant appeared and contested the action "on its merits, this was a waiver of any defect in the service of process, if the same was in any manner irregularly or defectively served".

34. "It was an appearance in the action, which gave the court jurisdiction of the person of the defendant; and consequently no objection to the jurisdiction of the police justice could be taken on appeal in the county court".

—*Atkins v. Fraker*, 32 W. 510, 517.

35. The county court "has all the jurisdiction, both legal and equitable, unless expressly reserved, necessary to the due administration of the estates of deceased persons and to the performance of all acts required in the course of such administration, including the probate of wills and the giving effect to the intention of testators, whenever such intentions may be effectuated by the powers and processes possessed and used by any court of justice".

36. Where the county court admitted a nuncupative codicil on sufficient evidence but against the law, and the order was simply reversed by the circuit court, held "that the circuit court should have rendered a judgment, or have remanded the case to the county court directing it to render a judgment, establishing and confirming a trust in favor of the petitioners" and against the residuary legatee, "according to the principles of equity governing the case".

37. In this case the residuary legatee by express or implied promise was to pay certain bequests to the petitioners, such bequests not being contained in the will, and it was held that a trust was created "as part of the testamentary disposition" of the testator, to pay such bequests.

38. The county court "may grant equitable relief or enforce a trust in a case of this nature, the same as a court of equity; and although the jurisdiction of a court of equity still exists, it does not oust that of the county court in a proper case".

39. "The doctrine of equitable estoppel may be recognized, and its principles enforced, as well by the county court as by the court of chancery, the jurisdiction of the latter being concurrent, merely, in any matter pertaining to the settlement of the estates of deceased persons".

40. "And it is immaterial, also, that the petitioners, or parties seeking redress in the probate court, may have their remedy by action in a court of law as well".

—*Brook v. Chappell*, 34 W. 405, 411.

41. Courts of record have inherent power to appoint assistants. See PROBATE COURT. —*In re Janitor of Supreme Court*, 35 W. 410, 419.

42. Where the will is not proven, the court has “no power to appoint” an administrator.

43. “In no correct sense can it be said that the court has jurisdiction of the estate, before proper proceedings are instituted therein to prove the will (if there be one), or to appoint an administrator”.

—*Chase v. Ross*, 36 W. 267, 272.

44. The service of notice of final distribution, on the heir, is jurisdictional. See JUDGMENT. —*Ruth v. Oberbrunner*, 40 W. 238, 269.

45. The county court had jurisdiction of the construction of wills even before any specific statute on the subject. See also CONSTRUCTION OF WILLS.

46. General notice by publication without a specific statute, is held to bind the parties interested, notwithstanding *Ruth v. Oberbrunner*, 40 W. supra, and *Bresee v. Stiles*, 22 W. 120 (see INFANTS).

—*Appeal of Edw. Schaeffner*, 41 W. 260, 264.

47. “The jurisdiction of the county court, though limited and defined, is original and exclusive over the subject matter of the probate of wills, and fully attaches upon the death of the testator and proof of his domicile or the situation of his estate.

48. It is said that death of the testator gives to courts of probate general jurisdiction; and proof of the domicile and situation of the estate, both the general jurisdiction of the subject matter, and jurisdiction of the particular case. 3 Redfield on W. 120.”

49. “Formerly, in England, the ecclesiastical court had jurisdiction only of the probate of wills of personal property, and the courts of common law over devises of real estate;

50. And the decrees of the ecclesiastical court in reference to the personal estate were final and conclusive as to all persons; but the judgments of the common-law courts, in the case of wills of real property, were conclusive only as between the parties to the suit”.

51. “In most of the states, courts of probate have jurisdiction of wills of both personal and real property;

52. And the statute confers upon our county courts such jurisdiction, by the language, ‘of all cases of the probate of wills;’ and thus full and complete jurisdiction of the probate of all wills is given;

53. Not, however, to proceed as in common law courts, by suit, but in a particular manner defined by statute; and it has been held that the decrees of such courts, in respect to all wills, are final and conclusive as to all parties having notice. 1 Jarman on W., 213; *Potter v. Webb*, 2 Greenl. 257.”

54. In cases of sale of the real estate to pay debts, proceedings in derogation of the common law, "the facts in the petition must be such as by the statute authorize them; and even in such cases it is held that the petition and proof of the facts confer jurisdiction of the subject matter. *Grignon's Lessee v. Astor*, 2 How. 338; *Sitzman v. Pacquette*, 13 Wis. supra".

55. "Jurisdiction of the parties or persons interested, and due notice to them, are also unquestionably necessary to make the sale valid as to them; and such proceeding is in the nature of a suit, and the defendants must have notice as in other cases of suits at law or in equity, and the want of notice would be attended with the same consequences. (Cases)."

56. "*Ruth v. Oberbrunner*, 40 W. supra, and other cases, in which this point is considered, do not in the least conflict with the principle that want of notice only makes such proceedings void as to the persons not appearing or assenting, and that such notice may be waived."

57. "In the application of these principles to the decree of probate under consideration, it is clear that such decree, and the subsequent proceedings in the execution of the will, are void only as to such persons in interest as did not appear or assent thereto, or as have not since supplied such want of appearance by acts clearly indicating an assent thereto or a ratification thereof."

—*O'Dell v. Rogers*, 44 W. 136, 168.

58. The subsequent appointment of a guardian ad litem for infants, does not cure defective service or want of jurisdiction. See SERVICE.

—*Helms v. Chadbourne*, 45 W. 60, 69.

59. "The only jurisdiction the county court has, in respect to the administration of estates, is over the estates of dead persons", and all proceedings of administration as to live persons are void ab initio. See also PRESUMPTION OF DEATH.

—*Melia v. Simmons*, 45 W. 334, 337.

60. "Of the power of the legislature to take away the jurisdiction of the circuit court in actions to charge the estates of deceased persons with the payment of the debts of the decedent, there can be no doubt".

61. "The only question is, Has it done so? The repeated decisions of this court hold that it has, and the supreme court of Michigan from which we copied our law, have held the same way under the law of that state. (Many cases)." See also CLAIMS.

—*Lannon v. Hackett*, 49 W. 261, 271.

62. While notice to the incompetent in sale of realty is not necessary where a guardian represents him and is licensed to sell,

63. Yet notice to the adverse party is held necessary to give jurisdiction of the person in the case of a license to an executor or administrator;

64. While "the petition and proof of the facts conferred jurisdiction of the subject matter". See also *INCOMPETENTS' SALE OF REALTY*.

—*Mohr v. Porter*, 51 W. 487, 493.

65. As to jurisdiction in incompetent guardianship proceedings, the contents of the petition, and it being necessary that the statutes "appear to have been strictly complied with upon the face of the proceedings; and no inferences are indulged in in support of the proceedings". See also *INCOMPETENTS*.

—*Appeal of Royston*, 53 W. 612, 618.

66. Where no special guardian represented minor children at the probate, "still, the widow having been named as an executrix in the will, and having, with the two executors named, accepted letters of administration, and she and they having given the requisite bond, and qualified and entered upon such administration, they, and each of them, became bound by the probate, and the widow was thereby necessarily put to her election whether she would take under the will or under the statutes. (Secs. 2170-72).

67. So, upon the same assumption, the probate of the will was binding upon creditors.

68. If the probate of the will was void for the reason assigned, as to anyone, then it was only as to such minor heirs". *O'Dell v. Rogers*, 44 W. supra.

69. The widow, being "sole devisee and legatee", but the estate being insolvent, she duly "elected to take the provision made for her by law, instead of the provision made for her in the will, and by so doing the will immediately became inoperative as to the real estate, the title of which at once upon such election, if not upon the testator's death, became vested in his heirs subject to their mother's right of dower and the payment of the testator's debts".

70. And as to personalty under the will, or "had there been no will, the legal title and right to the possession of such personal property and proceeds thereof would have vested in the administrator", and not either in the legatees or the heirs.

71. And on the theory apparently, but without saying so, that the unrepresented minors were not harmed by the operation, the court holds, "that the will in question was properly admitted to probate on any theory", and that the "title to the land" under license to pay debts, "vested in the defendant P. by virtue of the executors' sale, and their deed to him thereon".

—*Melms v. Pfister*, 59 W. 186, 191.

72. As to the notice for probate of a will, fifteen years before, in the affidavit of publication, "through some inadvertance the number of 'successive weeks' is left blank. Since there were three such weeks intervening, we would naturally suppose that there was a publication in each week as ordered. In that respect 'the record is merely silent', and the validity

of the probate may therefore be presumed after the lapse of so many years. *Blodgett v. Hitt*, 29 W. supra." (Cited approvingly in *Chandler v. Munkwitz*, R. & I. Co. 148 W. 5, 13; see PRESUMPTION).

—*Portz v. Schantz*, 70 W. 497, 505.

73. As to setting aside fraudulent sales of real estate by an executor as trustee. See CONCURRENT JURISDICTION.

—*Hawley, by Gdn. ad Litem v. Tesch*, 72 W. 299, 304.

74. Settlement of estates "is essentially proceedings in rem". Federal courts "have uniformly disclaimed jurisdiction in probate matters." See also ADMINISTRATION.

—*State, ex rel Sanderson v. Mann*, 76 W., 469, 476.

75. While service by publication on a non-resident under sec. 2640, gives "the court jurisdiction over the property" within the state, yet "such service by publication could give the court no jurisdiction to render any personal judgment against him. *Renier v. Hurlbut*, 81 W., 24."

—*Cox v. North Wis. L. Co.*, 82 W., 141, 145.

76. Where, as upon a note before maturity, a judgment "was prematurely entered, the error does not go (to) the jurisdiction of the court, but is an irregularity only, which may be waived by the judgment debtor, and which was so waived in this case by a duly authorized release of errors, which appears of record". *Salter v. Hilgen*, 40 W., 363.

77. And, "where, as in the present case, the attack is made on the ground of mere irregularity, such other creditors (the appellants) are in no better position than the judgment debtor, and neither can avoid the judgment unless the same is shown to be unjust or inequitable. (Cases)".

—*Marshall v. Il. Bank v. Milwaukee W. M.*, 84 W. 23, 26.

78. "Locality of personalty of a deceased confers local probate jurisdiction, without consideration as to his last domicile, (without the state),

79. And debts due the deceased are deemed bona notabilia, i. e., personalty suitable for conferring local probate jurisdiction; and the rule is that simple contract debts constitute such where the debtor (not creditor) resides, and where they can be sued upon. So of any chose in action or money right. *Schouler, Extrs.*, 24; *Attorney General v. Bouwens*, 4 Mees. & W. 191; *Owen v. Miller*, 10 Ohio St., 136; *Pinney v. McGregory*, 102 Mass., 186; *Clark v. Blackington*, 110 Mass., 373."

—*Bragg v. Gaynor*, 85 W., 468, 485.

80. "The objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be taken, in the first instance, by answer or demurrer on that ground, or it is waived.

81. It cannot be raised afterwards by a demurrer ore tenus on the trial.

(Cases). The only question which could properly be raised by the demurrer ore tenus is, Does the complaint state a cause of action in equity? *Sherry v. Smith*, 72 W. 339". See also CONCURRENT JURISDICTION.

—*Meyer Admr. v. Garthwaite*, 92 W. 571, 572.

82. Order on settlement of guardian's accounts, conclusive. See ACCOUNTS OF GUARDIANS. —*O'Connor v. Decker*, 95 W., 202, 204.

83. County court has jurisdiction to make a final order of assignment, on application of interested parties. See JUDGMENTS.

—*Will of Hess*, 97 W. 244, 249.

84. "The general rule is that when a court has jurisdiction", that "every proposition assumed or decided, leading up to" a judgment, "is included within it", and such judgment is conclusive as to collateral attack. See also JUDGMENTS. —*Roberts v. Weadock*, 98 W. 400, 405.

85. Probate of a will is set aside three years after allowance, for failure of jurisdiction, it appearing that proof of publication of notice had not been filed, and oral proof merely "that a notice was published", without detail thereof, is held insufficient, on the record showing the order for hearing reciting "Saturday, the 3rd day of July", Saturday being July 4th, a legal holiday, and the hearing had July 3rd, as shown by the decree which recited that due notice "of such hearing has been given as required by the order, etc.", the order being "deceptive and misleading";

86. "There is not the same liberality of intendment to support the proceeding as in cases where it comes in review collaterally", as to recitals of precedent things done; yet, it is said:

87. "If the recitals in the decree allowing the will had said that notice had been given according to law, or had used words of similar import, we should not hesitate to support the jurisdiction of the county court. Such recitals would import a compliance with statutory requirements".

88. The court had "undoubted jurisdiction to hear proofs of the will," but not "to bind the parties in interest unless it secured that right in the manner provided by statute, or it was waived".

—*Heminway v. Reynolds*, 98 W. 501, 506.

89. A trial court has no jurisdiction over its judgment affirmed on appeal, "except to enforce it". See JUDICIAL DECISIONS.

—*Crowns v. Forest Land Co.*, 100 W. 554, 555.

90. "If jurisdiction be obtained to determine a fact, its determination wrong or on insufficient or improper evidence is immaterial", the petition being sufficient. See ADOPTION. —*Parsons v. Parsons*, 101 W. 76, 79.

91. A recitation "in the certificate of probate, that the court proceeded 'pursuant to notice duly published', supplemented by" acceptance by a

trustee, and the surety executing the required bond, is held sufficient to support jurisdiction, "in the absence of any evidence to throw doubt upon it." See also RULES OF PRACTICE.

—*Richter v. Estate of Leiby*, 101 W. 434, 438.

92. As to jurisdiction to probate or administer property, real or personal, within the state, regardless of jurisdiction to administer other estate in another state, and the question of domicile being immaterial. See FOREIGN JUDGMENTS. DOMICIL.

—*Frame v. Thormann*, 102 W., 653, 670.

93. Jurisdiction to grant administration after seven years absence, with two inconsistent statements thereof in the petition. See PRESUMPTION OF DEATH.

—*Wis. Trust Co. v. Wis. M. & F. Ins. Co. Bank*, 105 W., 464, 467.

94. "The duty and power to examine, consider, and decide, is jurisdiction." So stated, upholding the power of the court to refuse to grant discontinuance of a suit on application of the plaintiff.

—*State ex rel City of Milwaukee v. Ludwig*, 106 W. 226, 233.

95. As to special jurisdiction being necessary to be acquired over parties in sale of realty proceedings, by special notice, etc., to invalidate such sales. See SALE OF REALTY.

—*Bloor v. Smith*, 112 W., 340, 348.

96. Where the proof of publication of the notice to prove a will, "was insufficient to show jurisdiction", following *O'Dell v. Rogers*, 44 W., supra, "we must hold that the court had jurisdiction as to such parties as appeared in the case". (Other cases). See also PUBLICATION.

—*Flood v. Kerwin*, 113 W., 673, 678.

97. As to appointment of an administrator de bonis non, where executor was erroneously continued as trustee. See ADMR. DE BONIS NON.

—*Barney v. Babcock's Est.*, 115 W., 409, 414.

98. The county court having "jurisdiction of the subject-matter",—by submitting "the question to the court as to how much she should pay to her attorney out of the" estate, the administratrix, "waives any question of jurisdiction of her person", and is held bound by the judgment.

99. Which cannot be set "aside in a collateral action". See also ADMINISTRATION EXPENSES.

—*Vaughn v. Walsh*, 122 W. 486, 490.

100. The "broad general power", under sec. 2443, "necessarily carries with it by implication all judicial authority of courts of equity in the administration of trusts necessary to the proper administration of the particular class of trusts in question". *Tryon v. Farnsworth*, 30 W., and *Brook v. Chappell*, 34 W., supra.

101. As to authority over attorney's fees, and making them a lien on the estate personalty. See ADMINISTRATION EXPENSES.

—*Carpenter v. U. S. F. & Guaranty Co.*, 123 W. 209, 213.

102. Administration proceedings had, before a will was found, held jurisdictionally valid, and effective until set aside. See ADMINISTRATION.

—*Perkins v. Owen*, 123 W. 238, 241.

103. The appointment of an administrator cannot be collaterally attacked. See ADMINISTRATION. PUBLIC ADMINISTRATOR.

—*Jordan v. C. & N. W. R. Co.*, 125 W. 581, 587.

104. Amendment, in circuit court on appeal, of petition to vacate probate, by including the final assignment order (not appealed from), held proper. See AMENDMENT.

105. "The appeal from the judgment refusing to set aside the probate of the will brought up the whole matter. The judgment assigning the real estate depended upon the probate of the will, and fell with the judgment setting such probate aside, at least so far as the questions involved upon this appeal are concerned".

—*Parsons v. Balson*, 129 W. 311, 319.

106. "Where a court possesses jurisdiction of the subject matter but ought not to exercise it in the way invoked it should be deemed to be without jurisdiction.

107. Where it ought, regardless of the attitude of parties, to decline to act, it should be deemed, regardless of such attitude, not to have jurisdiction to act (*Harrigan v. Gilchrist*, 121 W., 127, 229);

108. And where the jurisdiction of the court is invoked in a matter within its power but in a manner entirely unknown to the law, written or unwritten, ordinarily, at least, it should refuse to open its doors,

109. And if it does not this court should treat the result as jurisdictionally defective whether objection be or be not made by any party to the litigation. *Harrigan v. Gilchrist*, supra; *Burnham v. Norton*, 100 W. 8. See also COURT COMMISSIONERS. —*Potter v. Frohbach*, 133 W., 1, 4.

110. Where the statute gives a court jurisdiction of certain actions, "this is jurisdiction of the subject matter.

111. When the plaintiff properly commences such an action in the proper court and serves his summons on the defendant jurisdiction of the parties is obtained,

112. And thus complete jurisdiction of both the subject matter and the parties is acquired by the court and the contentions of the parties may be heard and decided.

113. Absence of a party from the trial cannot deprive the court of jurisdiction to proceed unless, indeed, there is some statutory provision to that effect.

114. Such absence may affect the nature of the judgment which should properly be rendered, but if the court renders a wrong judgment such action is an error only—it is not an act without jurisdiction.

115. Having jurisdiction of both the subject matter and the parties, the court has jurisdiction to render not only a right judgment but an erroneous judgment as well". See also *VACATING JUDGMENTS*.

—*Comstock v. Boyle*, 134 W. 613, 615.

116. Where a county judge holds his court "outside of the county," or is "pecuniarily interested", the proceedings are held invalid. See *COUNTY JUDGES*.

—*McIntosh v. Bowers*, 143 W. 74, 76.

117. After probate of a will, the county court has jurisdiction to determine as to annulment of a paragraph thereof. See *REVOCATION*.

—*Will of Battis*, 143 W. 234, 238.

118. "A prima facie showing" "or a bona fide claim" in the case "of a resident of the county", "that there is an estate" is sufficient for administration, such being sufficient "jurisdictional facts" as to estate, for granting letters. See also *ADMINISTRATION*.

—*Barlass v. Barlass*, 143 W. 497, 498.

119. The county court in its final decree "had no jurisdiction to adjudicate the rights of" a lessee for life.

120. It could "determine what distribution was intended" by the will. See also *JUDGMENTS*.

—*Triba v. Lass*, 146, W., 202, 204.

121. "Jurisdiction of the subject matter is not, necessarily, measured by the scope of the controversy as presented by pleadings.

122. Generally speaking, as said in *Cooper v. Reynolds*, 77 U. S. 308, 'By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this * is to be sought for in the general nature of' the court's 'powers, or in authority specially conferred' ". p. 441.

123. "Jurisdiction of the subject matter 'is conferred by the sovereign authority which organizes the court, and is to be sought' " as stated, "meaning conferred by law, not by mere consent of the parties". p. 450.

124. As to lack of jurisdiction to substitute parties' agreement as to disposition under a will, and judgment so doing, being void and coram non judice. See *PROBATE OF WILLS*. —*Will of Rice*, 150 W. 401, 440.

125. "The county court has full jurisdiction, in law as well as in equity, in respect to all controversies involved in the settlement of the estates of deceased person. (Cases)".

126. Held, that such jurisdiction should have been exercised in the creation of an implied trust and in an accounting, where the decedent had acquired his property with the funds of his wife. See also *IMPLIED TRUSTS*.

—*Wisdom v. Wisdom*, 155 W., 434, 436.

127. While "appellate jurisdiction cannot be conferred merely by consent to its exercise",

128. Yet "where a trial de novo is permitted in the appellate court and where that court has original jurisdiction to hear and determine any case whenever the parties voluntarily appear before it and submit their controversy", it has been held such court may try a case so submitted. *Mfg. & M. I. B. v. Everwear H. Co.*, 152 W. 73.

—*Free v. Western U. T. Co.*, 158 W. 36, 39.

129. "When a person dies intestate, primary jurisdiction to probate his will and grant letters testamentary vests in the county court of the testator's residence at his death (*Will of Hess*, 97 W. supra; 18 Cyc. 67);

130. It was necessarily decided by the Kenosha county court, when it probated D.'s will and assumed general and primary jurisdiction of the estate, that D. was a resident of that county;

131. That decision, rendered after due notice to all parties, and never appealed from or reversed, settled the question so far as the parties are concerned in all subsequent actions in the courts of this state (*Huebschmann v. Cotzhausen*, 107 W. 64; See JUDGMENTS).

—*Will of Durkee*, 164 W. 41, 43.

JURY.

Administration, on appeal:

Not a case for a jury, 26.

Commitment of infants:

Industrial sch.; house of refuge, 19.

Communication, judge, jury, 36.

In open court only, 36.

Presence of counsel, 37.

Contract breach, by jury, 40.

Equity cases:

Only in aid of the court, 11.

Tries only special issues, 10.

Guardians appointed without, 2.

Insanity determinations:

Criminal cases:

Discretion of the court, 24.

Not as a matter of right, 22.

Prior to the constitution, 25.

Right does not extend to, 20.

Sec. 4700, as common law, 21.

Summary, jury or otherwise, 23.

Partition; circuit court:

Feigned issue in chancery, 30.

Finding, erroneous instruction, 31.

Supreme court; equity:

Reverse; clearly against facts, 13.

Reviews questions of fact, 12.

View, knowledge from, 38.

Credibility of evidence, 38.

Waived only by consent, 1.

Will probate on appeal:

Analogous to chancery courts, 18.

Assist court, if desirable, 3, 7.

Court may determine wholly, 16, 29.

Long established rule, 42.

Questioned in dictum, 39.

No authority for, 41.

Triable in common law courts, 40.

Court's duty same as without, 6.

Declining to submit, not error, 35.

Errors and urging to agree, immaterial, 34.

Feigned issue in chancery, 4, 6, 15, 27.

Improper testimony, immaterial, 33.

Insanity verdict set aside, 5.

May be entirely disregarded, 17.

May order new jury trial, 8.

Discretion of the court, 9.

Not binding on the court, 7, 17, 28.

Nuncupative; same effect, 6.

Set aside, if unsatisfactory, 4.

Special question form, unimportant, 29.

Submitted; later withdrawn, 14.

Submitting special issue, 15.

Weighty, in doubtful case, 8.

1. Juries can be waived only "by the consent of the parties", and not by default of defendant.
—*Haskins v. Wilson*, 5 W. 106.

2. Guardians may be constitutionally appointed, without right to trial by jury. See GUARDIAN AND WARD.
—*Gaston v. Babcock*, 6 W. 503.

3. "Upon an appeal from an order of the county court admitting to probate a will, the circuit court must proceed and determine the matter according to settled principles applicable to the case; and if the assistance of the jury is desirable to determine doubtful questions of fact, it may have the verdict of a jury to inform its judgment and conscience".

4. "When the verdict is unsatisfactory, and clearly against the weight of evidence upon the issue submitted, it is the duty of the court to set it aside and grant a new trial, where perhaps a court of law might not disturb it. This is the practice upon feigned issues in chancery."

—*In re Jackman Will*, 26 W. 104, 109.

5. A verdict of insanity in a will case was set aside and new trial ordered, the Jackman Will Case being followed.

—*Chafin Will Case*, 32 W. 557, 569.

6. A jury to try a nuncupative will case, its determination having "substantially the effect of a verdict on a feigned issue in chancery", held therefore, that the court is "called upon to review the evidence, the same as though no jury had intervened".

—*In re Pritchard's Will*, 37 W. 68, 70.

7. Where a jury found the will valid, and the finding is disapproved by the circuit judge, but approved by the supreme court, it is said: "We recognize the fact that the verdict of the jury was simply advisory, and to aid the court in arriving at a right determination of the facts in issue, and not absolutely binding upon his judgment in case he was of the opinion that it was not sustained by the evidence".

8. "In case of doubt, such verdict is entitled to great weight; and usually, instead of finding in hostility to the verdict, if the court is dissatisfied with it, a new trial would be directed upon the same issues by another jury".

9. "Such direction of a new trial is in the discretion of the court, and a judgment would not be reversed for want of such direction, if the judgment rendered in opposition to the verdict was sustained by the weight of evidence".

—*Will of John Meurer*, 44 W. 392, 397.

10. In equitable actions the jury tries only special issues. See EQUITY.

—*Stahl v. Gotzenberger*, 45 W. 121, 123.

11. "The verdict of a jury in an equity case is only in aid of the court, and the court is not bound by it to the same extent as in a case at law.

12. The law requires this court, upon appeal, to review the questions of fact upon the evidence.

13. In cases of this kind this court has repeatedly held that it would not reverse a finding of fact by the court below, unless it appeared that such finding was clearly against the preponderance of the evidence. (Cases)".
—*Stanley v. Risse, Extrx.*, 49 W. 219, 220.

14. Where the circuit court by order submitted to a jury all the issues in a will contest, but at the trial orally limited the questions for the jury, and later "ruled that the whole question be taken from the jury", and itself passed thereon, it was held this "was tantamount to a formal revocation of all orders of submission of any of the issues to a jury, and was clearly within the power and discretion of the court".

15. "Submitting special issues to a jury in such a case 'is strictly analogous to the course pursued in courts of chancery when a feigned issue is awarded', and 'is subject to the discretion of the court'.

16. 'The court may, if it sees fit, determine all the questions of fact, as well as of law, without the intervention of a jury;'

17. And the verdict when taken, is not conclusive and binding upon the judgment of the court, and is merely advisory, and may be entirely disregarded".

18. "The statute authorizing such a submission, the analogous practice of courts of chancery, and the decision of this court in *In re Jackman Will*, 26 W. supra, fully confirm this view of the question".

—*Will of Carroll*, 50 W. 437, 440.

19. "It has been held in several of the states that this right of trial by jury does not extend to proceedings to commit infants to the industrial school or house of refuge. (Cases). See *Mil. Ind. Sch. v. Mil. Co.*, 40 W. 328.

20. Nor does it extend to the determination of the mere insanity of a party. (Cases)".

21. "Our statute (sec. 4700) has adopted substantially the same practice", as at common law.

22. "The statute certainly did not give a jury trial as a matter of right upon such collateral issue" of insanity in criminal cases.

23. "It says 'the court shall make inquisition thereof in a summary manner, by jury or otherwise, as it deems most proper'.

24. Undoubtedly it may, in a proper case, make such inquisition by a medical commission or otherwise. The method of making inquisition is left to the discretion of the court."

25. "A trial by jury of such preliminary and collateral issue was not a matter of strict right prior to the constitution". See also *WRIT OF ERROR*.
—*Crocker v. State*, 60 W. 553, 556.

26. The question of appointment of an administrator, on appeal, was held "not a case for a jury trial." See also *ADMINISTRATION*.

—*Est of Sargent*, 62 W. 130, 135.

27. On appeal from probate "the verdict of a jury on questions submitted has essentially the same effect that it had upon a feigned issue in chancery.

28. It is not conclusive and binding upon the court even as to the facts. (Cases *supra*).

29. This being the case, the precise form of the questions submitted is of less importance than in actions at law, because the court must determine from the whole evidence whether the proposed will should be admitted to probate".

—*Ballantine, Extr., v. Proudfoot*, 62 W. 216, 219.

30. In the trial of an issue of fact in partition, by a jury (sec. 3129) the verdict is "merely advisory," "like a feigned issue in chancery".

31. But where a jury found as to such a fact, after an erroneous instruction, and the court adopts such finding, the judgment thereon was reversed, the error being material.

—*Williams v. Williams*, 82 W., 393, 397.

32. The verdict of a jury on a contested will, "is merely advisory to aid the conscience of the court. (Cases, *supra*).

33. Such being the law and the facts, it becomes unnecessary to consider whether, technically, some of the testimony was not improperly admitted". The verdict here, being as to testamentary capacity, was sustained by the trial and supreme courts. See TESTAMENTARY CAPACITY.

—*Loughney v. Loughney*, 87 W., 92, 101.

34. In a will contest, before a jury, errors in instructions, or urging by the trial judge to agree, are immaterial, "inasmuch as the verdict was only advisory in character". (Cases *supra*).

—*Jones v. Roberts*, 96 W. 427, 430.

35. Where on trial of a will contest with a jury, the circuit court declined "to take verdict of the jury", "no reversal can be predicated" thereon, as "such verdict would have been advisory merely, leaving the duty still upon the trial court to decide all questions of fact according to his own judgment".

—*Mueller v. Pew*, 127 W. 288, 292.

36. "No communication should be had between the judge and the jury after submission of the cause except in open court.

37. The presence of counsel is not indispensable, although it is the better practice to procure such attendance. *Meier v. Morgan*, 82 W. 289", *Havenor v. State*, 125 W. 444.

—*Hurst v. Webster, Mfg. Co.*, 128 W. 342, 347.

38. A jury may use knowledge from a view "in determining the credibility" of evidence. See also CONDEMNATION.

—*Solberg v. Robbins, L. Co.*, 147 W. 259, 262.

39. "It was held in the Jackman Will Case, 26 W. supra, that a contest on the allowance of a will to probate was triable by the court. The authority of this case is somewhat shaken, if indeed it has not been abrogated, by the later case of Will of Slinger, 72 W. 22 (See TESTAMENTARY CAPACITY), and Bovee v. Johnson, 130 W. 447 (See TRIAL).

40. However this may be, the Jackman Case went upon the theory that actions of that nature were not triable in the common-law courts by a jury. The contrary is of course true of actions for damages for breaches of contract", as here.

41. (There seems to be nothing in either the Slinger or Bovee cases justifying the dictum to which they are cited. In the first the court simply directed judgment on the verdict because there happened to be such verdict and because the supreme court agreed with the jury on the facts, and disagreed with the trial court's version. In the Bovee case there was not even an incidental question about a jury, the opinion simply referring to the Slinger case on the question of trial de novo being necessary.

42. Neither is the question either in or determined in the instant case. Nor does there appear to be any law or reason for thus weakening or shaking the long-established and heretofore unquestioned rule of the Jackman Will Case. See cases, supra). See also LEGACIES.

—*Dilger v. Est. of McQuade*, 158 W. 328, 331.

KIN, RELATION.

See also ADMINISTRATION.

Administration right of kin, 16, 24, 25.

Blood descent favored, 5.

Liberally, illegitimates, 22.

Brother, brother-in-law, 1.

Consanguinity: definition, 13.

Civil, canon, and common law, 14.

Difference only in collateral, 15.

Degrees, how computed, 13, 14.

Each question, a degree, 14.

Lineal and collateral, 13.

Definition; strict; general, 2.

Class; includes interested, 8.

For administration purposes, 24.

Petitioners; interested persons, 25.

Degrees, how computed, 13, 14.

Diagram and method, 26.

Father and mother, equal, 15.

Father-in-law; son-in-law, 7.

Grandmother; uncles, 6.

Heirs-at-law; realty, 19.

Statutory difference, 20.

Next of kin, sec. 3807, 8.

Administration rights, 16, 24, 25.

Includes as to personalty, 18.

In their legal sense, 19.

Liberally, illegitimates, 22.

May be "near relatives," 21.

No interest; living relative, 23.

Not mean nearest relatives, 17.

Practically, as heirs, 20.

Refers to a class, 8.

Those entitled to share, 8.

Relation; not include wife, 3, 5.

Affinity by marriage, 10.

Blood kindred, 4.

Step-daughter, as child, 9.

Benefit certificate, 9.

Her husband not, 12.

Son-in-law as near of, 2, 7.

Step-daughter, orphan, 9.

Relationship of daughter, 11.

1. Brother, and brother-in-law of deceased, not being heirs are assumed but not stated to be next of kin, for the purpose of petitioning for administration, only infant children being heirs, an irregular administration previously granted to strangers being revoked on such petition. See also ADMINISTRATION.
—*Brunson v. Burnett*, 2 Pin. 185.

2. "The word 'kin', in its strictest sense, includes only relations by blood; but in a general sense it is used to include both relations by blood and marriage, and in this sense the objects of this provision of the statute evidently require it to be interpreted". So held, under the statute disqualifying justice "near of kin to either party", on the ground that a son-in-law was such kin.
—*Hibbard v. Odell*, 16 W. 633, 635.

3. In the statute (sec. 2289) as to lapsed legacies, in the language "to any child or other relation of the testator," the term "relation" is held not to include the wife.

4. The statute is taken from Massachusetts, and has a uniform construction for more than a century, "which confined the word used in bequests, to relations by blood, and made it virtually equivalent to kindred".

5. "The law has always favored blood in the descent of estates. The particular provisions of our statutes in favor of the wife are personal to her, and tend rather to exclude than to include her in the term relations as used in the section".
—*Cleaver v. Cleaver*, 39 W. 96, 100.

6. The paternal "grandmother is one degree nearer of kin than the uncles" on the mother's side, and she is held to take in preference to the uncles.
—*Est. of Kirkendall: Cramer's App.* 43 W. 167, 177.

7. Following *Hibbard v. Odell*, 16 W. supra, it is held, that "father-in-law and son-in-law are 'near of kin', within" sec. 3617, as to a justice's disqualification.
—*Elderkin v. Wiswell*, 61 W. 498, 499.

8. Without deciding the question, the court says "there is much reason in" the view that, under the statute, sec. 3807, "the language 'next of kin' refers to a class, and includes all persons who are entitled to a share in the intestate's estate under the statute of distribution, without regard to the degree of consanguinity".

—*Est. of Sargent*, 62 W. 130, 135.

9. In construing a benefit certificate, a step daughter is held to be R.'s, her step father's "orphan" after his decease. It is quite clear that, in a legal sense, she was his child during his lifetime. She was his wife's daughter, his step-daughter.

10. 'By marriage one party thereto holds, by affinity, the same relation to the kindred of the other that the latter holds by consanguinity'.

Spear v. Robinson, 29 Me. 531; Higbe v. Leonard, 1 Denio., 186; Simcoke v. Grand Lodge, 84 Ia. 383.

11. In the beneficiary certificate she was designated as 'my daughter Josefa'. This was strictly correct; for such was the legal relationship, by reason of the affinity between them".

12. "Perhaps Josef V., her husband, was not so eligible. He was not at all related to R. Higbe v. Leonard, 1 Denio. 186". (Approvingly cited in Jones v. Mangan, 151 W. 215, 223).

—*Renner v. Bohemian, S. B. Soc.* 89 W. 401, 404.

13. "Consanguinity, it is said, is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between an intestate and his father or grandfather, etc., in the direct ascending line, or between him and his son or grandson, etc., in the direct descending line;

14. And every generation in lineal, direct consanguinity constitutes a different degree, reckoning either upward or downward. This method of computation of degrees of kindred in the direct line obtains as well in civil and canon law as in the common law. 2 Chit. Bl. 203.

15. The difference in the method of computation of degrees exists only in relation to collateral consanguinity", and where an intestate "left no children, his father and his mother were his next of kin and in the first degree", and "they stood as such in equal degree." See also DESCENT AND DISTRIBUTION.

—*Brown v. City of Baraboo*, 90 W. 151, 154.

16. "Right of the next of kin" to administration, "is limited to" application for a suitable person "within thirty days after the death". See ADMINISTRATION.

—*Welsh v. Manwaring*, 120 W., 377, 378.

17. "This court has not so held (Est. of Sargent, 62 W. supra.)",—"That the term 'next of kin'", "means nearest in relationship",—"though there is much authority supporting such view. (Many cases)".

18. Without "discussing the question of the precise scope of the term 'next of kin'", "it is clear, at least, that it includes those entitled to take the personal estate in case of intestacy". N. Y. L. Ins. & T. Co. v. Hoyt, 161 N. Y. 1, 9.

19. "Treating the" "next of kin" and the term "heirs at law" "only in their legal sense the one refers to those who take the personalty of an intestate, and the other to those in whom the title to the realty possessed by the intestate vests immediately upon his death.

20. Under our statutes there is very little difference between the two terms, since, in the main, those who take the personalty of an intestate are the same as those upon whom the law casts the title to the realty. Secs. 2270, 3935".

21. Here, in the petition to allow appeal under sec. 4035, the term "near relatives" was used as synonymous with the" term "next of

kin" and "that meaning may reasonably be attributed to such term. (Citation)". So held. See also *APPEAL*.

—*Perry v. Scaife*, 126 W. 405, 408.

22. As to "blood relatives", and "next of kin", concerning illegitimates under wills, construed liberally. See *LEGITIMACY*.

—*Est. of Sander*, 126 W. 660, 664.

23. "A next of kin or heir apparent has no right or legal interest in the property of a living relative. (Citation)". See also *AGGRIEVED PERSON*.

—*Sanborn v. Carpenter*, 140 W., 572, 575.

24. (While often considering the term, the court thus far seems to have avoided giving any definite and circumscribed meaning for administration purposes to the term 'next of kin'. However, perhaps inferentially, and certainly reasonably, the term probably should, in administration proceedings, be assumed to include only those relatives or persons who have a legal financial or property interest in the estate under consideration. For analogous indications, see the title, *AGGRIEVED PERSON*.)

25. For instance: To be jurisdictionally safe, no kin of the decedent, without a property interest in the estate, should be recognized either as a petitioner for administration or as a person having any right in the matter of issuing letters. If all interested are under disability, a guardian should first be appointed, and he should make the necessary petition for administration.)

26. (As to method of computing degrees of kindred, and diagram in aid thereof,—see *ZIMMERMAN'S PROBATE PRACTICE*, pp. 625, 626.)

LABOR.

See *SERVICES*.

LACHES.

Circumstances govern, 1.

Disability; not imputed, 12.

Discourteged in equity, 10.

Long delay will prevent, 11.

Less than limitation, 11.

Equitable action:

Unreasonable delay bars, 7.

Final judgment set aside, 9.

Fraudulent concealment, 9.

Heir, not knowing interest, 15.

Knowledge: upon inquiry, 8, 12.

Duty of inquiry, 8, 13.

Kept in ignorance, 14.

Legal action:

Acquiescence as estoppel, 6.

Limitation statute analogy, 3.

Long delay held no bar, 14.

Kept in ignorance, 14.

Time: lapse not bar, 2.

Frequent value changes, 5.

Long accounting delay, 3.

Reasonable, depends on facts, 4.

When not affected by, 2.

Year's accounting delay, not, 16.

1. "Courts of equity do not impute laches by any iron rule, but allow circumstances to govern their decision in every case.

2. And it is said: 'Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction'. 13 Am. & Eng. Ency. of Law, 674; U. S. v. Alexandria, 19 Fed. Rep., 609, and cases cited." See also IMPLIED TRUSTS.

—*Fawcett v. Fawcett*, 85 W., 332, 336.

3. "Laches is a bar in analogy to the statute of limitations". Held not a bar after long delay in accounting. See ACCOUNTS OF GUARDIANS.

—*Taylor v. Hill*, 86 W., 99, 106.

4. "A court of equity applies the rule of laches according to its own ideas of right and justice," there being no specific period, and "reasonable time" "depends upon the facts and circumstances of each particular case. *Brown v. Buena Vista Co.*, 95 U. S., 157, 160; (other cases).

5. The rule is peculiarly applicable where the property, the subject of litigation, is subject to rapid or frequent changes in value, as stocks, oil wells, mining property and the like. (U. S. Cases)."

6. "It is argued that laches or acquiescence, in order to operate as bar, must be such as will amount to an estoppel, and such, no doubt, is the rule in cases where the cause of action is a legal one.

7. Where it is purely of an equitable character (and not founded on any strict legal right) there the rule in equity", as stated, "applies, and unreasonable and unexplained delay is sufficient to bar relief". *Galway v. Metropolitan El. R. Co.*, 128 N. Y., 132; *Menendez v. Holt*, 128 U. S. 523.

8. "In *Johnston v. Standard Mining Co.*, 148 U. S., 370, it was held that 'the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry.' (Cases)."

—*Rogers v. Van Nortwick*, 87 W., 414, 429.

9. Application to set aside a final judgment for fraudulent concealment of a former marriage and invalid divorce. See FRAUDULENT ORDERS.

—*Thomas v. Thomas*, 88 W., 88, 93.

10. "Laches and neglect are always discountenanced in equity, which always refuses relief in favor of stale demands.

11. Long delay, and even, sometimes, a delay less than the period of limitation by statute, will be regarded as laches, and will prevent the intervention of equity;

12. But laches will not be imputed to one while under disability, and there must have been knowledge, actual or imputable, of the facts,

13. Which should have prompted investigation and action, and, if there was actual ignorance, that must have been without just excuse. Beach, Mod. Eq. Jur. 18, 19". See also SALE OF REALTY.

—*Melms v. Pabst Brewing Co.*, 93 W., 153, 173.

14. A complaint seeking equitable relief by a person twelve years after arriving at majority, as to acts twenty-five years before proceeding, is held to show no laches on the facts presented showing that complainant was kept in ignorance of his rights.

—*Steinberg v. Saltzman*, 130 W. 419, 430.

15. Laches was not imported in an heir as to affairs of the intestate in his lifetime, such heir not having, or knowing he would have, an interest. See FRAUDULENT ORDERS.

—*Scheer v. Ulrich*, 133 W., 311, 318.

16. "A delay of a year in bringing an action of this kind",—for fraud and accounting against a surviving partner,—"is not per se laches, especially in the absence of any facts showing that the defendant had suffered thereby".

—*McCartney v. Boyd*, 161 W. 146, 148.

LAND CONTRACT.

See also MORTGAGES.

Acceptance: non-signing grantee, 5.

Agreement of both parties, 6.

Adopted, party not signing, 1.

Binds both parties, 2.

Assignee: of vendor, notes, 17.

Against vendor for title, 18.

Entitled strict foreclosure, 18.

Vendor, trustee of legal title, 26, 27.

Whether notes non-negotiable, 21.

Both or neither bound, 1.

Decedent vendee: fully paid, 9.

Administrator no right thereto, 11.

Descended to heirs at once, 10.

Interest in lands, real estate, 10.

Land not required for debts, 9.

Deceased vendor: work payment, 12.

Declarations to show work, 12.

Equitable mortgagor and mortgagee, 8,
14.

Strict foreclosure of contract, 8.

Escrow: not to a party, 3.

Notes; whether non-negotiable, 21.

Payment: enforcement of, 22.

When promise is absolute, 23.

Without tender of deed, 22, 23.

Possession right, silent, 19.

Purchase money to be paid, 19.

Presumption of meaning, 24, 25.

Several notes due on default, 7.

Share pro rata, not priority, 7.

Vendee: owner after execution, 13.

Equitable owner of the land, 20.

Liable for taxes assessed, 15.

Mortgagor and mortgagee, 14.

Vendor, legal title in trust, 13, 16, 20.

Vendor: legal title, security, 16, 20.

Legal title for his assignee, 17.

Remedy of assignee, 18.

Transfers notes to another, 17.

Trust for assignee and vendee, 26, 27.

Vendor retakes possession, 4.

Ineffective, vendee not consenting, 4.

Wife's: failure to sign, 28.

Inchoate dower value, 33.

Computation methods, 34, 35.

Proper, not necessary party, 29.

Refusal to join in deed, 30.

Options of vendee, 31, 32.

1. "Both parties ought to be bound by the contract, or neither should be bound. And where the contract has been accepted and adopted by the party not signing it he does assent and agree to it on his part, and the law implies a promise to perform."

2. "And unless the contract is affected by misrepresentation or fraud, it must be held binding upon both parties".

3. The contract could not be delivered to the other party "to remain in escrow"; for in case of a deed in escrow it must be delivered to a stranger, "and we see no reason why the same rule should not apply to the delivery of a written contract for the sale of real estate".

—*Lowber v. Connitt*, 36 W. 176, 183.

4. If the vendor retakes possession, "the contract could not thus be rescinded by the vendor alone. The mere fact that the vendor repossessed himself of the land sold without any agreement or consent of the vendee, would not extinguish the contract, or relieve the vendor from the obligation to convey on a full compliance with the conditions of the contract by the vendee".

—*Hart v. Stickney*, 41 W. 630, 637.

5. "It is settled in this court that the acceptance, by the grantee, of a deed or land contract executed by the grantor alone, binds such grantee. (Cases)."

6. Hence, the instrument signed by the plaintiff alone, and accepted by the defendant, is as much the written agreement of the latter as it is of the former".

—*Hubbard v. Marshall*, 50 W. 322, 327.

7. The owners of several notes becoming due "by reason of default in the payments", must share pro rata, and not by priority. See MORTGAGE.

—*Pierce v. Shaw*, 51 W. 316, 320.

8. In case of an "ordinary executory contract for the sale" of land, where the "right to a conveyance thereof was made conditional upon "the vendee's performing certain agreements within a specified time, it is said of the vendee and vendor that, "under all the authorities, such relation is that of equitable mortgagor and mortgagee. The mortgagor has only an equitable interest in the land, which, in case of default, may be cut off by a strict foreclosure of the contract. (Many cases.)"

—*Superior Consolidated Land Co. v. Nichols*, 81 W., 656, 659.

9. In an action for specific performance, by the administrator, to enforce "an agreement to convey lands" to the decedent, where "the purchase price had been fully paid", and "the decedent was in actual occupancy of the lands, and left children" in possession, and there were no debts or a "deficiency of personal estate to pay debts,"—on "demurrer ore tenus", it is held:

10. "No doubt the interest which plaintiff's decedent had in these

lands is 'lands' and 'real estate' within the statute definition. Sec. 4971, subd. 9. These lands, on the death of the intestate, descended at once, by operation of law, to her children. Sec. 2270, subd. 1.

11. That the administrator, at common law, "has no right of possession", and "under the statute (sec. 3833) he has no right to the possession unless there are claims against the estate unpaid. *McManany v. Sheridan*, 81 W. 538 (See *REAL ESTATE*).". Demurrer sustained.

—*Carpenter v. Fopper*, 94 W., 146.

12. Oral declarations of a deceased vendor, in a land contract providing for payment in money, were held admissible "to show that in fact the covenants of the written agreement had been paid and satisfied by work instead of in money", the plaintiff though not a relative, having lived with decedent since "he was five years old up to the time of the contract in question was made, doing farm work of all kinds, without pay." Specific performance decreed. *Jilson v. Gilbert*, 26 W., 637 (See *SERVICES*.)

—*Boles v. Welch*, 94 W., 189, 190.

13. "After the execution of the contract, the vendee must be regarded as the real owner of the property, though not the holder of the legal title,—the vendor holding the legal title in trust for the vendee, subject to the payment of the purchase money;

14. And, as between the parties, the latter is regarded as a mortgagor, and the vendor as the mortgagee, of the premises for the amount due for the purchase money".

15. Where "the vendee obtains possession and the use, and the vendor covenants to execute a conveyance or warranty deed, free and clear of incumbrances," "the vendee is liable for the taxes assessed" after his taking possession. (Many cases)".

—*Williamson v. Neeves*, 94 W., 656, 665.

16. It has been "held, in effect, that the vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money;

17. And, if he transfers to another the purchaser's notes for the whole of the unpaid purchase money, he will continue to hold such legal title in trust as security for his assignee;

18. And on default of the vendee the assignee will be entitled to a strict foreclosure as against the vendee, and also a judgment against the vendor, compelling him to execute the trust in an appropriate manner. *Church v. Smith*, 39 W., 492; *Bartz v. Paff*, 95 W., 100, 108". Followed.

—*Emerson v. Schwindt*, 108 W., 167, 173.

19. Under an executory contract for the sale of land, "which is silent on the subject of possession of the premises, the purchaser acquires no

right of possession or entry until the purchase money is paid or tendered.' ” *Northwestern I. Co. v. Meade*, 21 W., 474.

—*Grindo v. McGee*, 111 W., 531, 534.

20. “It has repeatedly been held in the decisions of this court that the purchaser under an ordinary land contract is regarded in law as the equitable owner of the land purchased, and that the vendor holds the legal title to secure the payment of the unpaid purchase money. (Cases) ”.

—*Krakow v. Wille*, 125 W. 284, 287.

21. In a suit by the assignee of the payee, on a note, it is not determined whether by the “notation on its face ‘secured by land contract’,” the note “was rendered non-negotiable”, that fact being immaterial, as the plaintiff “was not a holder without notice, although for value.

22. Under a (land) contract like this, where conveyance is only to be made upon demand after completed payment, the promise of payment is absolute and may be enforced by suit without tender of the conveyance.

23. The duty of the vendor to convey is neither a condition precedent to payment nor an act which may be demanded concurrently therewith. *Gale v. Best*, 20 W. 44 (See CLAIMS) ”.

—*Collins v. Schmidt*, 126 W. 227, 228.

24. Ordinary bilateral land contracts that “purport to set out the mutual undertakings of the two parties” are presumed to do so and “to be a correct and complete expression of their final contract. (Cases). ”

25. Only by the very clearest proof, if at all, can this presumption be overcome. *Kercheval v. Doty*, 31 W., 476 (See COMPROMISE). ”

26. “The vendor in a land contract who assigns that contract or the right to the payments thereunder to another holds the legal title to the land in trust for the two parties under that contract, and such trust persists and accompanies the legal title wherever it may go, unless, indeed, into the hands of a bona fide holder for value.

27. Of course, when payment is completed that trust is solely and exclusively for the purchaser, who thereby gains the complete equitable title to the land. (Cases) ”.

—*Foster v. Lowe*, 131 W., 54, 57.

28. Though the wife has not signed the contract of sale, she is a “proper party” defendant in an action for specific performance she having “an inchoate right of dower” in the lands.

29. “Being a proper party defendant, she cannot successfully demur on the ground that she is not a necessary party”, though “she is not a necessary party”. (Cases).

30. “Should the wife refuse to join in the deed and release her dower interest, it might become necessary to determine the value thereof and deduct it from the purchase price.

31. For in a case where the wife of the vendor refuses to join to bar her dower right the vendee has the option to decline to take a deed from the husband alone, and sue for breach of the contract,

32. Or he may accept such deed as part performance and retain from the purchase price a sum equal to the value of the wife's contingent interest. (Many cases).

33. The case of *Wright v. Young*, 6 W. 127, points out how the value of such an interest should be ascertained". (See pars. following).

34. ("There can be no difficulty, however, in ascertaining what this reversionary interest (wife's inchoate dower) is worth. In *Davis and Peck's Mathematical Dictionary*, and by *Cyclopedia of Mathematical Science*, pp. 501 and 502, formulas are given, by which the present value of an annuity can be calculated which is to commence at the death of one individual and terminate at the death of another.

35. In *Emerson's Miscellanies*, pp. 96 and 97, can be found a like formula. The interest of the wife in the estate sold being susceptible of calculation, we see no hardship in deducting the value thereof from the purchase money, if she is unwilling to relinquish her dower". *Wright v. Young*, 6 W. 127, 132).

—*O'Malley v. Miller*, 148 W. 393, 394.

LANDLORD AND TENANT.

See also RENTS AND PROFITS.

Alterations:

- Different, landlord, life-tenant, 46.
- Life-tenant, remainderman, 45.
- Making small apertures, 42.
- Material building changes, 9.
- Material change is waste, 9, 44.
- Substantial change meant, 43.

Covenant of enjoyment:

- Implied at common law, 7.
- Statute, under three years, 7, 22.

Equity: remove lease cloud, 54.

Fixtures: removed by tenant, 2.

- Building not attached, 19.
- Parties may agree as to, 17.
- Remove while in possession, 18.
- Replevin proper remedy, 19.

Forfeiture stipulation:

- Choice of damages for breach, 52.
- Delay to declare, 53.
- Equity to remove cloud, 54.
- Lessee's surety not party, 55.
- Not bound or relieved, 55.
- For benefit of lessor, 51.

Growing crop at leasing, 10.

Lease:

- Assignment by lessee, 4.
- Lessee still liable, 4.
- Growing crop at execution, 10.
- Not reserved, lessee's, 10.

Lease for years:

- Not written, with possession, 27.
- Rent binding on lessee, 27.

Parol evidence of surrender, 5.

Lease with purchase option, 49.

- Not a contract of sale, 49.

Mining leases, distinct, 30.

Covenant to prospect, 31.

Ninety-nine years, trustee, 32.

- Under an implied power, 32.

Parol: one year, building, 28.

Affirmatively appear, year, 34.

Effect in future, valid, 28.

Statute of frauds, different, 35.

Tenancy becomes periodic, 37.

Modified estate at will, 38, 40.

Notice to terminate, 39.

Payment period, 41.

Pays rent regularly, 36.

Until premises sold, void, 33.

Renewal: privilege clause, 20.
 Called for a new lease, 21.
 Conditions, when enforceable, 50.
 Precise terms of original, 20.
 Except removal condition, 20.
 Privilege "four years more," 23.
 Notice; not new lease, 23.
 Time of notice waived, 24.
 Rent: in advance; fire loss, 1.
 Acceptance after breach, 3.
 Repairs: agreement necessary, 25.
 Applies, parts used in common, 26.
 Surrender: in law, 6.
 Effect of voluntary, acceptance, 29.

Surrender—continued
 New lease including old, 6.
 Parol evidence, incompetent, 5.
 Tenancy at will. See Parol.
 Tenancy by sufferance, 14.
 Landlord's consent essential, 15.
 No notice to terminate, 16.
 Tenant in common:
 Lessee of co-tenant, hold over, 8.
 Tenant: possession rights, 11.
 Landlord no entry rights, 13.
 Live-stock, includes increase, 47.
 Hiring for term, likewise, 48.
 Trespass against landlord, 12.

1. Rent paid in advance per agreement, without protection in lease, cannot be recovered in case of fire. See RENTS AND PROFITS.

—*Cross v. Button*, 4 W. 468, 484.

2. Fixture as between landlord and tenant may be removed by the tenant during his term. See FIXTURE.

—*Frankland v. Moulton*, 5 W. 1, 5.

3. The rule is "well settled that the acceptance of rent by the landlord from the tenant, accruing due, after the forfeiture, will operate as a waiver of the breach complained of."

—*Gomber v. Hackett*, 6 W. 323, 324.

4. "The authorities are clear that where the lease contains a covenant to pay rent, the lessee continues liable therefor, notwithstanding the fact that the lease may have been assigned, and the lessor may have accepted rent of the assignee".

5. Evidence by parol to show that there had "been an express surrender of the estate to the lessor" of "a lease for years" was incompetent.

6. In taking a new lease "for the whole or part of the term embraced in the former one, there is said to be a surrender in law, because the giving a new lease necessarily implies a surrender of the old one".

—*Bailey v. Wells*, 8 W. 141, 157.

7. A covenant for quiet enjoyment under a lease, is implied at common law; and still under the statute "in case the term did not exceed three years". See COMMON LAW.

—*Eldred v. Leahy*, 31 W. 546, 551.

8. A tenant in common does not hold over under a lease from his co-tenant unless by "evidence aliunde". See TENANTS IN COMMON.

—*Rockwell v. Luck*, 32 W. 70, 72.

9. "A tenant, whether rightfully in possession or not, cannot, without the consent of the landlord, make material changes or alterations in a building to suit his taste or convenience, and, if he does, it is waste. The law is undoubtedly so settled."

—*Brock v. Dole*, 66 W. 142, 145.

10. "Being a lease, there can be no doubt, we think, that the crop of wheat growing upon the leased premises when the instrument was executed, and which matured during the term of the lease, became the property of the lessee,—the same not having been reserved by the lessor.

11. This must necessarily result from the rules of law that the tenant is vested with all the rights incident to possession, and the use and enjoyment of all the privileges appurtenant to the leased premises,

12. And may maintain an action against any person who disturbs his possession or trespasses upon the premises, even though it be the landlord.

13. The latter has no right to enter during the term, to repair or to remove crops, unless he has stipulated with the lessee for such right. (Citations)".

—*Emery, Admr. v. Fugina*, 68 W. 505, 507.

14. "The doctrine that a tenancy by sufferance necessarily arises when a man comes into possession of lands lawfully, but holds over wrongfully after the determination of his interest therein, has been qualified in this state and elsewhere in an important particular.

15. It was held by this court in *Meno v. Hoeffel*, 46 W., 282, that, in order to create a tenancy by sufferance in favor of a tenant holding over after the expiration of his term, the consent of the landlord, either express or implied, to the continuance of the tenancy, is essential."

16. So held in this case, and that without such consent, "after such default no tenancy existed, either at will or by sufferance; and hence the defendant was not entitled to the statutory notice required to terminate a tenancy".

—*Eldred v. Sherman*, 81 W., 182, 188.

17. "It is settled that landlord and tenant may, by their agreements, treat as personal property improvements which would otherwise be part of the realty, and thus convert them into personal property to all intents and purposes as between themselves. *Smith v. Waggoner*, 50 W., 155.

18. It is also settled that the right to remove such improvements must ordinarily be exercised by the tenant while still in possession under his lease, or it will be lost. *Keogh v. Daniell*, 12 W., 164; *Josslyn v. McCabe*, 46 W., 591."

19. So held as to a building not actually attached to the soil, sold by the tenant, and sought to be removed after the tenancy, by replevin which was held to be the proper remedy, though removal was refused on the facts.

—*Fitzgerald v. Anderson*, 81 W., 341, 342.

20. A covenant in a ten-year lease, 'with the privilege of a renewal', is held valid, and it is said that "leases containing a general promise to renew have been uniformly held to the terms of the lease in which such language is used, so as to be, in effect, an agreement to renew upon the precise terms and conditions therein stated, except as to the condition to renew". *Laird v. Boyle*, 2 W. 431, contra, in effect, overruled.

21. So held, and, following *Orton v. Noonan*, 27 W. 272, it is "held that an agreement to renew a lease called for a new one".

—*Kollock v. Scribner*, 98 W. 104, 108.

22. Covenants as "for quiet enjoyment," are not implied in leases of longer than three years. See also COVENANT.

—*Koeber v. Somers*, 108 W., 497, 500.

23. In a lease for a certain term, "with the privilege of four years more, * by giving ninety days' notice before" the end of the first term, "the stipulation was not to 'renew' or 'extend' the lease, which stipulation would require the making of a new lease (*Kollock v. Scribner*, 98 W., supra), but it was a stipulation that by the giving of a certain notice the lease itself should cover an additional four years".

24. Where "the notice was not given ninety days before", but "notice was given and accepted without objection on the score of time", this was a waiver of such time, and the notice was effective.

—*Sheppard v. Rosenkrans*, 109 W., 58, 63.

25. "The common law that in the absence of an express agreement to the contrary a landlord is under no obligation at all to his tenant to keep the leased premises in repair",

26. Applies even "where there are several tenants in a building," and as to the portions "used by them in common, such as the stairways, the halls, and the roof". —*Kuhn v. Sol. Heavenrich Co.*, 115 W., 447, 449.

27. A lease for five years, not signed by the lessor "or by his agent duly authorized in writing, as required by sec. 2302", where the lessee took possession, and the agent's act of making was ratified, is "a good contract for a lease, enforceable in equity as from the date thereof, and binding upon" the lessee "at law as regards the rent, so long as the enjoyment of the property actually continued".

—*Kriz v. Peegc*, 119 W., 105, 121.

28. "A parol lease of a building for a period of one year, to take effect in the future, is valid." Sec. 2304 "does not prevent leases being" so made, and subd. 1, sec. 2307, is held not "applicable to a parol lease" which "relates to real estate, and ch. 104, Stats., deals with such contracts whether they actually convey an interest in real property or not."

—*Baumgarten v. Cohn*, 141 W., 315, 316.

29. "Where there is a voluntary surrender, accepted by the landlord, all liabilities under the lease which would arise in the future had no surrender taken place are terminated, but liabilities which have already accrued remain unaffected. (Citation)".

—*Boyd v. Gore*, 143 W. 531, 536.

30. "While analogies arising from urban or agricultural leases are not to be wholly rejected, it must be remembered that" "mining leases form a distinct class of instruments, creating special and peculiar relations and legal rights".

31. "The covenant to prospect a mine is in the nature of a condition and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort".

—*Loveland v. Longhenry*, 145 W. 60, 67.

32. Trustees held properly authorized to lease for ninety-nine years, under an implied power. See TRUST VARIATION.

—*Upham v. Plankinton*, 152 W. 275, 291.

33. Under sec. 2302, an oral lease "to occupy the premises as tenant until they were sold was undoubtedly void so far as fixing the term".

34. "To come within the exception it must affirmatively appear that the term of the lease does not exceed one year",

35. While under subd. 1, sec. 2307, a contract is void only when 'by its terms' it 'is not to be performed within the year. (Case).'

36. "When a tenant enters premises under a void parol lease like the present and pays rent regularly thereafter,

37. His tenancy becomes a 'periodic tenancy', i. e., either a tenancy from 'year to year', 'month to month', or 'week to week,' according" to the rent payments,

38. Being "a modified form of an estate at will, namely, one which, either by force of judicial decision or statute or both,

39. Cannot be terminated by either party without the giving of a notice of a certain duration". *Koplitz v. Gustavus*, 48 W. 48; *Hunter v. Frost*, 47 Minn. 1.

40. "The term 'tenancy at will' in this section (2183) includes the so-called 'periodic tenancies', except those tenancies from year to year which have been put in a class by themselves by sec. 2187. (Cases)".

41. The termination of such tenancies, under sec. 2183, can only be had by "notice in writing" for the payment period, and "the notice must terminate at the end of such a" period.

—*Sutherland v. Drolet*, 154 W. 619, 621.

42. As between landlord and tenant, it is held that making small apertures in a building to admit electric wires "is not an 'alteration' in the leased premises", under a clause of the lease forbidding alterations.

43. "Ordinarily the word 'alteration' as applied to a building means a substantial change therein."

44. Under *Brock v. Dole*, 66 W. supra, as "between landlord and tenant" "any material change is waste, even though it enhances the value of the property".

45. In *Melms v. Pabst B. Co.*, 104 W. 7, "it is substantially held that very material changes may be made by the life tenant, so long as the value of the property is not thereby depreciated.

46. So we have a different rule applicable to the ordinary relation of landlord and tenant from that which applies to life tenant and to remainderman." —*Cawker v. Trimmel*, 155 W. 108, 112.

47. "A lease of livestock, as in this case, without reservation, carries with it the whole use thereof, including an increase of number of animals".

48. So also as to hiring, the "increase belongs to the person who hires them." "That manifestly does not apply to casual hiring but to letting for a term so that an increase would naturally be expected in the ordinary course". —*August Brandt & Co. v. Verhagen*, 161 W. 3, 5.

49. Where "in form the contract" "is a lease, containing an option under which the lessee may purchase the premises at a specified price within a prescribed period", and in such case "the sum paid for rent was to apply as a payment on the purchase price",—it is held not "a contract of sale". —*Nelson v. Goddard & Co.*, 162 W. 66, 69.

50. "A covenant to renew a lease, if the terms are definitely fixed, or means are provided whereby they may be made certain by construction, is enforceable". The rule of *Kollock v. Scribner*, 98 W. supra, stated and applied. —*Fergen v. Lyons*, 162 W. 131, 133.

51. "The right to declare a forfeiture of a lease is one created by stipulation in the lease for the benefit of the lessor and he is not obliged to invoke it.

52. He has the choice whether to hold the lessee responsible in damages for breach of covenant or to declare the lease at an end for breach of condition.

53. We do not think his delay to declare or enforce a forfeiture has any effect upon the measure of damages".

54. While "foreclosure judgment" under sec. 2197a was "improper" because of all the statutory conditions not existing, it "nevertheless was within the general jurisdiction of equity and valid as between the parties thereto, and sufficient as a decree to remove a cloud against the lessees and those claiming" under them.

55. The surety on the lessee's bond not being "a party to that suit

and the defense of the suit" not being "tendered to it", "is therefore not concluded thereby. But it was not relieved thereby of anything".

—*Mohawk Co. v. Bankers Surety Co.*, 162 W. 272, 276.

LAPSED LEGACY.

See LEGACIES. VESTING OF ESTATES, ETC.

LAST SICKNESS.

See CLAIMS.

LAW.

Foreign to be proved, 1.

Ignorance no excuse, 7.

Not an exact science, 2.

Presumption of knowledge, 4, 6.

Presumption, etc.—continued

Administrative rule, 7.

Criminal code, effect, 5.

Obsolete in broad sense, 3.

Unconstitutional act, not, 8.

1. Foreign law must be proved as a fact to be noticed. See FOREIGN LAWS.
—*Walsh v. Dart*, 12 W. 635, 638.

2. "The law is not one of the exact sciences. Its rules and principles are incapable of positive demonstration, and as to many of them, there is always room for much difference of opinion. We can, as it were, only approximate to the truth, coming as nearly to it as possible, but are never certain that we have precisely reached it". Dixon, C. J.

—*Roebke v. Andrews*, 26 W. 311, 335.

3. "While it is often said that the presumption is, that every one knows the law, that is, in some respects, a legal relic. It is, in its broad sense, obsolete. It is so said in effect, in all modern text-books, based on judicial authority".

4. "The legal presumption however exists, and is applicable wherever necessary to the due administration of justice. Ignorantia legis neminem excusat, is a rule of necessity and is limited in its scope by the reason of it",—

5. Which is to prevent "immunity from punishment for violation of the criminal code and immunity from liability for actual loss for violations of personal and property rights".

—*Topolewski v. Plankinton P. Co.*, 143 W. 52, 72.

6. "There is no presumption that every person knows the law as a fact.

7. A better statement of the rule is that ignorance of the law affords no excuse for its violation. It is a rule of administrative law and not strictly a rule of evidence". *Topolewski v. Plankinton P. Co.*, 143 W. supra.

8. "An unconstitutional act of the legislature is not a law; it confers no rights, it imposes no penalties; it affords no protection, and is not operative, and in legal contemplation it has no existence. *Norton v. Shelby Co.*, 118 U. S. 425, 442; *Bonnett v. Vallier*, 136 W. 193, 200".

—*State ex rel. Kleist v. Donald*, 164 W. 545, 552.

LEADING QUESTIONS.

Appearance of persons; things, 10.

Defined; answer suggested, 3.

Presumption of inquiry, 5.

Discretionary with court, 2, 4, 7.

Abuse of discretion, 4, 7.

Error may be fatal, 4.

Discretionary, etc.—continued

Suggested answer; presumption, 5.

Objection should be special, 6.

Own witness hostile, 1.

Stir witness' recollection, 8.

Not to suggest answer, 9.

1. "A party is allowed to put leading questions to his own witness, where the latter appears evidently hostile to the party calling him".

—*Juneau Bank v. McSpedon*, 15 W. 629, 631.

2. "Whether leading questions shall be permitted rests in the sound discretion of the court in which the trial is had, and decisions with respect to them are not the subject of exception." Dixon, C. J.

—*Barton v. Kane*, 17 W. 37, 42.

3. The question to the witness "unmistakably suggested to him the desired answer. It was therefore leading".

4. While *Barton v. Kane*, supra, is explained and adhered to, yet, held, "if a leading question be improperly allowed against the objection of the appellant (made in proper form), and to his injury, it is an abuse of discretion; and if it appears from the record that such injury resulted therefrom, no good reason is perceived why it should not be held that the error is fatal to the judgment".

5. Where the answer is suggested by the question, "we are inclined to hold the presumption to be that the appellant is thereby injured, unless there are circumstances in the case which rebut such presumption."

—*McPherson v. Rockwell*, 37 W. 159, 162.

6. "The objection, to be available, should have been special", and "made to it for that reason", in the case of a leading question.

—*Tegarden v. T. of Caledonia*, 50 W. 292, 296.

7. "The rule is that the allowance of leading questions is discretionary with the trial judge, and unless there be an abuse of discretion such allowance does not constitute error. *Coggswell v. Davis*, 65 W. 191".

—*McDermott v. Jackson*, 97 W. 64, 70.

8. "Where a witness has, without prompting, given his version of a conversation or transaction and counsel thinks he has inadvertently omitted to mention some things said or done, he ought to be allowed by proper questions to stir the recollection of the witness again on this point.

9. Such questions are not leading when they do not suggest the answer".

—*Samson v. Ward*, 147 W. 48, 51.

10. As to leading questions as to appearance of persons or things, being admissible. See EXAMINATION OF WITNESSES.

—*Schultz v. Frankfort M. A. & P. G. Ins. Co.*, 151 W. 537, 550.

LEASE.

See LANDLORD AND TENANT.

LEGACIES. LEGATEES.

See also CONSTRUCTION OF WILLS. VESTING OF ESTATES, ETC.

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By father for minor child, 66.

Testimony of mother, 66.

Consideration; name child, 52.

Elect to sue for damages, 67.

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Oral, to leave legacy, 37, 63.

Pay for past services, 60.

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Charge upon devised land, 30.

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Devisee personally liable, 42.

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Remainder sold to pay, 25.

Separate sales, injury to parties, 55.

Court adopt best method, 56.

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Legacy first applied, 57.

Value thereof computed, 57.

Charge upon, etc.—continued

Remainder applied, if necessary, 58.

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Distinction from devisees, 6.

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Sometimes devisees, 6, 7.

Delay in admitting, 88.

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- Accrued income thereon, 82.
- Specific, carry accessions, 81.
- Joint tenancy, legacies, 32.
- Judgment creditor of devisee, 49.
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- Bar specially pleaded, 85, 86.
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- Delivered to life beneficiary, 3.
- Personalty first liable for, 34.
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- Proportionate residuum share, 61.
- Meaning of said legacies, 62.
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- Extrinsic evidence to prove, 16.
- Ineffective as to legacy, 14.
- Residuary, also executor, 36.
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- Misapplies funds, estopped, 47, 48.
- Residuum: personal, real, 23.
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- Widow preserve, election only, 27.
- Heirs protected by bidding in, 29.
- Life estate in, immaterial, 28.
- Reversion sold to pay, 25.
- Specific legacies:
 - Distinction from general, 9, 10.
 - Railroad stock, at par, 8.
 - Title: transfer by executor, 1.
 - Vesting: condition precedent, 38.
 - Condition before decease, 38.
 - Void legacy, residuum, 33.

1. "So perfect is this right of disposition in an executor, that he may even transfer an absolute title to a specific legacy."

—*Roy v. Vilas*, 18 W. 169, 174.

2. A legacy directed to be paid by a devisee, is held a charge upon the lands devised. See TRUSTS.

—*Powers v. Powers*, 28 W. 659, 662.

3. The executor is not accountable for "personal chattels" delivered to the life beneficiary if they are afterwards lost or destroyed. See LIFE ESTATE.

—*Golder v. Littlejohn*, 30 W. 344, 352.

4. An oral promise by a residuary legatee to the testator to pay certain sums as legacies, the testator therefore not changing his will, will be enforced as a trust either by the county court or a court of equity. See JURISDICTION. PRAYER FOR RELIEF.

—*Brook v. Chappell*, 34 W. 405, 411.

5. "A legatee is one who takes personal property" under a will.

6. The term 'legatee' "is not infrequently used as synonymous with

—‘devisee’, and such use is sanctioned by lexicographers. Chattels are bequeathed to a legatee, and real estate is devised to a devisee.”

7. “We think that it can be gathered from the will itself and the surrounding circumstances, that the testator used the term ‘legatee’ in his will in its broader and more popular sense, and that he intended that his brothers and sisters should share in the distribution of the surplus, even though they are technically devisees and not legatees”.

—*Chandler’s Appeal v. Estate of McCoy*, 34 W. 505, 509.

8. In *Noonan v. Ilsley*, 17 W. 314, “the instrument sued upon was a due bill for ‘three hundred dollars in Watertown railroad stock’, and it was held that the contract would be filled by delivering the stock of that company of the par or face value of three hundred dollars. A legacy in that form would be substantially a specific legacy”.

9. “If the same rules of construction govern contracts and wills alike, the difference between that case and the one before us (in language ‘the sum of four thousand dollars in bonds or notes secured by mortgage’) is measured by the difference between a specific and a general legacy”.

10. Had the due bill been “in railroad stock, generally, without naming the company; or, being as it was, had the testator in the present case directed in what specific notes or bonds each legacy should be paid, the cases would be more nearly alike”.

11. “After careful deliberation, we are impelled to the conclusion that the legacies to the appellants are not only general legacies, but demonstrative also”; and it is held in effect, that if the securities are insufficient, the deficiency must be paid out of the remaining estate, and that it is immaterial whether the securities are turned over, or “sold by the executors and the proceeds applied in payment of the legacies”

—*Wheeler v. Hartshorn*, 40 W. 83, 102.

12. Legatees may properly be joined in a suit in circuit court to recover legacies. See PARTIES. CONCURRENT JURISDICTION.

—*Catlin v. Wheeler*, 49 W. 507, 519.

13. Where a release of a \$1500 note and mortgage of C. to the deceased, “was executed by the testator about two weeks prior to the time he executed the will”, and “he never delivered it to C., nor any one in her behalf, but retained it in his own possession until the time of his death”, and in his will “left to C. a legacy of \$2000”, without referring to the note and mortgage, it is held that this and other “releases never took effect as such for want of delivery”, and that “they could not operate as declarations of trust, because they did not contain the requisite expressions for that purpose”.

14. “For the reasons given, we must hold that the notes and mortgages were existing and valid claims against the makers, respectively, at the time of the testator’s death, and passed to his executor as a part of his estate”.

15. "The equities of the respective parties can readily be adjusted in the probate court. There can be no question but what the executor has the right to deduct, from the legacies to C. and J., the amounts of the notes and mortgages against them, respectively. (Cases)". p. 271.

16. It is not determined whether "extrinsic evidence should be admissible to prove such unexecuted intention to satisfy and extinguish the debt, and thus correspondingly increase the amount of the legacy", there being "nothing in the will to indicate an intention to release, satisfy or extinguish the debt." —*Brunn, Extr. v. Schuett*, 59 W. 260, 263.

17. "The mere fact that a person named in a will as an executor has qualified as such does not, at common law, render him liable in an action at law to a legatee therein for his legacy. (Cases.)

18. But it was held, even at common law, by Lord Mansfield, C. J., that an action of assumpsit would lie upon a promise by an executor to pay a legacy in consideration of assets. *Atkins v. Hill*, Cowp., 284; *Hawkes v. Saunders*, Cowp., 289."

19. In view of the general duties of an executor under sec. 3794, and being exempted by the will and by sec. 3795, as executrix and residuary legatee, from giving bond, and having sold the realty "charged with the payment of the legacy in question, and converted the proceeds thereof to her own use, and become a resident of another state, the defendant must be regarded as having accepted the devises and bequests on condition that she would pay the debts and legacies as in the will prescribed.

20. In other words, by such acceptance she became personally liable upon an implied promise to pay. *Gridley v. Gridley*, 24 N. Y., 130; *Brown v. Knapp*, 79 N. Y. 143; *Adams v. Adams*, 14 Allen, 65.

21. Under the provisions of the will (no time stated therein) and the statutes, (sec. 3850), we think the trial court was right in holding that the legacy became due and payable at the end of the year limited (by order) for the payment of debts and legacies;

22. And hence that the plaintiff is entitled to interest from that date, and upon unpaid balances created by partial payments. This is the rule which seems to be indicated by the authorities. *Thorn v. Garner*, 113 N. Y. 198; *Kent v. Dunham*, 106 Mass., 586; *Davison v. Rake*, 45 N. J. Eq., 767." (Approvingly cited as to personal liability, in *Merton v. O'Brien*, 117 W., post.) —*Evans v. Foster*, 80 W., 509, 514.

23. "It may be observed here that there is abundance of authority to the effect that when, as in this case, legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, such legacies are a charge on the residuary real as well as personal estate, unless such construction is opposed to other provisions in the will. In *Turner v. Gibb* (N. J. Ch.) 22 Atl. Rep., 580, numerous cases are cited which sustain this doctrine."

24. "It follows that the heirs took the reversion or remainder (whichever it may be, See DEVISES.) subject to the payment of legacies. The

personal estate has been exhausted, and it has proved insufficient to pay all the legacies. Hence, the contingency has arisen which renders necessary a resort to the residuary real estate to make up the deficiency.

25. A reversion or vested remainder may be sold on execution before the expiration of the precedent estate. 1 Freem. Ex'ns, Sec. 178, and cases there cited. No valid reason has been suggested why the same interest may not also be sold to enable an administrator to pay legacies which are a charge upon such interest.

26. We think the power and duty of the court to order the residuary estate sold to pay legacies is not impaired or affected by the circumstance that a portion of such estate was the homestead of the testator at his decease."

27. The testator may "devise it to a stranger (Secs. 2271, 2277, 2280), and his widow can preserve a homestead right therein only by electing to take the provision made for her by law instead of that contained in the will."

28. Here the widow was devised a life estate, elected to take under the will, and "the fact that it was once the homestead of her husband and herself does not affect the tenure upon which she holds one way or the other, and there remains attached to the property no quality of homestead which interferes with the sale of the reversionary interest therein to complete the payment of legacies."

29. The fact that the widow is young and that the reversionary interest "would sell for little," is no reason for prevention of the sale, and the legatees and "the heirs must protect themselves by bidding or procuring bidders at the sale." Held, that the petition for the sale of "the residuary estate should have been granted". See also DEVISES.

—*Will of Root*, 81 W., 263, 267-8.

30. In the case of a legacy which was a charge upon the land, and unpaid for perhaps thirty years, it was held, in a partition suit, that it was a proceeding against the landowners "as trustees, to enforce the trust and payment of his legacy out of the land", and that neither the statute of limitations nor "the presumption of law that after the lapse of twenty years the claim has been paid", was applicable as a bar to recovery.

31. (However, as to this case, it is said in *Merton v. O'Brien*, 117 W., post, that "so far as it indicates that a mere devisee of land, subject to the payment of a legacy charged thereon, is a trustee for the legatee, of such a nature that the statute of limitations will not run in his favor, it must be considered as overruled").

—*Williams v. Williams*, 82 W. 393, 399.

32. "Legacies come within the exceptions of our statute", as to joint tenancy, and may be such, the survivor taking. See JOINT TENANCY.

—*Farr v. Trustees, A. O. U. W.*, 83 W., 446, 454.

33. As to void legacy passing to the residuary clause. See DEVISES.

—*Milwaukee Protestant Home v. Becher*, 87 W., 409, 413.

34. There being no designation of "specific property out of which the same should be paid," it is said that "legacies so given, under our statute, would seem to be first payable out of the personal estate, if the same is sufficient." Sec. 3899.

35. The rule at common law is stated by Mr. Hawkins thus: "Legacies and annuities given generally, without reference to any particular fund, are, of course, payable out of the personal estate, and the rule with respect to exoneration applies to them." Hawkins, Wills, 289. See Reynolds Extrs., 16 N. Y. 257; Goodrich's Est., 38 W. 492."

—*Hughes v. Hughes*, 91 W., 138, 145.

36. A residuary legatee also executor, holds as such executor before settlement of the estate. See CONCURRENT JURISDICTION.

—*Meyer v. Garthwaite*, 92 W., 571, 576.

37. An oral promise to leave a legacy for services, held a valid consideration. See SERVICES.

—*Slater v. Est. of Cook*, 93 W. 104, 106.

38. Vesting of a legacy with a condition precedent, the time for determining the condition arising before the testator's decease. See VESTING OF ESTATES.

—*Stark Extr. v. Conde*, 100 W. 633, 640.

39. In "an action in equity to foreclose a legacy" "charged upon certain real estate", under a will and final judgment,—a defense of a parol gift with possession before the testator's decease of nearly twenty years, and valuable improvements on the realty, was not sustained on the facts, and judgment of sale of the realty "unless the legacy should be paid", was affirmed. See also GIFTS.

—*Hawkes v. Slight*, 110 W., 125, 128.

40. The word "legacies", held to include realty as well as personalty. See LIFE ESTATE.

—*In re Stuart's Will*, 115 W., 294, 298.

41. A mere devise of land subject to the payment of a legacy is not an express trust barred by the statute of limitations, and Williams v. Williams, 82 W. supra, so far as contrary, is overruled.

42. Such devisee "became personally liable", and the legacy to him "might be foreclosed" after it became due. See also LIEN. LIMITATION OF ACTIONS.

—*Merton v. O'Brien*, 117 W. 437, 440.

43. A will gave the widow a life estate in all the realty and personalty with the power to exhaust the latter, which amounted to less than the total money bequests thereafter given, and after the wife's death "gives to the two sons the real and personal property, 'with the exception of the above named bequests'; clearly indicating the purpose of the testator that such bequests should be paid in any event, before the two sons received anything.

44. To this may be added the further facts", among others, that the

widow "was in vigorous health" and that the sons were named as executors and "absolved from giving bonds", with resultant power to dissipate the personalty.

45. Without deeming "it necessary to decide the full scope of the rule of law", "in all cases of the bestowal of mere residuum of mixed real and personal property, there must arise an inference of intent to charge specific money legacies upon the whole of that residuum, including the real estate", and it is so held here from the will and facts. Will of Root, 81 W. *supra*; other cases.

46. Though generally, "as between legatees and devisees", "personalty is the primary source from which debts and legacies are payable," and realty though "chargeable therewith can be resorted to only in case of deficiency of personal assets" "left by the testator, not merely a deficiency resulting from misapplication or devastavit by the executors",—

47. Yet such rules "cannot, however, be patiently heard in a court of equity, when the devisee is also the executor, who, having both the personal and real property, has by his own wrongful act caused the deficiency in the former"; Wyckoff v. Wyckoff, 48 N. J. Eq., 113;

48. "He certainly" must be estopped to assert the existence of such assets in exoneration of the realty, which he takes subject to these legacies.

49. Of course, his judgment creditor, who is the sole appellant, stands in no better position than the executor himself," his judgment being "a lien merely" "subject to all equities therein in favor of others".

—*Hamilton v. Buckman*, 118 W., 169, 172.

50. The statute does not "prevent legacies from being made a charge upon the homestead by a 'general direction' in a will." See also *HOME-STEAD*.

—*Kuener v. Prohl*, 119 W., 487, 492.

51. A devise in fee, defeasible, 'upon express condition', to pay a legacy held chargeable on the lands. See *VESTING OF ESTATES, ETC.*

—*Korn v. Friz*, 128 W. 428, 433.

52. "The privilege of naming a child" is "a sufficient consideration to support a contract" to bequeath property, and the child may "ratify the transaction and enforce the contract in its favor." (Cases).

53. But an agreement to "leave her something at his death", though the promisor made "declarations to third persons and in wills which he revoked before his death" that he would leave \$500,—is held "invalid for indefiniteness and uncertainty." (Cases)".

—*Freeman v. Morris*, 131 W. 216, 218.

54. Following *Merton v. O'Brien*, 117 W., *supra*, where appellant W., received land, 'an estate in fee, defeasible' on conditions, with remainder over, 'subject to the charge of the legacy of \$5000' of plaintiff (see

Korn v. Friz, 128 W., supra), "there is no question but that the plaintiff is entitled to have the land sold under foreclosure judgment".

55. As "the selling of" appellant's and remainderman's "interests separately will operate to the injury of all parties interested in the land",

56. And as "the court must adopt the course which, in freeing the property from the lien of the plaintiff, will least threaten loss to the estates and which will promote the interests of all the owners", (In re Kingston's Est., 130 W., 560, see FUTURE CONTINGENT ESTATES), it is held,—

57. That "the whole property in fee" be sold, and "under the rules for computing the value of such estates", W's interest first "ascertained" "and applied in payment of plaintiff's judgment", and "a balance over," if any, "paid to him as absolute owner thereof."

58. If appellant's share "is insufficient to satisfy" the legacy judgment, then in addition, "sufficient to satisfy the judgment must be taken out of the estate in remainder",

59. And the balance not so required "must be placed in charge of a trustee to administer and hold for accumulation for the persons entitled thereto at the time of the death of appellant.

—*Steele v. Korn*, 137 W., 51, 57.

60. On breach of an agreement to pay for past services a definite amount by will, only quantum meruit recovery can be had. See also SERVICES.

—*Murtha v. Donohoo*, 149 W. 481, 486.

61. A will in the 2d clause gives a legacy to E.; the 3d clause provides for conversion of his realty and personalty and 'out of the proceeds' to 'pay the legacies hereinafter named'. The 4th clause provides various specific legacies, not including any to E.; and the 5th clause provides 'if said estate is more than sufficient (which it is) to pay said legacies, said legatees shall share the same in proportion to their respective legacies'.

62. "The county and the circuit court" decided that the 5th clause included "all legacies theretofore named in the second and fourth clauses". Affirmed, the court saying,—“the will is plain and unambiguous”; Marshall, Winslow, and Vinje, JJ., dissent, holding that the 5th clause does not include the 2nd, and "the whole will is in perfect harmony therewith".

—*Will of Derrickson*, 150 W. 26, 28.

63. "An oral contract based on a valid consideration to leave the promisee a legacy in personal property is lawful and enforceable. *Jilson v. Gilbert*, 26 W. 637 (See SERVICES); (other cases, supra).

64. It logically follows that a written contract founded on a valuable consideration to leave real estate would likewise be valid and capable of enforcement".

65. "The plaintiff is seeking to establish the contents of lost writings",

to prove such a contract, "and sound public policy requires that agreements of the character here involved should be clearly and satisfactorily shown".

66. Where the father gave the custody of his minor child to another, in consideration of the latter agreeing to leave his personal and real estate to the child at his decease, "the mother was competent" to testify in the child's behalf as to the making of the contract, after the promisor's decease.

67. There being "a valid contract, no good reason is apparent why the plaintiff (child) might not elect to sue for damages for its breach", which action "is triable by jury in the circuit court".

68. "The fact that the instrument was lost would not make the action an equitable one", nor the fact that the "contract could only be established by parol because the writings had been lost", there being realty involved. See also JURY. —*Dulger v. Est. of McQuade*, 158 W. 328, 330.

69. Where a devise is made of a homestead to a son J. 'charged with and subject to the' support 'at the homestead' of the wife B. while she remains there, 'and further charged with' 'the payment' of a sum 'annually to my said wife any year or years when she may for any reason reside elsewhere', 'in lieu of support', it is held,—

70. Following *Merton v. O'Brien*, 117 W. supra, that the devisee J. "was not a trustee of an express trust, and that an action by the legatee (B.) to enforce the lien may be barred by the statute of limitations".

71. That he was also executor, "does not change the rule", "first, because as executor no duty devolved upon the son to pay the legacy in question", he having gone "into the possession of the land at once and his duty to pay devolved upon him as devisee, not as executor";

72. And, "second, upon the closing up of his father's estate he was fully discharged as executor more than six years before the commencement of the action". "He could invoke the bar of the statute," for either reason.

73. "Failure to pay the legacy (for money support) for any one year gave the mother a legal as well as an equitable remedy".

74. "Having two remedies, the statute of limitations barred the equitable one at the same time the legal one was barred. *Casper v. Kaltz-Zimmers Mfg. Co.*, 159 W. 517, 530." And "the six-years statute" "applied to" this equitable "cause of action".

75. The provision to "pay her \$300 annually 'any year or years when she may for any reason reside elsewhere' than with him", "implies that no account is to be taken of any absences for less than a year". Payment "for irregular short absences", of from one to four months a year, is denied.
—*Nolan v. First Natl. Bank*, 161 W. 22, 25.

76. Where the will "provides that in case of the death of either of the legatees, her legacy 'shall be payable to the legal heir or heirs of such legatee',"

77. This is held to "include legatees who had died prior to the making of the will", "under the peculiar circumstances" "that the legatees named lived in Germany, had not been visited by the testator in more than twenty years, and apparently had never been in correspondence with the testator". —*Flemming v. Griem*, 161 W. 608, 611.

78. (Where there is no contrary authorization by will or statute, the rule is well established that "a general legacy commences to bear interest from one year after the testator's death". See 40 Cyc. 2094, and many cases there cited.

79. See also *Evans v. Foster*, 80 W. supra, where it was held that interest be reckoned, by order under sec. 3850, from a fixed date seventeen months after the testator's decease.

80. In the case of infants whose support is not otherwise provided for, it is said that "it is almost uniformly held that the legacy commences to bear interest from the death of the testator". 40 Cyc. 2096.

81. And it is further said that "specific legacies carry any accretions by way of increase or interest which accrue after the testator's death"; and that annuities "commence from the death of the testator". 40 Cyc. 2101, 2103.

82. It seems that "the great weight of authority" is to the effect "that in the case of a bequest of a life estate in a residuary fund", "the legatee for life is entitled to the interest or income of the clear residue" accruing thereon from "the death of the testator", and in the executor's hands at the time of transfer to the trustee. 40 Cyc. 1882; *Mass.*, *N. J.*, *N. Y.*, and other cases. *Lovering v. Minot*, 63 *Mass.* 157.

83. The authorities are in conflict on the question as to whether a life beneficiary of a general legacy fund to be invested for his benefit, should receive an income from the death of the testator or commencing a year thereafter. 40 Cyc. 1881;

84. But as, pending a reasonable administration period, the executor is not expected or bound to set apart a fund for investment from which to produce an income for such life tenant, it would seem that there would be no justly computable accrued income in his hands for payment until after such investment was regularly made; and that in any event the life tenant would be entitled only to such income at the estate settlement as it could be effectively shown accrued for him, if any.)

85. Where a will after giving realty to other heirs, provides as to a daughter E., that such 'heirs shall pay her after my death the sum of \$200', and by agreement there was a delay of about twenty years in the probate of the will, and such legacy not being paid, it is held:

86. That the questions that the legacy "became the personal obligation of the" heirs, and if so was barred by the statute,— "are disposed of by the rules that in order to take advantage of the bar of the statute of limitations such bar must be specially pleaded (*Roach v. Sanborn L.*

Co., 135 W. 354, 359), and that questions not brought up in the court below cannot be entertained here (*Birdsall v. Fraczel*, 154 W. 48, 53)''.

87. By the words 'after my death', 'the payment was intended by' the testator 'to become due and payable at such times as is ordinarily the period after death that the law provides for such payment in the ordinary course of administration, namely, one year after such death'.

88. 'The delay in admitting the will to probate is immaterial; it may be admitted at any time after the death of the testator (*Hanley v. Kraftezyk*, 119 W. 352; see PROBATE OF WILLS)'.

89. 'The general rule is that such legacy becomes due and payable at the end of the year following the death of the testator, which is the time generally limited for the payment of debts and legacies. *Evans v. Foster*, 80 W. supra; (other cases).

90. Such legatee is in the same position as a creditor and entitled to be awarded interest at the legal rate for such time as he is kept out of his payment. *Matter of Rutherford*, 196 N. Y. 311, 315.

91. Interest does not depend upon demand or default (cases); and even if the delay is caused by the legatee contesting the will, it does not affect the paying of interest as of one year from the death of the testator. *Clafin v. Holmes*, 202 Mass. 157, 159'.

—*Will of Brandon*, 164 W. 387, 390.

LEGAL HOLIDAY.

See HOLIDAYS.

LEGAL TENDER.

See TENDER.

LEGITIMACY.

Child of divorced husband, 15.
 Born after subsequent marriage, 15.
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 Second husband; no curtesy, 15.
 Second marriage immaterial, 15.
 "Children," include illegitimate, 17.
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 Legitimizing children, 18.
 Not involved in probate, 18.
 Nearest blood relations, 21.
 Child of illegitimate son, 22.
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 Judicial intention construction, 21.
 Set definitions modified, 23.
 Non-resident illegimates, 19.
 Judgment inoperative, 20.

'Paternity: determined how, 27.
 Acknowledged, but in fact not, 33.
 Whether entitled to inherit, 33.
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 Law of parents domicile, 30.
 Letter "your affectionate father," 32.
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 Presumption of legitimacy, 2, 13.
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Damages for death, 34.

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Void marriage:

Child legitimate, 8.

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Wife's evidence:

Incompetent as to non-access, 1, 6, 14.

Even inferential evidence, 3.

Location of husband; improper, 5.

Not testify as to illegitimacy, 11.

Recital in deed; improper, 10, 12.

1. "The law is well settled that the wife, on the question of the legitimacy of her children, is incompetent to give evidence of the non-access of her husband during the time in which they must have been begotten. This rule is founded on the very highest grounds of public policy, decency, and morality.

2. "The presumption of the law is in such a case that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child.

3. "Testimony of the wife even tending to show such fact, or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case;

4. "And such non-access and illegitimacy must be clearly proved by other testimony." (Cases.)

5. "The question, 'Where was your husband at any particular time,' whether during the time within which the child was begotten or not, was held in *King v. Inhabitants*, etc. 5 Adol. & EL., 180, to be a collateral fact directly connected with the main fact, and objectionable."

—*Mink v. State*, 60 W. 583, 585.

6. "The doctrine" of *Mink v. State*, 60 W. supra, "rests upon 'the very highest grounds of decency and morality', and applies to all cases", civil as well as others.

7. "To bastardize and disinherit a child born in lawful wedlock, the most clear and conclusive evidence of non-access is required."

8. The statute, sec. 2274, that "the issue, (also) of all marriages declared null in law shall nevertheless be legitimate", means "that a child born within the wedlock of a regular marriage, which is null in law, shall, nevertheless, be the legitimate child and heir of each and both parents, so far as the question of legitimacy is concerned".

9. Held, where the mother had a husband living at the time of marriage, a child born of such last marriage, is legitimate "by virtue of the statute".

10. The mother by recital in a deed, "virtually admits by such recital that her child is illegitimate. This, we have already shown, she cannot do.

11. She cannot even testify that she is illegitimate by reason of non-

access to her husband, much less can she effect the same purpose by a mere admission."

12. "The rule that recitals may effect the question of pedigree cannot be extended to embrace such as is, in effect, an admission of non-access between the father and mother, for the purpose of disinheriting a child".

—*Watts v. Owens*, 62 W. 512, 519.

13. "Although F. was born during the lawful wedlock of L. (her mother) and S., and is presumptively their child and heir, the facts may overcome such a presumption, and show conclusively that she is not the child of S". (See such determination on the facts, in *Schuman v. Schuman*, 83 W., post).

—*Schuman v. Hurd*, 79 W., 654, 656.

14. "No rule of evidence is better settled than that husband and wife are alike incompetent witnesses to prove the fact of non-access while they lived together. (Citations and cases supra)".

15. Where I. lodged in the same house with L., his wife, for the three months preceding a divorce judgment from her, November 15, 1884, and L. married S. February 10, 1885, and her daughter F. was born July 8, 1885, it is held that the divorce record as to non-access, as well as the testimony of both I. and L. relating thereto, is inadmissible on the question of legitimacy, that the rule is not affected by the mother's second marriage, that the inference from the proofs "is conclusive that I. is the father of the child F.", and therefore that "S. is not entitled to curtesy in those lands of which L. (his wife) died seized, which descended to F."

16. "The old common-law rule," and this rule "considerably modified by judicial decisions in later times," as, "well stated by Lord Langdale M.R. in *Hargrave v. Hargrave*, 9 Beav., 552," with reference to the presumption of legitimacy of the child of a married woman,—are given in detail.

—*Schuman v. Schuman*, 83 W. 250, 254.

17. An illegitimate descendant may be included in the word 'children' if the evidence shows such intention. See CONSTRUCTION OF WILLS.

—*Will of Scholl*, 100 W. 650, 655.

18. "The question of legitimatizing" children born before the marriage of the testator, "was not properly involved in determining whether the will should or should not be admitted to probate".

19. "While the legislature of Wisconsin may properly regulate the status of citizens of this state, we do not understand that it has any power to prescribe the status of citizens of other states." (Cases).

20. "So far as the judgment in form attempted to legitimatize the adult children who were residing in and citizens of Louisiana, we must hold that it was extra-judicial and inoperative".

—*Frame v. Thormann*, 102 W. 653, 672.

21. While "the words 'my nearest blood relations'," "generally speaking, in wills means such persons as take under the statute regarding the

distribution of estates of intestate (cases)", "that does not stand in the way of giving to them, by judicial construction, any reasonable different meaning necessary to effectuate the intention of the testator".

22. Where the testator "must have known, or had reasonable ground to suppose" "that he had no blood relatives" otherwise, the "children of an illegitimate son of the mother of the deceased", he being also her illegitimate son, are held to be intended in his will and entitled to take the residuum.

23. "The offense of the parents in the case of an illegitimate offspring under the humane laws of our day is not visited upon the children to the extent of preventing them from taking under a will regardless of the ordinary meaning of the term 'blood relatives', or 'child', or 'heirs', or 'next of kin' at common law.

24. The intention of a testator as regards illegitimates is to be respected and effectuated by courts the same as his intention respecting lawful issue. Will of Scholl, 100 W. supra".

25. Whether the blood relatives of illegitimates, "given inheritable blood, as to the mother"; "include his brothers and sisters of the common mother, though they are also illegitimates, and also include their descendants", is not determined, though there is "much authority to" that effect.
—*Est. of Sander*, 126 W. 660, 664.

26. As to finding an illegitimate son of an Indian, heir under the federal statute. See HEIRS: —*Smith v. Smith*, 140 W., 599, 601.

27. "The question of the paternity" "must be determined not alone upon the testimony as to" the date of the birth, "but upon the whole evidence in the case" Where the father "always spoke of and acknowledged her as his child", this is held "more persuasive and controlling than the testimony of" two aged women as to date of birth of more or less indefiniteness.

28. "It is not essential that the written acknowledgment (of parentage under sec. 2274) shall be made for the express purpose of establishing heirship or of a compliance with the statute", or "that the witness should attest or subscribe the writing", or that it "shall be in precise formal language.

29. It is sufficient if it appear with reasonable clearness and certainty from the written words that the paternity of the child is acknowledged. *Crane v. Crane*, 31 Ia. 296.

30. So, also, the law of the domicile of the person making the written acknowledgment, and not that of the domicile of the child or the mother, governs the question of legitimation." (Cases).

31. A report to the pension bureau, making acknowledgment of parentage, "signed by him in the presence of W., a competent witness", it is held, "fully satisfied the requirements of the statute".

32. And it is stated that a letter addressed to M. as his daughter, "signed by him" "your affectionate father," all written, including signa-

ture (he being illiterate), "through C., and in his presence as a competent witness",—is supplemental evidence of such paternity under the statute. (Cases).

33. Whether, the deceased having "in compliance with the statute, acknowledged M. to be his daughter, she is entitled to inherit even though in fact she was not his child",—is not decided.

—*Richmond v. Taylor*, 151 W. 633, 640.

34. "The policy of our written law is to give an illegitimate, as regards the mother, substantially the same status as a child born in lawful wedlock". Recovery by the mother of an illegitimate, of damages for the latter's death, held proper.

—*Andrzejewski v. N. W. Fuel Co.*, 158 W. 170, 179.

LETTERS.

See WRITINGS.

LEX LOCI CONTRACTUS.

See CONTRACTS.

LIABILITY.

Administrator or executor:

Concluded; order to pay claims, 22.

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Has lien on estate assets, 15.

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After neglect to pay, 14.

Funds not controlled by other court, 24.

Liable to third party, when, 25.

Liable as such; insolvent bank, 20.

Make sale through agent, 21.

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Payment of mortgage; contract, 31.

Assumed in deed accepted, 31.

Ordinary estate debt, 31.

Payment on void judgment, 28.

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Personally on his contract, 10.

Assets sufficient or not, 11.

Exceptions to general rule, 13.

Judgment out of his estate, 12.

Sale of personalty; personally, 27.

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After estate is settled, 2.

Administrator owes heirs, 2.

Liable; action, personally, 2.

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Chattels to life beneficiary, 4.

Sale or destruction, 4.

Counsel fees:

Administrator personally liable, 15.

Allows attorney to act for him, 18.

Liable quantum meruit, 19.

Charge same in account, 17.

Priority over general debts, 17.

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When he is unable to pay, 16.

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Garnishment of admr., trustee, 6.

Garnishment continues after order, 8.

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Trust fund for a period, 23.

Whether after final order, 9.

Money for safe-keeping, 5.

Revoked administration, 26.

Expenses, how paid, 26.

Share of heir:

Admin. primarily liable, 3.

Bond, cumulative remedy, 3.

1. "Liability, used in conjunction with the word debt, is broad enough to include all claims, whether founded upon tort or contract".

—*Smith v. Omans*, 17 W. 395, 396.

2. "After the estate is settled, debts paid, a final account rendered, which is settled and allowed by the county court, and an order of distribution made, the administrator may, with strict propriety, be said to owe the heir his share of the personal estate, and on failure to pay the same, should be held liable therefor in an action against him directly".

3. "The administrator is of course primarily liable to the heir for her share of the estate. If the money cannot be made out of him, then she may resort to an action on the bond and recover it from the sureties", which last is held to be an accumulative remedy.

—*Williams v. Davis*, 18 W. 115, 118.

4. On delivery of "personal chattels" to the life beneficiary thereof, the executor is not thereafter liable therefor if such beneficiary sells or destroys the same. See LIFE ESTATE.

—*Golder v. Littlejohn*, 30 W. 344, 352.

5. Where money is taken for safe-keeping, not to be identically returned, the holder is liable absolutely, though the money was stolen. See BAILMENT.

—*Shoemaker v. Hinze*, 53 W. 116, 117.

6. "The authorities are almost uniform that an executor or administrator is not liable to garnishee or trustee process before a final order for the distribution of the estate is made, unless he is rendered so liable by some provision of the statute. We have no statute in this state which takes such a case out of the general rule".

7. "It must be held, therefore, that the executor, when summoned, was not liable to garnishment, and hence that the action against him fails.

8. Manifestly it was not saved by the circumstance that the garnishee action remained in court until after the order of distribution".

9. "Whether the executor is liable to garnishment after the final order for settling and distributing the estate, is not here determined".

—*The J. I. Case T. M. Co. v. Miracle*, 54 W. 295, 298.

10. "It is a general rule that upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally,

11. And his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred;

12. And the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased.

13. There are, undoubtedly, exceptions to the general rule, but they

depend upon equitable considerations", clearly showing the reason therefor. (Quoted and approved, with exceptions explained. *Miller v. Tracy*, 86 W. post). See also *ACTIONS BY EXTRS. & ADMRS.*

—*McLaughlin, Admr. v. Winner*, 63 W. 120, 128.

14. Where moneys in the hands of the administrator "ought to have been paid to the creditors of the estate long before the time when it is claimed they were stolen," and not excused, "it was inexcusable negligence that he retained the money in his custody where it could be stolen," and he is liable therefor. *Williams v. Williams*, 55 W. 304".

—*Black v. Hurlbut*, 73 W. 126, 131.

15. "In employing counsel the executor incurs a personal liability, but his lien on the assets serves as his indemnity. *Schouler, Extrs.*, 256, 544."

16. And after approvingly quoting *McLaughlin v. Winner*, 63 W. supra, it is said: "But where the estate has derived a benefit from the services rendered to the administrator, and he is unable to pay or is insolvent, the creditor has been allowed to prove and proceed directly against the estate.

17. But in a case where the administrator makes payment of a claim for proper and necessary counsel fees or other proper expenses of administration, he can charge the same in his account and have it allowed at a reasonable amount and paid out of the assets of the estate in his hands; and such claim will have priority over the general debts of the decedent. (Citations)." (Approvingly quoted in *Ferguson v. Woods*, 124 W., 544; see *ADMINISTRATION EXPENSES*).

18. In this case, where the attorneys for a creditor, thought the administrator had engaged them to defend against a large claim, and the administrator denied this, but allowed such defense, which resulted in great benefit for the estate, and the administrator "has assets out of which to indemnify himself", and there were other attorneys employed generally for the estate, it was held that the administrator was personally liable,

19. And that "a recovery may be had quantum meruit for the benefit conferred by them, and upon the ground 'that he who gains the labor and acquires the property of another must make reasonable compensation for the same' (*Van Deusen v. Blum*, 18 Pick., 229, 230)"; and especially because of assets.

—*Miller v. Tracy*, 86 W., 330, 333.

20. The executors as such, of the estate of a decedent stockholder of an insolvent bank, are held liable, though no claim was filed in the county court. See *CONCURRENT JURISDICTION*.

—*Gianella v. Bigelow*, 96 W., 185.

21. Where administrators, as such, sold animals, "under the authority of the court" through an alleged agent B. to C., "to hold them liable in

tort at common law for prior false representations of B. to C.," "it should at least be made to appear that he was especially authorized to make such representations, or else that he was at the time authorized to make such sale, and made it by false representations in pursuance of such authority".

—*Newell v. Clapp*, 97 W. 104, 109.

22. The executor and his bondsmen are concluded by an order for the payment of claims, whether there are assets or not. See CLAIMS.

—*Roberts v. Weadock*, 98 W. 400, 404.

23. As to trustees appointed by the county court, holding a fund payable to G. should he return within "a period of ten years", it is said: "Manifestly, such fund, in the hands of such trustees, cannot be reached by garnishment. J. I. Case T. M. Co. v. Miracle, 54 W., supra; (other cases)".

—*Evans v. Rector*, 107 W., 286, 290.

24. While executors and trustees, who hold trust property of a debtor, cannot be enjoined or controlled by another court as to such funds,

25. Yet they may be held liable to pay to a third party, where the debtor could assign and transfer such property. See also CREDITORS ACTIONS.

—*Williams v. Smith*, 117 W. 142, 144.

26. While expenses of a revoked administration are not properly a claim, yet in a subsequent administration in another county, they may be presented as administration expenses. See ADMINISTRATION EXPENSES.

—*Brown v. McGee's Est.*, 117 W. 389, 392.

27. While the administrator is personally liable in sales of personalty, he is not so in mortgage and sale of realty. See SALE OF REALTY.

—*Wisconsin Trust Co. v. Chapman*, 121 W., 479, 486.

28. As to executors being personally liable for trust funds paid out under a void judgment,

29. And being protected by an erroneous judgment jurisdictionally made. See PROBATE OF WILLS.

—*Will of Rice*, 150 W. 401, 463.

30. "Liability is 'the state of one who is bound in law and justice to do something which may be enforced by action'. (Citations)".

—*State ex rel. Quinn v. Thompson's M. F. Co.*, 160 W. 671, 675.

31. Where an administrator assumed to pay a mortgage pursuant to a "contract made by the deceased in his lifetime", in "its formal completion by the exchange of deeds under the authority of the county court after" the decease,—this "created no personal liability on the part of the administrator nor preferred liability against the estate, but simply a liability on an equal footing with other debts contracted by the deceased".

—*Clarke v. Johnson*, 164 W. 461, 464.

LICENSE.

See LIQUORS. SALE OF REALTY.

LIEN.

Administrator's attorney's fees, 34.

Artisan's common-law, 42.

Statute prior to mortgage, 43.

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Agreement; personal injury, 19.

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Cause of action, plaintiff, 6.

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Devise in fee, defeasible, 35.

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Money loaned upon a note, 36.

Homestead, vendor's liens, 38.

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Vendors of realty:

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Homestead, how affected, 16, 17, 29.

Waiver of superior rights, 17.

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Foreclosure, though mortgage discharged, 40.

Grantee's death, not destroy, 22.

Homestead also included, 15, 17, 38.

Not after vendee's decease? 16, 17, 29.

J. bought, pays for P., deed direct, 8.

Equity, strictly confined, 13.

Money advanced; subrogated, 11, 12.

Same as deed from himself, 9.

Substantial equity clear, 10.

Mere chose in action, 23.

Representatives; not heirs, 23.

Third person, when entitled, 13, 14.

Same effect and order as mortgage, 18.

Under certain circumstances, 1.

Waiver; voluntary surrender, 4.

1. "A vendor of real estate has a lien, under certain circumstances, on the estate sold, for the purchase money" on the equitable principle "that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not pay the full consideration in money. 2 Story's Eq. Jur. § 1219."

—*Tobey v. McAlister*, 9 W. 463, 467.

2. An attorney having a town order for collection, held "that he had a lien for compensation upon the order, by well established principles". See ATTORNEY AND CLIENT.

—*Howard v. Osceola*, 22 W. 453, 458.

3. "We are satisfied that independently of an agreement to that effect—"that the attorneys have a lien upon the cause of action"—between

the plaintiff and his attorneys, of which the defendant has received notice, no such lien attaches before judgment to a claim for unliquidated damages".

—*Courtney v. McGavock*, 23 W. 619, 622.

4. "Where a lien is given by law, the doctrine is well settled that a voluntary surrender of the possession is deemed a waiver".

—*Smith v. Scott*, 31 W. 420, 432.

5. "It cannot be doubted that the attorney has a lien upon the judgment which he has recovered for his client, for his services and disbursements in recovering the same".

6. And where "the written contract on which the actions were founded was in the possession of the plaintiff's attorneys during the litigation, such lien extended to the cause of action; and payment of the plaintiff's claim to the plaintiff, without the consent of his attorneys, even before judgment, would not defeat such lien".

—*Rice v. Garnhart*, 35 W. 282, 283.

7. A mechanic's lien may be had for materials bought by the husband, and applied to the wife's house, she consenting to the improvements. See HUSBAND AND WIFE.

—*Wright v. Hood*, 49 W. 235.

8. Where J. bought and paid for land for P., took the deed in P's name and delivered it to P. upon the latter paying one-half of the purchase price and giving J. his notes for the balance, and "P. went into land as a homestead", it is held:

9. "So far as the equitable principle of a vendor's lien for the purchase money is concerned, they occupy the relation substantially, of vendor and purchaser." "It is the same, in substance, as if J. had taken the deed directly to himself, and then deeded to P."

10. "In courts of equity, names merely, and legal definitions and distinctions, will not stand in the way of substantial equities, clearly established, and forms are disregarded, and the substance only is considered in the application of equitable principles, and especially in the enforcement of a vendor's lien for purchase money. *Jones v. Parker*, 51 W. 218".

11. Treating J. "as a stranger or third person who advanced or loaned to the purchaser the money for the express purpose of paying, and for no other purpose, and which is actually paid to the vendor by him, or by his directions, as the consideration for the purchase of the land", he is likewise "substituted or subrogated to the right of the vendor to an equitable lien upon the land for such purchase money".

12. It is so held on the authority of *Jones v. Parker*, supra, (cited under MORTGAGE), where "the transaction was quite similar to that of the parties in this case"; "and the principle is precisely the same in both cases".

13. "It must be understood that the extension of this equity to a third person is strictly confined to those who furnish or advance the purchase money to the purchaser in such manner that they can be said either to have paid it to the vendor, personally, or caused it to be paid, on behalf or for the benefit of the purchaser; and to this extent they become parties to the transaction. It must not be a general loan" to the purchaser, which he might use for this purpose or some other.

14. "The principle in either case is very much questioned, and in many of the states is not recognized". "However, so far as this state is concerned, it must be considered as a settled question that such third persons are entitled to the full benefit of the vendor's lien".

15. "It may be said here that the provision of the statute in sec. 2983, which subjects the homestead to 'purchase-money liens', must be construed to embrace cases where the purchase-money is furnished and paid, as the consideration for the homestead, by a third person, in such way that it can be said to have procured it for the purchaser, which is the reason of the rule".

16. (The last foregoing point, so far as it affects the homestead after the vendee's decease, is overruled in effect, in *Berger v. Berger*, 104 W. post, in consideration of sec. 2271, the court saying the effect "did not occur to the counsel who presented the case, or to this court", and that the point was there conceded.)

17. J. having filed his claim, and the proceeds of the land not a homestead, having been applied to pay 20% of his and the other claims, he has waived his right to his equitable lien upon such lands, but not as to the homestead, though he should now receive of the homestead proceeds only so much thereof as is necessary to pay his claim after "the net product of the administrator's sale of the eighty acres be ascertained and deducted", "and without regard to the per cent he has already received".

18. "An equitable lien for purchase money has the essential character and incidents of a mortgage to secure it, and, in its enforcement by sale of the land, the same order should be followed, and the same consequences should follow", as indicated in sec. 3163.

—*Carey v. Boyle*, 53 W. 574, 578.

19. In an action for personal injury "where the plaintiff had agreed with his attorneys to pay all his own costs and save them from any court costs, and give to them one half of the damages recovered and all of the taxable attorney's fees, and not to discontinue the action, nor settle the same without their consent, in consideration of their agreement to prosecute the action to final judgment with their best efforts, and they do so prosecute", the defendant can "with knowledge of such agreement and performance, and against the protest of such attorneys, relieve itself from all further liability by paying to the plaintiff, personally, a sum of money in settlement of suit, and procuring from him a release and discontinuance of the action".

20. So held on the authority of *Coughlin v. Railroad Co.*, 71 N. Y. 443, "that 'a party having a cause of action, in its nature not assignable, cannot, by an agreement before judgment or a verdict thereon, give his attorney any interest therein,'" this cause of action not being assignable "under our statute (sec. 4253)".

21. The agreement is held not to be champertous within the rule laid down by this court in *Allard v. Lamirande*, 29 W. 502 (cited under CHAMPERTY)". —*Kusterer v. Beaver Dam*, 56 W. 471, 475.

22. "The death of the grantee does not destroy the grantor's lien for the purchase money. He may enforce the same against the widow and heirs at law of the grantee. (Cases)".

—*Crowe v. Colbeth, Admr.*, 63 W. 643, 646.

23. "A vendor's lien for an unpaid balance of the purchase price" of land, being "a mere chose in action, it would necessarily go by succession to" the personal representative and not to the heirs.

—*Evans v. Enloe*, 70 W. 344, 349.

24. Section 3873a is held "only to limit the power of the administrator to obtain license and sell the real estate after three years from the death of the deceased; that is, after that time the remedy to collect the debt through the proceedings in the county court is gone".

25. But "this does not bar any other existing remedy to enforce the payment of the debt. This leaves the equitable proceeding still in force" under secs. 3274 et al.

26. Under sec. 3873a the liability of lands to debts where the personalty is deficient, "the real estate was in the nature of equitable assets which would be applied; and the liability of the real estate to be so applied is denominated a lien upon or a valid claim against the real estate in this act."

—*Fisk v. Jenewein*, 75 W. 254, 257.

27. "A right to a mechanics lien was so distinctly a personal and individual privilege that it was waived by an assignment", has long been the law of this state, and so continued, except as modified by statute.

—*Shearer v. Browne*, 102 W. 585, 587.

28. Fees of a guardian ad litem may be made a lien on the ward's property and foreclosed. See COMPENSATION OF ADMR., ETC.

—*Tyson v. Richardson*, 103 W., 397, 402.

29. "We must hold to the plain letter of the statute (sec. 2271), deciding that the right to enforce a vendor's lien upon a homestead is lost by the death of the owner of such homestead." As to *Carey v. Boyle*, 53 W., supra, apparently contra, it is said that there "such right was not questioned, presented, considered, or discussed," and that there

both sides "conceded the right of lien in favor of a vendor, notwithstanding the death of the vendee."

—*Berger v. Berger*, 104 W., 282, 284.

30. As to "a devisee of real estate, upon which was imposed a money charge or lien", being a legacy, it is said: "By accepting the devise, and taking possession thereof under the devisee, he doubtless became personally liable to pay the charge thereon when it became payable by law. *Evans v. Foster*, 80 W. 509 (See LEGACIES).

31. His situation, then, was that he owned real property, subject to a lien thereon, which he had agreed to pay, and which might be foreclosed and enforced at any time after it fell due". (Approvingly quoted in *Steele v. Korn*, 137 W. post). —*Merton v. O'Brien*, 117 W. 437, 441.

32. As to "specific money legacies", by inference being a charge upon residuum of real as well as personal property. See LEGACIES.

—*Hamilton v. Buckman*, 118 W. 169, 172.

33. "A vendor of realty" has "an equitable right to have the unpaid consideration therefor, by the action of a court of equity, made a lien thereon, and to have the use of its jurisdiction to enforce the same as justice may require." (Cases)

—*Halversen v. Halversen*, 120 W., 52, 55.

34. The county court may make the administrator's attorney's fees a lien upon the assets of the estate. See ADMINISTRATION EXPENSES.

—*Carpenter v. U. S. F. & Guaranty Co.*, 123 W. 209, 212.

35. A devise in fee, defeasible, 'upon express condition' to pay legacy as a charge on the lands. See VESTING OF ESTATES, ETC.

—*Korn v. Friz*, 128 W. 428, 433.

36. "It is very clear, (therefore), that where money is loaned, as in this case, upon a promissory note, the mere fact that it was understood it should be used and was in fact used in the construction of buildings upon the real estate gives the creditor no lien upon such real estate.

37. The cases cited by plaintiff are purchase-money lien cases, and rest upon entirely different principles." (Cases, distinguished.) "It is clear under the authorities that the lien is not allowed" "to one who furnishes money to build a house on the lot"; that "is confined to the vendor's lien. (Citations)".

38. "The purchase-money liens referred to in" the homestead exemption statute, sec. 2983, "clearly means vendors' liens for purchase money. *Carey v. Boyle*, 53 W., supra; (other cases)". See also HOMESTEADS.

—*Bartle v. Bartle*, 132 W., 392, 399.

39. Foreclosure and manner of application of a legacy lien on realty. See LEGACIES.

—*Steele v. Korn*, 137 W., 51, 57.

40. As to unpaid purchase money giving a vendor's lien entitled to foreclosure, though the mortgage security was discharged. See *MORTGAGES*.
—*Latton v. McCarty*, 142 W., 190, 196.

41. There being a legal as well as equitable remedy, to recover an annual legacy charge the six-year statute of limitations applies. See also *LEGACIES*.
—*Nolan v. First Natl. Bank*, 161 W. 22, 26.

42. "There is a conflict of decisions upon the question" as to whether "the common-law artisan's lien" has a priority over a prior chattel mortgage.

43. However, our statute, "sec. 3343, expressly gives the mechanic a prior lien when he has made the repairs at the request of the owner or legal possessor of the property".

—*Jesse A. Smith Auto Co. v. Kaestner*, 164 W. 205, 206.

LIFE ESTATES.

See also *CONSTRUCTION OF WILLS. POWER. PRECATORY TRUSTS. VESTING OF ESTATES, ETC.*

Foreclosure sale:

Life tenant purchaser, 35.

Ineumbrance:

Life tenant; subrogation, 34.

Personal chattels:

Beneficiary sold or destroyed, 4.

Remedy against her extr., 4.

Delivered to life beneficiary, 2.

Executor's liability terminates, 2, 3.

Resume after decease, 3.

Life legatee also executrix, 5.

Possession vested as legatee, 5.

Co-executor's sale as her agent, 5.

Taking receipt of life legatee, 6.

Failure, not liable on bond, 6.

Phrases construed:

"All" estate, "right to sell," 8.

After "decease," "parted" to children, 8, 9.

No language of more than life, 9.

Power of sale not general, 10.

Sell life estate only, 11.

Will construed as made, 12.

Apparent devise in fee, 18.

Also disposed of fee thereafter, 18.

Child with proceeds; estopped, 63.

"For her special benefit," 29.

Fee; alternative modification, 25.

"Legacies" to include realty, 32.

Phrases construed—continued

"Purchaser," means for value, 42.

"Sell" as "to her seem fit," 30.

"Held for the income thereof," 33.

"Or to retain during her" life, 30.

Right to sell, or hold in specie, 31.

"Sell," "use and enjoy, during life," 38.

Life, with power as given, 39.

May give title in fee, 40.

When "breach of trust," 41.

What "remains" to children, 38.

"Sole use and benefit" during life, 13.

"Power to dispose of" as necessary, 13.

Sold and "necessarily used," 14.

Conveyance held valid, 16.

Power, without a trust, 17.

Statutes applicable, 17.

Unexpended, only passes, 15.

"Whatever remains" to heirs of both, 13.

"Sole use, benefit and behoof," during life, 20.

"Estate that may remain," to others, 20.

Could not give away, 22.

Corpus, necessary for support, 21.

Phrases construed—continued

- Trust held not created,
 - Die without issue, to others, 51.
 - Life estate in one-half, 57.
 - Life estate with control, 54.
 - No trust or power of sale, 52, 53.
 - Possession right and control, 57.
 - Power to sell implied, 56.
 - Use and consume; corpus, 55.
- "Use" and "Control" during life, 36.
- No right to the corpus, 37.
- "Use and dispose of," best judgment, 60.
- At death "all the property" to others, 60.
- Not power to dispose of fee, 62.
- Only life estate, 62.
- Widow life; children fee, 61.
- "Without issue remaining alive," 45, 49.

Phrases construed—continued

- Conditional fee, terminating, 47.
- Death at any time, 49.
- "Having children then living," 46.
- Passed on death of child, 48.
- Perpetuities not offended, 50.
- Words "for her life"; limited, 28.
- Power of sale: mortgage, 26.
- Ordinary deed conveys fee, 34.
- Power to devise; unexecuted, 27.
- Precatory words:
 - Construed as life; implied trust, 7.
 - Devise in fee; precatory words, 19.
- Rule in *Shelley's Case*, 12.
- Tax deeds:
 - Curtsey tenant, not profit, 1.
- Taxes: life tenant to pay, 43.
- Fraud in failure, 44.
- Testamentary guardian; wife, 58.
- Entitled to hold property, 59.
- May act as trustee, 58.

1. A life tenant (by curtesy) cannot divest the reversioners by obtaining tax deeds for taxes unpaid either before or after his tenancy, and "can take no benefit or advantage of the title acquired as against the reversioners."

—*Phelan v. Doynlan*, 25 W. 679, 682.

2. Where the "personal chattels" in a life estate as a specific legacy, are delivered to the life beneficiary, the executor's "liability therefor, as executor, at least so long as she lived" would terminate.

3. Where the life beneficiary dies possessed of such chattels it is the duty of the executor or trustee "to resume possession" for the benefit of the other legatees, but while the life beneficiary "lived, he would have" no further control over them, "and could not be held liable, as executor, on account" thereof.

4. Where the life beneficiary, "sold or destroyed the property after it came into her possession, the remedy of the legatees in remainder would not be against" the executor, "or upon his bond, as such, but against the personal representatives of" the life beneficiary after her death.

5. "In this case, the legatee for life was executrix of the will, and the possession of the property by her co-executor, was her possession, and we think that such possession immediately vested in her, by operation of law, as legatee—that of the executors, as such, being thereby divested—and that the subsequent sale thereof by K. (the executor), and the payment of the proceeds to her, were not the acts of K. as executor, but rather as agent of the legatee for life".

6. The taking of a receipt from the legatee for life "is doubtless the proper mode in which to transact the business, but we do not find that it has ever been held that a failure to take such receipt will render the

executor liable upon his bond for the value of such property". See also CONSTRUCTION OF WILLS. —*Golder v. Littlejohn*, 30 W. 344, 352.

7. Precatory words construed to create a life estate and implied trust. See PRECATORY TRUSTS. —*Knox v. Knox*, 59 W. 172, 175.

8. A will stating: "I give, bequeath, and dispose of as follows, to-wit: To my beloved wife M., all that is in my possession at the time of my decease; and also my wife to have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares",—is held to give a life estate to the widow only.

9. "In view of the fact that he employed no language from which an intention to bestow more than a life estate upon his wife can be inferred, the provision which he made for his children shows very clearly that he intended to give her only a life estate".

10. "The power of sale may be beneficial, but we are of the opinion that it is not a general power".

11. It "only authorizes the appellant to sell her life estate or interest in the property, leaving the property intact for the testator's children when his widow shall decease".

12. "We are aware of no other principle of law which forbids a construction of this will as the testator made it", the "rule in Shelley's Case", not being in force in this state. See also RULE IN SHELLEY'S CASE. CONSTRUCTION OF WILLS. —*Jones v. Jones*, 66 W. 310, 316.

13. A testator devised land to his wife 'to be for her sole use and benefit so long as she shall live, with power to dispose of the same if it shall be necessary for her support and comfort in this life.' "The residuary clause of the will is that 'whatever remains after her death shall go to the heirs of him and her in the manner provided by the laws of this state'".

14. The widow subsequently conveyed the land through a third party to a second husband, the testimony showing that the proceeds were necessarily used for her support, and, the contingencies having arisen, it was held that she "had the power to dispose of the corpus or fee of the estate. (Many cases)."

15. "In case the land is sold under the power, what may remain of the proceeds on the death of the devisee, unexpended, passes unto the residuary clause, and nothing else.

16. The authorities seem to be nearly if not quite uniform that under such a power the widow may sell and convey the fee whenever it shall be necessary for her support.

17. It would seem that our statutes of powers is to the same effect. Secs. 2107, 2108. We have seen that such a power is unaccompanied by any trust. Sec. 2112, seems to settle the disputed question whether such

a power is absolute. 'It shall be deemed absolute if the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit.' "

—*Larsen v. Johnson*, 78 W. 300, 303.

18. An apparent devise in fee with subsequent other disposition of the fee of both the testatrix' and her husband's estate, is held to be a life estate. See CONSTRUCTION OF WILLS.

—*Allen v. Boomer*, 82 W., 364, 370.

19. A will construed as a devise in fee, where there were precatory words of further disposition. See PRECATORY TRUSTS.

—*Tabor v. Tabor*, 85 W., 313, 317.

20. A testator's will disposes of "(3) all his personal estate to his wife, 'to have to hold the same to her sole use, benefit and behoof, with all the increase and increment thereof, so long as she shall live;' (4) 'of my estate that may remain after the death of my said wife, A., I give' ", certain legacies, and "all the rest, residue, and remainder" to certain sons.

21. "We construe the will as meaning that A. could use the corpus of the personal estate so far as reasonably necessary for her support, but no further;

22. She could not give it away as she attempted to do here without infringing on the rights of the remaindermen. (Approvingly quoted in *Perkinson v. Clarke*, 135 W., post.

23. The remainder was limited by the right of the life tenant to use the corpus for her support, but no further. *Paine v. Barnes*, 100 Mass., 470."

—*Murray v. Kluck*, 87 W., 566, 572.

24. A life tenant paying incumbrance, when subrogated? See WIDOW.

—*Melms v. Papst Brewing Co.*, 93 W., 140, 149.

25. A devise in fee, with subsequent alternative modification, construed as a life estate and conditional fee. See CONSTRUCTION OF WILLS.

—*Littlewood's Will*, 96 W. 608, 610.

26. A life estate with power to sell, construed, under the facts, to include power to mortgage. See POWER.

—*Lardner v. Williams*, 98 W. 514, 519.

27. As to a life estate with power to devise, and the power remaining unexecuted. See POWER.

28. "The words 'for her life' are, however, very significant, whether used by a lawyer or by a layman. It may be said that almost uniformly they convey to the mind of either the idea of limitation?"

—*Derse v. Derse*, 103 W. 113, 115.

29. In a will drawn an illiterate person, a life estate in both real and personal property to the widow, is held not curtailed because of a subsequent clause giving her all rents and profits "for her especial benefit," the remainder, at her death, going to others.

—*Evans v. Kemp*, 104 W., 87, 90.

30. A will giving to the widow 'all my estate, both real and personal, to sell and dispose of as shall to her seem fit and proper, or to retain during her natural life for her own use, subject, after her decease, to the following legacies:', then disposing of realty and personalty, with a residuary clause disposing of the remainder after the wife's decease,—

31. Gives her the right "to sell and dispose of all of his estate", "or to retain the same in specie during her" life, and a life estate only.

32. The word 'legacies' in the will, "manifestly applies to all the gifts thereafter mentioned, including real estate as well as personal property".

33. Certain stock to be 'held for the income thereof', and realty during life, and other realty absolutely, is held to mean subject to the widow's life estate therein.

—*In re Stuart's Will*, 115 W., 294, 297.

34. In case of a life estate with power of disposition, a conveyance by ordinary deed is held to convey a fee under sec. 2108. See also POWER.

—*Auer v. Brown*, 121 W., 115, 122.

35. As to life tenant's purchase at a foreclosure sale, held to be for the benefit of such tenant and remainderman, subject to a proportionate accounting. See TITLE.

—*Keller v. Fenske*, 123 W. 435.

36. A will giving to the wife 'all my estate', 'for her use, benefit, and control during her natural life if she does not again marry', and after her death 'not again married, my said estate' to go to children named, with power of sale by the executor and wife with approval of adult children, is held,—

37. "Offers no field for construction", "is not ambiguous", and gives the wife only a conditional estate, "and with no right to destroy, exhaust, or dispose of the corpus of the estate". (Cases, supra).

—*Schneider v. Schneider*, 124 W. 111, 113.

38. A wife "bequeaths to her husband", "without words of inheritance, all her estate, both real and personal, with full power to sell the same and to use and enjoy during his natural life, and upon his decease such of the estate as remains shall descend to her children.

39. The will created a life estate in the husband, with power of sale for the purpose designated, and vested the remainder, if any, of the property, or its proceeds, in the children. *Larsen v. Johnson*, 78 W., supra; (other cases).

40. The donee of the power was thereby enabled to sell the land and vest the fee in a bona fide purchaser,

41. But one who acquired the title from him, without paying any valuable consideration, and chargeable with knowledge of the breach of the trust, holds such title subject to the right of the remaindermen". *Post v. Campbell*, 110 W., 378.

42. In sec. 2108, on execution of the power changing the title "into a fee simple with respect to any purchaser", "the word 'purchaser'" "is not used in its technical sense, but must be understood according to the common and approved usage of the language," and "means a purchaser for a valuable consideration." (Cases). See also PRESUMPTION.

—*Perkinson v. Clarke*, 135 W., 584, 591.

43. "It was clearly the duty of the life tenant, for the benefit of the plaintiffs (remaindermen), to pay the tax charges upon the property during his tenancy. (Cases).

44. His failure to comply with this obligation, and the allegation that he omitted so to do pursuant to a collusive arrangement" with fiduciaries, to deprive the remaindermen of their interest, "states sufficient to charge a fraud".

—*Boon v. Root*, 137 W., 451, 455.

45. Where a testator, seventy-five years of age, devised to each of four children "separately certain specified tracts of land" severally occupied by them, "followed by" provisions (1) giving his wife a life estate in 'all the lands above devised', and (2) 'in case of the death of any of my said children without issue remaining alive the land herein-above' 'devised to him' 'is to go to his other brothers and sisters equally',

46. 'But in case of them having children then living the same shall go to and belong to such children of such devisee respectively',—it is held:

47. The will gave "to the widow" a life estate "and to each of his four children" "a conditional fee terminating at their death,

48. And that the fee so devised to his four children by the will passed on the death of either of them to such children of such devisee as were then living, and in default of children to the brothers and sisters of the devisee".

49. "The phrase 'without issue remaining alive', in case of the death of either child, naturally imports, in the connection in which it is used, that he referred to their deaths at any time", and not "to death during the testator's lifetime". VINJE, WINSLOW, and TIMLIN, JJ., dissent.

50. "The estates created by the will do not suspend the absolute power of alienation for more than two lives in being at the creation thereof". *Tyson v. Tyson*, 96 W. 59 (See PERPETUITIES).

—*Eggleston v. Swartz*, 145 W. 106, 109.

51. The will of a testatrix—she having the custody of her two children, minors, with a divorced husband living—gives realty and personalty to her ‘son and daughter, or to the survivor of them, share and share alike during their natural lives and during the life of the survivor of them, with the right to use and consume such part’ ‘as either of them shall find necessary’, and in case of death ‘after my decease’, without issue, ‘of the last survivor, then the whole residue and remainder’ to go to persons designated.

52. There is no mention of any trust, nor is the word ‘trust’ used, nor is there any power of sale given directly to such children or to the executors. Held:

53. “There is no intimation of any trust in the language used, and none can be inferred from the will when read in the light of surrounding circumstances”.

54. “The intention of the testatrix was that her children should have a life estate with power to control and dispose of the property unencumbered by any trust”, as to both realty and personalty. *Larsen v. Johnson*, 78 W. supra; *Auer v. Brown*, 121 W. supra.

55. “The right to use and consume, declared in the will, clearly gives the right to use the corpus of the estate devised and bequeathed,

56. And therefore power to sell the personal property absolutely and convey the fee in the real estate necessarily follows. *Perkinson v. Clarke*, 135 W. supra; (other cases).”

57. “We conclude that” each child has “a life estate in one-half” “with the power to sell, use, and consume such portion as either shall find necessary”, with “right to the possession and control”, but “during their minority by a guardian or trustee as more definitely specified hereinafter.”

58. Without deciding as to her right to appoint a testamentary ‘guardian of the person and estate’ of her children, “she was competent to vest the title (to her property) in the so-called testamentary guardian as a trustee for the minors.

59. As we construe the will, that is all she did”, and such appointee “is entitled to take and hold the property for the minors during minority”. See also TRUSTS. —*Otjen v. Frohbach*, 148 W. 301, 309.

60. Where testator gave to his widow realty and personalty ‘to have and to hold during her natural life, use and dispose of same according to her best judgment’, and in the next paragraph, ‘after the death of my said wife all the property hereinbefore described shall be equally divided among my children (naming them), or their heirs, forever,’—and the widow having conveyed the fee,—it is held:

61. “It is manifest that the testator intended to give his widow a life estate and that he intended to give his children the fee to his lands”,

62. And that “the words ‘use and dispose of same’ could not confer the power to dispose of the fee, and the widow possessed no power addi-

tional to that which the law confers on a life tenant to transfer her life estate". (Cases, supra).

63. One of the children having "received several sums of money as her share of the purchase money" from the widow, and "now retains the same", the trial court "properly held her estopped from also claiming the right to recover her interest under her father's will in these premises", and "in effect" "she has elected to hold the deeds from her mother to be valid".

—*Hovely v. Herrick*, 152 W. 11, 15.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

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1. The statute does not abrogate the common law twenty-year presumption of payment. See PRESUMPTION.

—*Sanderson v. Olmsted*, 2 Pin. 224.

2. The statute of limitations is not "a rule for presumption of payment". "After a lapse of twenty years, the law presumes a debt to have been paid", but "the common law presumption does not disable the plaintiffs from suing while the statute of limitations does".

—*Pritchard v. Howell*, 1 W. 131, 136.

3. "We cannot suppose that the legislature intended to allow a trustee to plead the (ten year) statute in bar of a bill filed, to compel the performance of the trust, when he has acted as trustee ten years, with the consent, and at the request of the cestui que trusts and all persons interested in the trust property".

4. "The 'ten years' commenced with the denial of the trust, or the setting up of a claim to the trust property, by the trustee in his own right".

—*Sheldon v. Sheldon*, 3 W. 699, 707.

5. "The statute of limitations, to avail the party, must be pleaded. The court (circuit) will not otherwise take notice" thereof. May be met by "a new promise to pay the debt, made within the time limited by the statute; and sometimes absence of the defendant from state or jurisdiction, etc."

—*Peck v. Cheney*, 4 W. 249, 251.

6. Partial payments made before the obligation is due, take the case out of the statute.

—*Cleveland v. Harrison*, 15 W. 670.

7. "Part payment (of note) within the period prescribed (6 years) takes a case out of the statute of limitations. This was determined in *Cleveland v. Harrison*, 15 W. *supra*".

—*Eaton v. Gillet*, 17 W. 435.

8. "It is a settled principle in the construction of statutes of limitation, that general words are to have a general operation; * no exceptions can be claimed in favor of particular persons or cases, unless they are expressly mentioned".

—*Woodbury v. Shackelford*, 19 W. 55, 60.

9. "The pendency of the action in the circuit court could not be properly considered", to take the claim within the statute, on filing in the county court. See also CLAIMS.

—*Jones v. Est. of Keep*, 23 W. 45, 50.

10. "A warrant of attorney under seal, given with a promissory note," does not extend the period of limitation to an action on the note, or authorize judgment on the warrant after the note is barred.

—*Walrod v. Manson*, 23 W. 393.

11. A claim for services to be paid by a "testamentary provision agreed upon", does not accrue until the decease of the promisor. See also SERVICES.

—*Jilson v. Gilbert*, 26 W. 637, 645.

12. The five year and ten year statutes of limitation are held a bar to an action by the heir for the recovery of lands sold under an invalid administrator's sale eleven years before. See SALE OF REALTY.

—*Jones v. Billstein*, 28 W. 221, 227.

13. Filing a claim stops the running of the statute. See CLAIMS.

—*Large v. Large*, 29 W. 60, 64.

14. A general objection to the introduction of evidence "without any reference whatever to the statute of limitations", does not raise the question, as the party must "place his objection upon that distinct ground".

—*Heath v. Heath*, 31 W. 223, 228.

15. The statute may be waived or not. "It is purely a personal privilege, and can only be made available by answer".

—*Dudley v. Stiles*, 32 W. 371, 376.

16. The statute does not begin to run on an action to recover money paid on a domestic judgment based on a foreign judgment afterward reversed, "until the subsequent reversal of the" foreign judgment.

—*Mann v. Aetna Ins. Co.*, 38 W. 114, 118.

17. The statute where disability exists, sec. 4218, appeared in the revisions of 1839, 1849 and 1858, and is "a transcript from the statutes of New York", 1829.

18. "It was well settled in that state, as it was in England, that if an adverse possession commences in the lifetime of the ancestor, it will continue to run against the heir notwithstanding any existing disability on the part of the latter when the right accrues to him or her (*Jackson v. Robins*, 15 Johns 169); and this uniform construction of the statute of limitation ought not now to be disturbed.

19. We must presume that the law was enacted here in view of this judicial construction and generally received opinion on the subject".

—*Swearingen v. Robertson*, 39 W. 462, 466.

20. "The law is fully established, that, to revive a debt barred by statute, there must not only be an acknowledgment of the debt, but an

unqualified promise to pay it", and "made within the time limited by the statute".

21. "It is also settled that the state is entitled to the full benefit of the statute, the same as any other defendant".

22. "The mere admission of a legal liability is not sufficient. The statute, as to parties residing in this state, 'does not affect the remedy merely, but directly destroys the right itself, after the time prescribed by it has once elapsed.' Dixon, C. J., in *Brown v. Parker*, 28 W. 21, 27.

23. This shows that the statute does not establish a mere presumption of payment, but extinguishes the contract itself".

—*Carpenter v. State*, 41 W. 36, 41.

24. The rule relieving items of account beyond the six year limitation, is "confined to mutual accounts". See also ACCOUNT BOOKS.

25. Where payments are not applied by the parties, the court may apply them to earlier items that otherwise would "fall within the bar of the statute." See also PAYMENTS.

—*Hannan v. Engelmann*, 49 W. 278, 282.

26. It is settled in this state: "(1) That when the statute of limitations has run against a debt in favor of the party owning the same, the debt is extinguished;

27. (2) That no mere admission of a legal liability is sufficient to remove the bar of the statute,—to effect that there must not only be an acknowledgment of the debt or obligation, but an unqualified promise to pay the same, and such promise must be in writing, signed by the party making it".

—*Pierce v. Seymour*, 52 W. 272, 276.

28. A payment by one joint debtor, by agreement and consent of another, removes the bar of the statute as to both. See JOINT OBLIGATIONS.

—*Nat. Bk. v. Cotton, Admr.*, 53 W. 31, 35.

29. The six year statute is a bar to the collection of uncollected wages, payable monthly. See SERVICES.

—*Butler v. Kirby*, 53 W. 188, 192.

30. It appears from the authorities, in England and in the several states, here approved, that "where the cause of action accrued prior to the death", "as the statute commenced running before the death, it is not interrupted by the death, unless excepted by the provisions of the statute itself";

31. While in "cases where" "the cause of action did not accrue prior to the death, it cannot in law be regarded as having accrued after the death, until parties are in being, capable of suing and being sued".

32. "It is true, the cases cited arose under general statutes of limitation, but the reasons given are equally applicable to the two years' limitation in question". See also APPEAL.

—*Sambs, Admx. v. Stein*, 53 W. 569, 572.

33. Where letters were granted in May 1875, and a judgment was rendered in circuit court on appeal December 1881, directing the county court to assign certain real estate and rents therefrom in the possession of the executor, it was held under the six-year limitation statute (sec. 3850), that "at the time of the rendition of such judgment, the functions of the executor, as such, had ceased".

34. "We are clearly of the opinion that whatever possessory right the executor may once have had to the land, *virtute officii*, that right was determined by the statute before the judgment was rendered from which this appeal is taken". (Questioned in *Mackin v. Hobbs*, 116 W. post).

—*Est. of Prosper A. Pierce*, 56 W. 560, 564.

35. The statute as to pleading (sec. 4206), "is general as to all actions which can be barred by the statute".

36. "The only exception (if it can be called an exception) is where the facts, by which the statute operates as a bar, are sufficiently stated in the complaint.

37. In such case the objection that the action was not commenced within the time limited may be taken by demurrer, and such demurrer is an answer, according to the opinion of Chief Justice Dixon in *Howell v. Howell*, 15 W. 55, within the meaning of the statute.

38. This ruling very clearly shows that the mere mention of the statute of limitations is quite unimportant, but the facts which show that the statute has run in the action are material and essential;

39. And it makes no difference whether such facts appear in the complaint or in the answer, so that they are stated in the pleadings".

40. "At common law the statute of limitations had to be pleaded specially, and all the facts to make the statute applicable must be specially and particularly stated".

41. And it is held that the rule is "but a reasonable one" under the statute also.

—*Paine v. Comstock*, 57 W. 159, 163.

42. The six-year limitation applies where accounts are not mutual. See ACCOUNT BOOKS. —*Fitzpatrick v. Est. of Phelan*, 58 W. 250, 255.

43. While the defendant, a former resident, was frequently "temporarily in this state on business", but the accumulation of such times "did not amount to six years, he was therefore not entitled to the benefit of the statute of limitations".

—*Whitcomb v. Keator*, 59 W. 609, 614.

44. Where "the defendant resided in this state, was out of it when the cause of action accrued, and returned into it some two years thereafter, while so out of the state the statute did not run against the note."

—*Parker v. Kelly*, 61 W. 552, 557.

45. As to the statute, sec. 3850, limiting to six years the "final settlement of the estate", it is said: "Such limitation is to secure a speedy settlement of the estate, when it can be done according to the will.

46. It is not designed, however, to frustrate, or render nugatory, any portion of the will. On the contrary, the estate is to be administered according to the will. Here it is impossible to so administer and finally settle the estate within the time mentioned." See also VESTING OF ESTATES.
—*Scott, Extrs. v. West*, 63 W. 529, 555.

47. "In the case of an express trust the law is well settled that the statute of limitations has no application, where there has been no denial or repudiation of the trust. (Cases)".

—*Bostwick, Admr., v. Est. of Dickson*, 65 W. 593, 597.

48. Sec. 4234 "only reaches a case where the person entitled to bring the action dies during the last year of limitation".

—*Curran v. Witter*, 68 W. 16, 22.

49. A voluntary unconditional part payment is sufficient "to take the cause out of the operation of the statute." See PAYMENTS.

—*Marshall v. Holmes*, 68 W. 555, 559.

50. The three year limitation as to debts of sec. 3873a only applies to the county court, and not to actions against heirs under secs. 3274 et al. See LIENS.

—*Fisk v. Jenewein*, 75 W., 254, 257.

51. An action at law for contribution of a co-surety, is limited to six years. See SURETIES.

—*Bushnell v. Bushnell*, 77 W., 435, 437.

52. "The statute of limitations does not run against a wife." See HUSBAND AND WIFE.

—*Second Nat. Bank v. Merrill*, 81 W., 151, 155.

53. The one exception named in the six-year statute, sec. 4222, "that in an action for relief on the ground of fraud, which before the adoption of the Code was solely cognizable in chancery, the cause of action shall not be deemed to have accrued until the discovery of the fraud. This being purely an action at law, this exception does not apply to this case," and action is "cut off at the end of six years from the successful perpetration of the fraud." (Approved in *State v. C. & N. W. Ry. Co.*, 132 W., 345, 361).

—*Jacobs v. Frederick*, 81 W., 254, 256.

54. As to the statute and twenty-year presumption of payment, concerning a legacy, a charge upon land, where over twenty years had run. See LEGACIES.

—*Williams v. Williams*, 82 W., 393, 399.

55. As to an express trust and a resulting trust being "out of the statutes" and the conditions necessary. See IMPLIED TRUSTS.

—*Fawcett v. Fawcett*, 85 W., 332, 334.

56. Held not applicable as between guardians and wards in accounting. See ACCOUNTS OF GUARDIANS.

—*Taylor v. Hill*, 86 W., 99, 105.

57. "The circuit and county courts both found that the executor had used all reasonable care and diligence in administering the estate, and that it had been impossible to complete the administration thereof within the six years allowed by the statute (sec. 3850);" it is held, following *Scott v. West*, 63 W., supra, "that under the facts shown the refusal to remove the executor was right."

—*Ford v. Ford*, 88 W., 122, 134.

58. "The statute of limitations in force when an action is commenced governs in the absence of some indication therein, or in some other provision of law, to the contrary. *Woodbury v. Shackelford*, 19 W. supra; *Converse v. Burrows*, 2 Minn. 239; *Toland v. Wills*, 59 Ind. 529".

—*Relyea v. Tomahawk P. & P. Co.*, 102 W. 301, 306.

59. A citizen of Illinois "having a claim against another such citizen", upon which the period of the statute of limitation has there passed, cannot "come into this state and enforce such claim".

60. "It is conceded that the effect of the statute of limitations in this state extinguishes the right upon which it has completely operated. *Brown v. Parker*, 28 W. 21; (other cases);" and in Illinois it "has the same effect."

61. "It is the universal rule that so long as a limitation act operates on the remedy only, the law of the forum governs. When that right" is extinguished, "such effect attaches to and becomes inseparable from such right in the courts of this state".

62. The bar in "an action upon a contract is as effectual as payment or any other defense", and "where the defense has been vested" it cannot be taken away or destroyed,—the rule in *Brown v. Parker*, 28 W. 21, being applied "to property rights as well as to tangible property, on the ground that a vested right of defense is itself property".

63. "As said in *Pierce v. Seymour*, 52 W. supra, it is the settled law in this state that a completed statutory period of limitations upon the enforcement of a claim not only takes away the remedy for such enforcement, but the claim also".

64. (Citing this case, it is said in *Hite v. Keene*, 149 W. post: "This court, as well as some others, has held that a statute of limitation takes away the right as well as the remedy". "American courts generally, and among them the supreme court of the United States, hold the contrary rule").

—*Eingartner v. Illinois Steel Co.*, 103 W. 373, 375.

65. As to waiver or failure to plead the non-claim statute, being ineffective, and the bar being absolute. See CLAIMS.

—*Fields v. Est. of Mundy*, 106 W., 383, 387.

66. The statute does not begin to run until the termination of the proceeding, in case of an attorney's employment. See ATTORNEY AND CLIENT.

—*Lowe v. Ring*, 106 W., 647, 653.

67. Following *Morgan v. Bishop*, 61 W., 407, and cases therein cited, "it was an abuse of discretion to allow the statute of limitations to be set up by amendment upon the trial without any showing to excuse the delay, and without the imposition of any terms or conditions. Such a ruling cannot be considered as 'in furtherance of justice'", under section 2830.

—*Sullivan v. Collins*, 107 W., 291, 294.

68. "The suspension of the statutes of limitations, as to a person once a trustee, ceases upon the termination of his character as such, and before that time if he distinctly disavow the existence of a trust relation by holding the subject of the trust adversely, openly, and with notice to the cestui que trust. *Angell, Limitations*, 174; *Riddle v. Whitehill*, 135 U. S. 621".

69. So held as to an administrator upon his discharge as to sale of realty to pay debts, where the validity of the sale is questioned, and of which realty he, subsequent to the sale to his son, himself became and is the owner. See also SALE OF REALTY.

—*Gibson v. Gibson*, 108 W., 102, 105.

70. Services performed under a void contract to pay at decease, mature when the services cease, and action is barred six years thereafter.

71. The statute is effective as to a claim against a deceased person without being pleaded. See also SERVICES.

—*Martin v. Est. of Martin*, 108 W., 284, 289.

72. The general subject and the cases discussed, and the policy of regarding the statutes of limitation in an unfavorable light and defenses under them unconscionable, is disapproved for future guidance.

73. In demurring, the subdivision and section relied on should be specified, and amendments allowed as to the statute of limitation on like terms and discretion as other amendments.

—*Whereatt v. Worth*, 108 W., 291.

74. As to transactions between husband and wife, the statute does not run as against the wife.

—*Brader v. Brader*, 110 W., 423, 427.

75. "Under no circumstances, except such as create an equitable estoppel, can a person benefited by a completed period of limitation be precluded from insisting upon that benefit."

76. As to the widow's election statute being also so governed, and being obviated by equitable estoppel. See TRUSTEES.

—*Ludington v. Patton*, 111 W., 208, 234.

77. "All trusts arising otherwise than by contract inter partes, trusts created by operation of law, whether implied, resulting, or constructive,

78. And all trusts founded in contract having some of the elements of express trusts and properly referred to as such, though not belonging to that species of express trusts cognizable only in a court of equity, are subject to statutes of limitations." (Citations)".

79. And even "a cause of action for breach of an express trust subject to be dealt within a court of equity", "is barred by the six-year statute of limitations", where "it appears that the trust was repudiated to the knowledge of the plaintiff and her husband more than six years before the commencement of this action.

80. In an event, a repudiation of the trust, brought home to the knowledge of the person entitled to enforce it, started the six-year statute of limitations running. (Cases, supra).

81. A use of a trust fund by the trustee for his own benefit, or in any way clearly inconsistent with the trust, and conclusively evincing a repudiation thereof, is a repudiation of the same within the rule above stated".

—*Buttles v. De Baun*, 116 W., 323, 326.

82. Whether after six years, sec. 3850, "is so drastic and self-executing as to wholly terminate the administration, as intimated in *In re Pierce*, 56 W. supra,

83. Or whether power is still left in the county court to complete the settlement of the estate, so that the will and the law of defense and distribution may have effect, as seems to be indicated in *Scott v. West*, 63 W. and *Ford v. Ford*, 88 W. supra, (Followed in *Lindemann v. Rusk*, 125 W. 210, 225),

84. Still there can be no doubt that it declares a legislative policy in favor of closing estates within the six years, upon which county courts should permit no infringement not strictly necessary to accomplish the assignment and distribution of the property to those entitled". See also SALE OF REALTY.

—*Mackin v. Hobbs*, 116 W. 528, 533.

85. Quoting from *Buttles v. De Baun*, 116 W., and citing other cases, supra, it is said: "It must therefore be considered as settled in this state that a trust which is to be held exempt from the operation of the statute must be (1) an express trust and (2) a technical and continuing trust, cognizable only in a court of equity".

86. A mere devisee of land subject to the payment of a legacy is not

"the trustee of an express trust" under section 2081, and an action to enforce the lien was held barred by the twenty-year statute of limitations. Sec. 3850. *Williams v. Williams*, 82 W. *supra*, *contra*, overruled.

—*Merton v. O'Brien*, 117 W. 437, 440.

87. Where the residuary legatee has given bond as such under sec. 3795, and became personally liable for the debts, a cause of action of a claimant for a debt, is held not barred until six years after the giving of such bond to pay debts, etc. —*Pym v. Pym*, 118 W., 662, 672.

88. The four year statutory limitation is held to apply on a guardian's bond in void proceedings, held to be a voluntary bond. See BONDS.

—*Dudley v. Rice*, 119 W., 97, 100.

89. Recovery for services quantum meruit, where the services terminated as per contract more than six years before the decease, at which latter date payment was due under a void contract, held barred. See SERVICES.

—*Loper v. Est. of Sheldon*, 120 W., 26, 32.

90. Sec. 3844, as to filing claims, does not affect an action for a partnership accounting against a surviving and another deceased partner.

91. A cause of action arising after death, does not accrue until an executor or administrator is appointed. See SURVIVING PARTNER.

—*Stehn v. Hayssen*, 124 W. 583, 589.

92. "Our decisions" "have not gone further than" to hold that "the statute of limitations" does not operate "on a transaction between husband and wife giving rise to a cause of action between them".

93. "The common-law rule is that the limitation statutes do not run against a married woman, subject to the exception that where it has commenced to run on a cause of action the intervening circumstances of marriage will not interrupt it".

94. "Each of the" "three cases", *Second Natl. Bk. v. Merrill*, 81 W., *Fawcett v. Fawcett*, 85 W., and *Brader v. Brader*, 110 W., *supra*, "arose out of a transaction between husband and wife. We are constrained not to extend the doctrine thereof so as to cover a cause of action not so arising, and upon which the limitation statute commenced to operate before the parties became adversaries in respect thereto".

95. "As we have said, where once the statute of limitations has commenced to run on a cause of action, no circumstances not expressly provided by statute will interrupt it. (Citation)".

96. "The right of subrogation merely justifies the payor in asserting the mortgage right of the payee, which, though extinguished, is kept alive as an equitable charge for the benefit of the latter.

97. The statute of limitations commences to run on a cause of action on implied contract, where one accrues in the manner stated (See

CLAIMS), upon the happening of circumstances creating the implied promise, and upon such a cause of action being extinguished by the statute of limitations, the equitable right of subrogation to the use of securities incident to the contract right falls also". See also CLAIMS.

—*Charmley v. Charmley*, 125 W. 297, 306.

98. Action against a guardian's sureties and the four-year limitation of sec. 3968, accrues at the ward's majority. See GUARDIAN AND WARD.

—*Wescott v. Upham*, 127 W. 590, 593.

99. Where "defendant wrongfully converted" "to his own use", property of an intestate "within one year before her death", and between seven and eight "years before the administrator was appointed",—recovery by such administrator is barred,—

100. By sec. 4222, which "limits the time for the commencement of an action to recover damages for the wrongful detention of personal property to six years after the right of action has accrued.

101. The death of the person to whom the right of action accrues does not extend such time unless such death accrues during the last of the six years", as provided in sec. 4234. *Curran v. Witter*, 68 W., supra.

102. As to such property "obtained and converted six days after her death", secs. 4222 and 4234 "do not apply. There was no person in existence competent to bring an action on account of such conversion till the administrator was appointed" seven years after the decease, and,

103. "That situation is governed by sec. 4251, providing" for limitation 'double the period otherwise prescribed by law', in such cases, and, therefore, this action being "commenced within the double time mentioned", it is not barred as to such subsequent conversion.

—*Palmer v. O'Rourke*, 130 W., 507, 511.

104. Where the debt secured by mortgage, is barred by the six-year limitation statute, and "the right of action" accrued to foreclose the mortgage, more than twenty years before,

105. But interest subsequently "was paid upon the indebtedness", it is held "that the payment of interest upon the debt" had "the effect of extending the twenty-year limitation upon the mortgage, which began to run "from the time of the last payment of interest". (Cases). See also SUBROGATION.

—*Hughes v. Thomas*, 131 W., 315, 323.

106. "Under our statute of limitations, especially sec. 4249, the time does not run until complete accrual of the cause of action.

107. Therefore, where some condition precedent to the right of action exists, whether it be a demand and refusal or some other act or con-

tingency, the cause of action does not accrue, nor the statute begin to run, until that condition is performed. (Many cases)''.

108. "Where all knowledge and control (as to performance of a condition precedent) is with one party (to a contract), the other may assume that conditions continue without change until informed to the contrary by the party having knowledge and power or election to change them. (Many cases)''.

—*Ott v. Boring*, 131 W. 472, 482.

109. Where a resident, owning a homestead, left Wisconsin and went to Indiana, and during the six years before his death "spent most of his time in I., returning to W. occasionally", and his estate is being probated here, it is held, under sec. 4231:

110. "Departing from the state and remaining absent a large portion of the time do not necessarily prove that the party so departing has changed his residence. The proof was not sufficient to show that the deceased departed from and resided out of the state", so as to stop the running of the statute.

111. As to recovery for services, "rendered more than six years before the death", being barred. See SERVICES.

—*Taylor v. Thieman*, 132 W., 38, 46.

112. Where an amendment "simply varies or expands the allegations in support of the cause of action already expounded", the amendment "relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point".

113. But where an amendment "introduces a new or different cause of action," "the statute continues to run until the amendment is filed;

114. And this rule applies although the two causes of action arise out of the same transaction". *Whalen v. Gordon*, 95 Fed. 305. See also AMENDMENT. —*Meinshausen v. A. Gettelman, B. Co.*, 133 W., 95, 102.

115. "A sealed contract executed by private persons" comes under the twenty-year statute, sec. 4220.

116. "The general rule is that sealed instruments are specialties within the limitation statute, and that they include contracts of parties, regardless of their nature, provisions, and purposes. (Citations.)"

—*Mariner v. Wiens*, 137 W., 637, 640.

117. As to various statutes as to minor's rights under a fraudulent administrator's deed being barred. See SALE OF REALTY.

—*Steinberg v. Salzman*, 139 W. 118, 122.

118. "It has been repeatedly held that the application of a statute of limitations cannot be avoided by showing facts that might ordinarily constitute an estoppel in pais. (Cases)."

—*Williams v. J. L. Gates & Co.*, 146 W. 55, 60.

119. Approvingly citing *Eingartner v. Ill. S. Co.*, 103 W. supra, it is said: "Our decisions are apparently grounded on the proposition that a right acquired by such a statute (of limitations) is a vested property right and that it would violate the 'due process' clause of the federal constitution to take away the right after it had accrued". See also FOREIGN LAWS.

—*Hite v. Keene*, 149 W. 207, 213.

120. A cause of action by a client against his attorney for collection of a note, "ripened as soon as the attorney breached his duty inhering in his agreement to remit to plaintiff the proceeds of the note, or notify her of readiness to pay within a reasonable time after the money was received." (Citation).

121. "Demand was not necessary to perfect such a cause".

122. "A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach,

123. Whether the facts are known to the party having the right or not and if the latter, whether through ignorance, neglect, or mistake of such party or fraud of his adversary. There is no exception. (Many cases)".

124. "When the bar is complete at law it is also complete in equity. The mere form of action, as to a matter remediable in either one field or the other, does not affect the question. (Citation)".

125. "Redress" may sometimes be had "for a remediable wrong committed subsequent to the breach upon which the statute has run.

126. Such a breach is possible between trustee and cestui que trust or parties sustaining similar relations, as indicated in *Ludington v. Patton*, 111 W. supra.

127. Such relations exist between attorney and client", as here. "If a person holding relations of trust and confidence with another and charged with the duty to guard such other's pecuniary interest, induce such other to take such a course as to lose a right against such person, that of itself is a remediable wrong, starting the six-year statute of limitations running as to it".

—*Ott v. Hood*, 152 W. 97, 99.

128. "If the place of a contract is in one state and an action to enforce it is brought in another", "the statute of limitations of the former apply";

129. "But, in case, at the former place, the right has been extinguished by the law there, then it cannot be enforced in another state even though its own statutory period has not expired".

130. There being a payment by one of the two "joint makers", the action was held properly sustained as against the other, under sec. 4248, on "the presumption that the law of Illinois—the place of the contract—is the same as here, there being no proof". "to the contrary".

—*State Bank of W. v. Pease*, 153 W., 9, 11.

131. Legacy charged on land, for payment of money annually, is barred by the six-year statute, there being a legal as well as equitable remedy. See also LEGACIES. —*Nolan v. First Nat. Bank*, 161 W. 22, 26.

132. "The bar of the statute" "must be specially pleaded". See also LEGACIES. —*Will of Brandon*, 164 W. 387, 390.

LIQUORS.

License:

Administrator not obtain, 1.

May dispose of bulk, 1, 6.

Comes to end with license, 5.

Personal; not assignable, 2.

Not go to administrator, 3.

Except now by statute, 4.

1. The excise law does not require "an administrator to obtain a license before he could sell or dispose of liquors belonging to his intestate." "In performing this duty,"—"to sell property, collect and pay the debts and settle up the estate",—"and disposing of the spirituous liquors belonging to the estate, it is no more necessary for him to obtain a license than it would be for a sheriff" on an execution sale.

—*Williams v. Troop*, 17 W., 463, 474.

2. "The fact that the defendant rented the saloon from B., and took an assignment of his license, therefore, gave him no authority to sell under the license issued to the latter.

3. Thus in the Pennsylvania cases cited (Blumenthal's Petition, 125 Pa. St. 412; Monroe's Appeal, 181 Pa. St. 233) it was held, "that 'a liquor license is a personal privilege, which ends with the life of the licensee. It is not assignable by him, does not go to his personal representatives, and is not an asset of his estate' ". A transfer and sanction thereof by the town board, "were without authority of law and void".

4. (By subsequent amendment, subd. 3, sec. 1548, by ch. 89, L. 1915, "the administrator of such deceased licensee may continue to sell", or assign the license).

—*State v. Bayne*, 100 W., 35, 39.

5. "It is well established law that in the absence of a statute providing otherwise a license of this kind (retail liquor), although for a fixed term, comes to an end with the life of the licensee. (Citations).

6. But the administrator of deceased licensee may, like a sheriff or receiver and by virtue of his authority as administrator lawfully dispose of the stock of liquors in bulk. *Williams v. Troop*, 17 W. supra".

—*State ex rel. Rich v. Steiner*, 160 W. 175, 177.

LOST WILL.

- | | |
|--|--|
| Declarations to rebut, 3. | Knowledge of accidental destruction, 15. |
| Existence or non-existence, 6, 12, 13, 17. | Coupled with an adoption, 16. |
| Existence three days before, 7. | Revoked the will, 16. |
| Against scrivener's evidence, 8. | Opportunity to reproduce, 15. |
| Secondary evidence of, 13. | Presumption of revocation, 15. |
| Equity: has jurisdiction, 1, 2. | Presumption of revocation, 4. |
| Not to set aside probate, 2. | Facts of stated cases, 11, 17. |
| Independently of statute, 1. | Opportunity of contestant, 14, 17. |
| Evidence of contents, 9. | Overcome by evidence, 5, 11, 17, 18. |
| As at common law, 10. | Whether contestant destroyed, 19. |
| Case sufficiently proved, 10. | |

1. "It is perfectly clear that a court of equity has jurisdiction of" an action to take proofs and establish a lost or destroyed will, "independently of the statute. The gravamen of the complaint is the fraud of the appellants in concealing the will or destroying it; and fraud is peculiarly within the jurisdiction of courts of equity".

2. While "there are many decisions which hold that equity will not set aside the probate of a will fraudulently obtained, and such is probably the law" yet equity will take jurisdiction in actions "brought to establish a will fraudulently concealed or destroyed".

—*Hall v. Gilbert*, 31 W. 691, 694.

3. It is indicated that admission of "declarations to rebut the inference of fact arising from the absence or loss of a will", is proper. See REVOCATION.

—*In re Will of Ladd*, 60 Wis. 187, 199.

4. "Where, as here, it is established that the testatrix properly executed a valid will, and the same was last known to be in her possession but cannot be found on her death, there is a prima facie presumption that she destroyed it with the intention of revoking it,

5. But such presumption may be overcome by competent evidence. (Citations). Of course, if such subsequent declarations (of the testatrix) are admissible in evidence to overcome such presumption, they are also admissible to support such presumption."

6. Declarations of the testatrix subsequent to the making of the will were held "admissible on the question of the existence or non-existence" and "of contents of a lost will." Cassody, Wills. (Many cases). See also PARTIES.

—*In re Valentine's Will*, 93 W., 45, 54.

7. The testatrix executed her will, the contents of which were duly proved, left it with the notary who drew it, obtained it personally several times and returned it, stated to several witnesses within three days of her decease that the will was at the notary's, and the evidence was clear that after she was unable to get it, she believed the notary "still had and held her will";

8. After her decease the will could not be found and the testimony of the notary "on the subject is quite unsatisfactory," and inconclusive as to whether she had gotten the will or not; the county court disallowed the will, and the circuit court allowed it, the last judgment being approved on the principles of *In re Valentine's Will*, 93 W., supra.

—*In re Steinke's Will*, 95 W., 121, 125-6.

9. "Of course, the fact that such (lost) will is not in existence and cannot be produced makes it necessary to prove its contents by secondary evidence. (Cases).

10. Such statute (sec. 3791) is in aid of the common law, and the proof of such contents may be made as at common law. (Citations)." On the testimony of "the attorney who drew it", "corroborated to some extent by" the two other subscribing witnesses, the execution and contents is held "sufficiently proved".

11. On the facts, among others, showing that the will, after being "in the custody of the county judge" for eleven months, was withdrawn by the testator and was in the custody of no other person up to the time of his decease eleven months later, and that he "was careless in keeping his papers", was "unconscious for several days immediately before his death", "that not long before his death" he spoke of it to several persons and stated that it "was still his will", that it was once lost and subsequently "he told his attorney that he had found his will, and showed him the sealed envelope in which it had been placed, and again showed it to him about" a month before he died, but it could not be found,—it was held that "the presumption that he destroyed the will with" intent to revoke it "is fully overcome;"

12. "That such declarations of the testator were admissible on the question of the existence or non-existence of such last will is abundantly supported by numerous adjudications. (Cases)".

13. As stated in an "able opinion of Judge Dyer" as to the testator's declarations concerning "the existence and contents" of a lost will, in *Southworth v. Adams*, 11 Biss., 256, "it is now" "fully settled both in England and in this country that such declarations are admissible, and that secondary evidence may be resorted to for the purpose stated."

14. "The mere fact that the contestant had an opportunity to destroy the will would not of itself overcome the presumption that it was destroyed by the testator with the intent to revoke it; still it is a circumstance to be considered with other proof. (Citations)." See also REVOCATION.

—*Gavitt v. Moulton*, 119 W., 35, 41, 49.

15. "Where reasonable time elapses after knowledge of the (accidental) destruction, coupled with opportunity to reproduce the destroyed will, a presumption of revocation arises, and the destroyed will cannot be admitted to probate". (And so held in *Deave's Est.*, 140 Pa. St. 242,

though there was evidence of testator's "declarations that he intended to" reproduce it.)

16. "The destruction of the will three years before the testator's death, with his knowledge, together with the adoption of L. after such destruction, revoked the will; hence there was no will which could have been admitted to probate as a lost or destroyed will". (Cases *supra*); *Glascott v. Bragg*, 111 W. 605 (See REVOCATION). See also FRAUDULENT ORDERS.
—*Parsons v. Balson*, 129 W. 311, 319.

17. Where deceased left his will with his attorneys six years, and about three years before his decease took it himself "stating that he had no intention of changing or destroying it", "many times" "recognized its existence," and "asserted that he did not wish to change it"; and the widow and son to whom she was partial "had ample opportunity to get possession of it" during the few days of his last illness; and "the only reason" "for destroying" would be to give the son \$2,000 more, he already having received "the bulk of" the property; and there had been several law suits between son and father; and the will could not be found, and there being no direct evidence of its destruction,—held:

18. That the "presumption that it has been destroyed for the purpose of revoking it" had been "overcome by evidence, the burden being upon proponent. (Cases, *supra*)";

19. And that it was not "necessary to consider or decide" the question as to whether the son and mother destroyed it. Will allowed.

—*Wendt v. Ziegenhagen*, 148 W. 382, 387.

LUCID INTERVAL.

See INSANE PERSONS.

LUNACY, LUNATIC.

See INSANE PERSONS.

MAGISTRATE.

See COUNTY JUDGE. CUSTODY AND COMMITMENT.

MAINTENANCE.

See BOND FOR MAINTENANCE. CHAMPERTY AND MAINTENANCE.

MAJORITY.

See also INFANTS.

Lex rei sitae; domicil, 2.
 Non-resident infant, 1.
 Estate interests here, 1.
 Majority different age, 1.

Personal statutes,
 Contracts within state, 3.
 Disability here, 3.

1. Where an infant lives in Minnesota (majority at 18), "had no title in fee to the real estate of the testator, either by descent or by devise; but her interests are connected with and grow out of the real estate situated in Wisconsin"; it is held that "the statute of this state governs the entire administration, including the sale of the estate, distribution of the proceeds, and the final settlement, even as to persons residing abroad.

2. The lex rei sitae, as well as the law of the domicil of the testator, are both of this state. 3 Redfield on W. 31, 35; Chase v. Chase, 2 Allen, 101; 6 Jones Eq. 365".

3. "Statutes fixing the age of majority are personal statutes and unquestionably govern the contracts and transactions of persons within the states where they are in force; but all the transactions" here are held "to have taken place within this state, where by the statute she was still under the disability of infancy". See JURISDICTION; NOTICE; GUARDIAN AD LITEM.
 —O'Dell v. Rogers, 44 W. 136, 182.

MANDAMUS.

Compel judge to fix bond, 1.

Compel referee approval, 2.

1. A mandamus is not the proper remedy to compel a county judge to fix an appeal bond. See BONDS.

—State ex rel. Tallmadge v. Flint, 19 W. 621.

2. A judge cannot be compelled to sign an approval of a referee's report on stipulation of the parties. See REFERENCE.

—State ex rel. Orton v. McArthur, 23 W. 427, 430.

MARRIAGE.

See also MARRIAGE CONTRACTS.

Ceremony prima facie valid, 13.
 Common law marriages, 37.
 Defined; valid here, 37.
 Not valid in England, 38.

Cohabitation. See Presumption.
 Declarations of deceased, 24.
 Definition: civil contract, 6.
 Agreement between parties, 25.

Definition—continued

Direct; circumstantial, 26.

Fact to be proven, 26.

Dower; action for, 3.

Fact of marriage, 4.

Proof of marriage, 3.

Foreign divorce; publication, 36.

Parties domiciled here, 36.

Foreign marriage; proof, 28.

Solemnized in a church, 28.

Burden on him who denies, 29.

Presumption:

Cohabitation: lawful, 9.

Illicit in origin, 10, 35.

Overcome by proof, 10.

Continuance of life, 14, 16.

Dissolution of divorce, 15, 16.

Facts of involved case, 11.

In favor of marriage, 13.

Proved: by oral testimony, 1.

Civil contract: formalities, 6.

Cohabitation and acts, 5, 7, 9.

Date; proved by conduct, 8.

Direct or circumstantial, 26, 30.

Proved—continued

Facts of involved case, 27.

Not hearsay declarations, 30.

See also Foreign Marriages.

See also Presumption.

Sign and verify as T. nee P., 23.

Sale of realty to pay debts, 11.

Void: common law or statute, 17.

Divorce from such marriage, 21.

Other valid marriage before, 21.

Held lawful widow, 22.

Not estopped by divorce, 21.

Where party already married, 17.

Invalid for any purpose, 18.

Otherwise, where voidable, 19.

Prior illegal intercourse, 20.

When valid, valid everywhere, 31.

Exceptions: law of nature, 32.

Grounds of public policy, 32.

Leave state, evading purposes, 33.

Ceremony in another state, 34.

Nor common law marriage, 35.

Not recognized here, 34.

Without legal authority, 2.

1. Marriage may be proved by the testimony of the witnesses at the marriage supper.
—*Mills v. U. S.*, 1 Pin. 73, 75.

2. Where a marriage ceremony was performed by one without legal authority, the marriage is held valid where cohabitation and acknowledgment before the world followed.
—*Martin v. Ryan*, 2 Pin. 24.

3. "The authorities hold, and this court is not inclined to hold otherwise, that in an action for dower the plaintiff is not required to make proof of the actual solemnization of a marriage between the plaintiff and the deceased in whose estate she claims dower;

4. But they also hold that the evidence must be sufficient to establish the fact of a lawful marriage between them.

5. None of the cases hold that living and cohabiting together as husband and wife, or even the declarations of the parties that they are husband and wife, constitute a marriage in fact; or that such acts and declarations are a substitute for the marriage contract; the extent to which the authorities go is, that such evidence may be sufficient to prove a lawful marriage in fact."

6. Under the law of this state "marriage is a civil contract" (Sec. 2328), without specific formalities prescribed.

7. "It would seem to follow, therefore, that every lawful marriage must have been entered into by the parties at some particular date and time, and that it cannot in any case be the simple result of cohabitation; or the continued conduct of the parties, which ordinarily accompany the married state.

8. As a general rule, when a marriage is sought to be proved by conduct, cohabitation and repute, the date of the marriage in fact, which such conduct and repute tends to establish, is the date of the commencement of such conduct and repute, and not afterwards."

9. "'Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage'. 2 Kent, 87; (cases)." p. 479.

10. "The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome, by proofs showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact".

11. "Where the party claiming a marriage (on the theory that she was lawfully married to J.) deliberately entered into a bigamous marriage contract with the deceased (W.), and commenced cohabitation under such a contract, if, notwithstanding the fact that she knowingly commenced cohabiting with the deceased when she was the lawful wife of another, she claims a lawful marriage with such deceased after her divorce, and after she had thereby acquired the right to become his wife, she ought to be required to establish the fact of such subsequent marriage, either by express proof of the contract of marriage, or by circumstances which would clearly exclude the presumption that she continued to live with him under illegal contract of marriage." (Approved in *Lanham v. Lanham*, 136 W. 360, 369 post).

—*Williams v. Williams*, 46 W. 464, 474.

12. The validity of the widow's marriage, it seems, may be raised on an application to sell realty to pay debts. See *DOWER*.

—*Paige, Admr. v. Fagan*, 61 W. 667, 670.

13. "Of course, where there has been a marriage ceremony, it is *prima facie* valid, for the law presumes in favor of marriage. *Piers v. Piers*; 2 H. L. Cas. 331".

14. "There is no rigid presumption against the continuance of the life of one of the parties to a prior marriage in order to establish the innocence of the other party to a subsequent marriage;

15. Much less is there any rigid presumption of a dissolution of the first marriage by a divorce prior to the second, in order to establish such innocence. *Smith v. Smith*, 5 O. St., 32".

16. "Each case must be determined upon its own facts and circumstances, and such inferences as should fairly and reasonably be drawn from them".

17. Where one of the parties is already married, another marriage either at common law, or under the statute, "was a nullity, absolutely and *ab initio*. (Many cases)".

18. Such marriage "was good for no legal purpose, and its invalidity may be maintained in any proceeding in any court between any parties, whether in the lifetime or after the death of the supposed husband or wife, or both, and whether the question arises directly or collaterally. (Citations).

19. It is otherwise where the marriage is voidable merely".

20. Under a void marriage, prior "illegal intercourse, even though it had been fraudulently concealed by her from W. before their marriage, would not, on discovery, have been ground for divorce from her at the suit of W., much less an impediment to their marriage. *Varney v. Varney*, 52 W. 120."

21. Where plaintiff contracted a void marriage with J., then a marriage with W. held valid, and then was divorced from J., she is not "estopped by the subsequent judgment of divorce from showing that she was never the lawful wife of J., but was the lawful wife of W."

22. And it is held that she "is the lawful widow of W. deceased, and as such is entitled to dower", in lands of his estate, "with damages for the withholding thereof from the time of making demand therefor. *Munger v. Perkins*, 62 W. 499. (Cited under DOWER)."

—*Williams v. Williams*, 63 W. 58, 64.

23. A widow in an affidavit "and also in her signature to the same, she described herself as 'M. M. T. nee P.' This, as we understand it, was a declaration by her that before she married T. her family name was P." There was a like declaration in the deed in question. "Such proofs, together with her admissions," were held sufficient evidence of marriage, in the absence of any evidence to the contrary.

—*Prickett v. Muck*, 74 W. 199, 203.

24. On the issue of marriage by one claiming to be the widow of T., an intestate, evidence that "T. stated that he had never married claimant," also statements of T's relatives to like effect, neither statement being "made in the presence of the claimant," was held inadmissible.

25. "To constitute marriage there must be an agreement between the parties that they will hold towards each other the relation of husband and wife, with the responsibilities and duties which attach to that relation. *Williams v. Williams*, 46 W. supra.

26. This agreement is a fact to be proven. It may be proven by circumstantial evidence, as many other facts are proven. In this case there is no direct evidence that the parties promised to assume the relations of husband and wife, but the circumstances proven seem to us very persuasive, and to justify the finding that there was a marriage in fact." (Quoted and approvingly discussed in *Becker v. Becker*, 153 W., post).

27. The parties openly left the claimant's home to be married, stopped at a hotel, where "a person whom the claimant supposed to be a minister

appears, something is done, the nature of which the claimant is prevented from disclosing, and from that moment the claimant is known and introduced as Mrs. T." They lived together for several years assuming to be husband and wife, visited relatives of both as such, then separated with occasional visits, and claimant is always announced as Mrs. T., "and always bears an untarnished reputation." The marriage is held valid, and his widow, the claimant is held the heir of T.'s property.

—*Thompson v. Nims*, 83 W., 261, 265.

28. "The law relating to proof of foreign marriage seems to be that where a formal ceremony of marriage, solemnized in a church by a person assuming the office of a priest or minister, is shown, it will be presumed, in favor of the marriage, that it is in accordance with the law of the country and valid.

29. So, when such a marriage is shown, especially if followed by cohabitation, the burden is on him who denies the validity of the marriage to show that the law required some further act or fact to make it valid. (Citations)." Held, sufficient on oral testimony, by witnesses present at ceremony.

—*Lanctot v. The State*, 98 W. 136, 138.

30. "The fact of marriage"—even as to a witness's interest, "must be proved by direct evidence, and not by mere hearsay or admissions of those not parties to the action."

—*Barton v. Bruley*, 119 W., 326, 328.

31. "The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere.

32. To this rule, however, there are two general exceptions"; "namely: (1) Marriages which are deemed contrary to the law of nature as generally recognized by Christian civilized states; and (2) marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy". See exhaustive "note to *Hills v. State* in 57 L. R. A. at p. 155; s. c. 61 Neb. 589".

33. "We hold that when persons domiciled in this state and who are subject to the provisions of the law (sec. 2330) leave the state for the purpose of evading those provisions,

34. And go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provisions of the law and will not be recognized by the courts of this state". (Many cases).

35. And further, "the finding that there was a common law marriage, resulting from the fact that the parties lived and cohabited together as man and wife for about six months" after the expiration of the year in which the marriage was invalid, and to the time of decease of the pretended husband, cannot "be sustained". *Williams v. Williams*, 46 W. supra; (other cases).

—*Lanham v. Lanham*, 136 W. 360, 365.

36. It is assumed that in case of a divorce granted in Utah, with service by publication, both parties being residents of Wisconsin, together with a subsequent marriage of the man to another woman,—both divorce and marriage are invalid. See also *ESTOPPEL*.

—*H. W. Wright L. Co. v. McCord*, 145 W., 93, 104.

37. “An oral contract of marriage, *per verba de proesenti*”, “entered into by competent parties without witness or ceremony of any kind, to then take each other for husband and wife, consummated by cohabitation and by holding themselves out to the public as married”, is “in this state a marriage legally valid and binding”. (Cases, discussed).

38. After various “American courts had become committed to this view of the ‘common law’” validity of such marriages, the English courts “decided against the existence of any such rule in the common law of that country,”—“the place of the origin of that law.” *Queen v. Millis*, 10 Cl. & F. 534, A. D. 1844. *Beamish v. Beamish*, 9 H. L. Cas. 274.

—*Becker v. Becker*, 153 W., 226, 227.

MARRIAGE CONTRACTS.

See also *MARRIAGE*.

Ante-nuptial contract:

Any “provision,” sufficient, 51.
Both parties retain property, 52.
Burden of impeaching, 39.
Cannot vary marriage duties, 14.
Construe, as other agreements, 42.
Meaning attributed at signing, 43.
Destroyed proven orally, 6.
Divorce; alimony, contract, 36.
Whether further property? 35.
Doubtful or ambiguous, 21, 44.
Most favorable to widow, 21, 45.
“Either party dying intestate,” 41.
Testacy does not nullify, 41.
Husband change, given more, 9.
Widow bound thereby, 9.
Inadequacy of provisions, 20.
Intention, controlling, 22, 43.
Marriage promises preceding, 46.
Not a badge of fraud, 46.
Must be free from fraud, 19.
Burden on party alleging, 47.
Not to share in personalty, 24.
Precludes allowances, 25.
Nothing inherently suspicious, 38, 48.
Oral, executed, valid, 10, 31.

Ante-nuptial, etc.—continued

Orally made before marriage, 28.
Deed in escrow; no title, 32.
Widow recording; no laches, 33.
Estoppel, not shown, 34.
Right to elect within year, 33.
Writing, etc., after marriage, 28.
Void, jointure statutes, 30.
Void, statute of frauds, 29.
Pecuniary amount not paid, 53.
Obligation is sufficient, 53.
Post contract attempts to construe, 27.
Value only as to intention, 27.
Preclude statutory allowances, 23.
Property rights, contract, 13.
Provide for necessities of life, 26.
Reasonable support provision, 26.
Monthly, sixty dollars, 26.
Regarded with favor, 38.
Regarded with rigid scrutiny, 19, 47.
Right existed before statute, 50.
Statutes as in most states, 49.
Undue influence indication, 40.
Wife only signing is bound, 54.
Husband's obligations:
Cannot vary marriage duties, 14.

Husband's obligations—continued

Support and care for wife, 11.

Cannot shirk; contract away, 12.

Support promise, no consideration, 15, 16.

Agreement, nudum pactum, 17.

Intended husband's deed, 4.

Given without consideration, 37.

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1. In a post-nuptial contract, made in Prussia, the parties being then domiciled there and owning no property here, held "The real property, therefore, in this state, acquired by the parties after they came to it, and which was held and owned by the husband in his own name, was subject to be disposed of by him, by will or otherwise, according to the laws of this state."

2. The rule of Judge Story approved that, "Where such an express contract applies in terms or intent only to the present property, and there is a change of domicil, the law of the actual domicil will govern the rights of the parties as to all future acquisitions."

—*Fuss v. Fuss*, 24 W. 256, 263.

3. A mutual agreement under seal, during coverture, between husband and wife, releasing "all her interest in his estate", is void. See *Widow*.

—*Leach, Extr. v. Leach*, 65 W. 284, 291.

4. A deed by an intended husband before marriage without the knowledge of his intended wife is not necessarily fraudulent, it depending upon circumstances. See *DOWER*.

—*Dudley v. Dudley*, 76 W., 567, 578.

5. In an action by a widow to recover on an election, where there was a will, and there had been a destroyed ante-nuptial contract, and an existing post-nuptial contract including and slightly adding to the terms of the ante-nuptial, it is held:

6. That the terms of the ante-nuptial agreement, proven by oral testimony, "satisfactorily and sufficiently appear, and that said agreement was valid and binding on both the said parties";

7. That although the post-nuptial agreement specifically stated a revocation of 'all previous contracts and agreements thereto,' yet, on the testimony, "it follows that the validity of the old contract was not destroyed or in any way affected by the new one; but was merely altered or changed in that one respect.

8. Beyond what was copied from the old contract, it did not require

her signature. It was his sole act. It was the additional gift of the furniture and clothing. The same consideration is preserved.

9. It was not a new contract, or any contract between them which he or they could not make in consequence of their marriage. He had a right to change the old agreement, and give her more than it provided; and he did so, and she accepted it. That is all there is of it." "The plaintiff is bound by said ante-nuptial contract as changed or altered by the said instrument."

—*West v. Walker*, 77 W., 557, 567.

10. An oral ante-nuptial agreement by the woman to convey land to the man, and that "she receive, her support and comfort as the consideration of the conveyance", an agreement to marry having "been made at the same time, but not as any part of the consideration for the conveyance," "although not in writing, was fully executed and performed. This, by all authority, takes it out of the statute," and it was held valid.

—*Larsen v. Johnson*, 78 W., 300, 305.

11. "The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health. This requirement is grounded upon principles of public policy.

12. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected".

13. "Husband and wife may contract with each other before marriage as to their mutual property rights,

14. But they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. (Citations).

15. It results from this that, when the plaintiff (husband) promised to care for, nurse, and support the deceased (wife) after marriage, he promised only to do that which the law required him to do in any event,

16. And neither the doing of what one is in law bound to do nor the promising so to do is any consideration for another's promise. (Citations.)

17. The alleged promise of the deceased",—"with the claimant that in consideration of his services in caring for, supporting, and nursing her she would leave him all her property upon her death",—"was therefore nudum pactum.

18. The plaintiff simply performed duties required of him by law as a husband which he could not avoid or contract away, and there can be no recovery upon express contract, nor will the law imply a contract".

—*Ryan v. Dockery*, 134 W. 431, 434.

19. "A valid ante-nuptial agreement may be made (*West v. Walker*, 77 W. supra)," but where "the future wife releases" dower and other rights, it "must be free from fraud or imposition, and it will be regarded with the most rigid scrutiny, and will not be approved" if the "future wife has been" so "overreached". (Many cases).

20. "Even if we adopted the view that such a contract might not be enforced because of the mere insufficiency of the provisions made for the intended wife", "we would be unable to say" that \$5,000 out of an \$86,000 estate, besides reasonable support during life, "was so inadequate that the contract could not be sustained".

21. Where "the contract may be doubtful or ambiguous", admitting "of more than one construction, that most favorable to the widow should be adopted, if consonant with reason".

22. "But in construing a valid ante-nuptial contract no exception should be made to the general rule that the intention of the parties is controlling and must govern. (Cases)".

23. "An ante-nuptial contract otherwise valid, which precluded the widow from claiming the allowances provided for by sec. 3935, is enforceable".

24. Where the contract provided "the considerations named therein 'in lieu of her dower right in the estate of said D., and in lieu of all right, title, and interest which she would have by law in the said estate', " "and she also agreed not to 'claim any share' in the personal estate",—

25. It is held, she was not entitled to the benefit of subds. 1 and 2, sec. 3935, as to property and support allowances given "by law and by law only, and a right which she expressly waived by her contract". (Many cases; Mich. contra.).

26. A provision 'that during his natural life, and the life of the said E., his intended wife, he will' 'provide for her all the necessities of life', is construed as giving her the specific "sum of \$5,000 (otherwise named), together with a reasonable provision for her support during her natural life", and apparently, \$60 per month is held "reasonable in amount".

27. A post-nuptial contract, apparently attempting to construe such support provision as not continuing 'beyond the life of' decedent, "cannot be upheld. It is of value only in arriving at what the parties meant and intended by the former contract".

—*Deller v. Deller*, 141 W. 255, 260.

28. An ante-nuptial contract "orally made before marriage and reduced to writing, signed, sealed, and acknowledged after marriage," purporting "to have been made in consideration of marriage",—is held,

29. "Void under subd. 3, sec. 2307", statute of frauds, "and cannot be validated by reducing it to writing and signing after marriage." *Brandeis v. Neustadt*, 13 W., 142 (See FRAUDS, STATUTE OF); Ind. and Ia., contra.

30. Furthermore, under secs. 2167-2172, "respecting dower, jointure, and election", "the ante-nuptial agreement must be made and concluded before marriage and the assent provided for in the statute must be in writing and before marriage. *Fellers v. Fellers*, 54 Neb. 694".

31. "Agreements made before marriage respecting the property of

the parties when executed by the transfer and delivery of the property may be good, though void under the statutes before execution." "In *Larsen v. Johnson*, 78 W., supra, the consideration "was not the marriage", and the agreement "was fully executed and performed".

32. Here it "was not executed", though "a deed of real estate was deposited" in escrow to be delivered upon the husband's decease, and "no title passed" "before his death".

33. Though the widow "consented to the recording of the deed," she was not "guilty of laches", and "still had the right of election" within the year. (Cases)

34. "Nor was any ground of estoppel shown" as "the estate in no way changed its position because of any act of" the widow.

—*Rowell v. Barber*, 142 W., 304, 306.

35. Whether, there being an ante-nuptial contract, "it is proper for the court to award to the wife anything but alimony", on granting her divorce, is not determined.

36. Alimony is granted here, and the ante-nuptial provision for the wife, on the death of the husband also secured to her.

—*Schwenn v. Schwenn*, 143 W. 399, 404.

37. A deed given by "a man on the eve of his marriage, without the knowledge of his prospective wife with intent to deprive her of her marital rights", was held given without consideration and inoperative "so far as it conflicts with the marital rights of the wife. *Dudley v. Dudley*, 76 W., supra; (citations)".

—*Hanson v. McCarthy*, 152 W., 131, 133.

38. "There is nothing inherently suspicious about ante-nuptial contracts. They are, in the absence of unfair characterizing circumstances, to be regarded with favor rather than disfavor.

39. In general, the burden is upon the one impeaching such a contract to support the claim of invalidity rather than upon the adversary to support the contract.

40. If there is anything about such an instrument, considering all the circumstances, indicating that the intended wife had been unduly influenced to make it, that will overcome its prima facie validity, so as to require the person asserting the contrary to, at least, restore such character".

41. It is held that the fact that the agreements provide for a disposition of the property "in case of either party dying intestate", does not nullify the contract because of the testacy of such party.

42. "The rule which overshadows all others, in determining the legal meaning of an agreement, applies to ante-nuptial as well as to other agreements,—there is no difference.

43. The meaning which the parties attributed to the paper they executed at the time it was signed,—their then intention,—is to be taken

as the legal meaning, if it can be found expressed in the language used".

44. "In case of its meaning being obscure, then of two or more reasonable meanings and uncertainty as to which the minds of the parties met upon,

45. That one should be taken which is most favorable to the woman from the viewpoint of the parties when the agreement was made". See also AMBIGUITY.

—*Oesau v. Est. of Oesau*, 157 W. 255, 259.

46. "The fact" of "mutual promises of marriage preceding an arrangement as to property matters", "does not constitute, even a badge of fraud, much less, in itself, ground for declaring a contract void as contrary to public policy".

47. While "anything suggesting unfairness in the property provision" is "to be scrutinized with care", yet "the burden to establish fraud is on the party alleging it, and such burden can only be efficiently lifted by clear and satisfactory evidence".

48. "There is nothing inherently suspicious or bad about such an agreement". (Cases, supra).

49. "Our statutes, secs. 2167 to 2171, are similar to those in most states. Secs. 2167 and 2169", as to "legal jointure," should not be confused with the right to make a mere ante-nuptial agreement settling property matters by treaty, before marriage.

50. That right existed before the statute and was not taken away thereby, but rather recognized and encouraged". p. 375.

51. Under sec. 2169, "anything which answers to the call for a 'provision', is sufficient. (Cases).

52. Where both parties have property and it is stipulated that each shall retain the individual possession with all rights the same as if unmarried, that is sufficient as held in *Oesau v. Est. of Oesau*, 157 W. supra.

53. Even if the pecuniary consideration named shall not have been paid, if there is in fact an obligation to pay, that is sufficient".

54. The plaintiff having, "without efficient fraud, assented to the agreement—as she prima facie did by the fact of her having signed, she is bound thereby", though the husband did not sign it.

—*Bibelhausen v. Bibelhausen*, 159 W. 365, 371.

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See also HUSBAND AND WIFE.

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1. "Where property is claimed by a married woman, she must show by evidence which does not admit of a reasonable doubt, either that she owned it at the time of her marriage, or else acquired it afterward by gifts, bequest or purchase."

2. "In the case of a purchase after marriage, the burden is upon her to prove, distinctly, that she paid for it with funds not furnished by the husband." *Gamber v. Gamber*, 18 Pa. St. 363. (But see par. 89, post.)
 —*Stanton v. Kirsch*, 6 W. 338, 341.

3. A personal judgment cannot be had against her on a contract signed by her with her husband, it not appearing that it related to her separate estate.
 —*Rogers v. Weil*, 12 W. 664.

4. The married woman statute gives her a separate estate, the power to contract as to it, and "legal remedies". See HUSBAND AND WIFE.
 —*Conway v. Smith*, 13 W. 125, 136.

5. Contracts as to her separate estate are binding in law; otherwise her contracts are binding in equity as before the statute. See HUSBAND AND WIFE.
 —*Todd v. Lee*, 15 W. 365, 830.

6. "We think it very clear that it is not to be inferred that the plaintiff (a married woman) has lost the possession of her land merely because she allowed her husband to reside with her upon it, or to assist her in cultivating it. To work a change of her possession something more must be shown—such as a lease or contract by which her intention to part with her possession and control of the premises is clearly made to appear".
 —*Boos v. Gomber*, 23 W. 284, 286.

7. A married woman may employ her husband "to manage her farm, without forfeiting her rights in the products; nor will the law imply, from the mere fact that she does employ him, that she has given up and surrendered to him the ownership in the rents and profits".

8. "But when the husband's labor and expense produce the crops upon his wife's farm, perhaps a court of equity, upon the application of his creditors, would make an apportionment of the products as between the fair rent and use of the capital of the wife and value of his personal services, so as to give the creditors the benefit of his industry".
 —*Feller v. Alden*, 23 W. 301, 304.

9. "With respect to her separate property the statute has placed her upon the same footing as to all the world, her husband included, as if this were her condition—as it were, in the words of the statute, 'a single female'. As a negotiation or dealing therefor with respect to her separate estate, the transaction is to be looked upon as if the debtor was not her husband, but a stranger".

10. Having the "privileges and capacities of a feme sole" she may "take title to property directly from him or without the intervention of third parties, or a trustee, the same as if she were in all respects sui juris, or as if the relation of husband and wife did not exist".

—*Beard v. Dedolph*, 29 W. 136, 140.

11. "The tendency and obvious purpose of all laws affecting married women", "have been, almost without exception, to extend the privileges and immunities of that class of persons without imposing upon them corresponding liabilities and burdens".

12. "We are impelled to the conclusion that the legislature, when it removed some of the disabilities of coverture, did not intend thereby to deprive the wife of any privilege or right extended to her by other statutes".

—*Wiesner v. Zaun*, 39 W. 188, 210.

13. "The word 'grant', as used in the statute, includes deeds of bargain and sale", and a married woman may so "purchase and hold to her separate use".

14. "When a conveyance is made by a stranger to a married woman, there is no presumption that the consideration therefor was paid by her husband; but rather, that it was paid by her".

—*McVey v. Green Bay & M. Ry. Co.*, 42 W. 532, 537.

15. A married woman may, "although out of possession, maintain an action for injury to the reversion", as to her separate estate, but not as to growing crops belonging to her husband.

16. On producing a patent proving "that the premises were her separate estate, in the absence of further testimony, the presumption of law would be that she had the possession and was entitled to the crops".

17. "We understand it to be well settled, that a wife who permits her husband, without objection, for a long series of years, to receive and appropriate to his own use, or to their joint use, the income of her separate estate, cannot compel him to account to her therefor until such permission is revoked by her, and then only from the time of such revocation."

—*Lyon v. Green Bay & M. Ry. Co.*, 42 W. 548, 552.

18. "A married woman is now entitled to her earnings by virtue of Sec. 2, Ch. 155, L. of 1872 (sec. 2343). This necessarily comprehends and includes the profits of the business carried on by her with capital which is her sole and separate property, as in the present case;

19. And she may make contracts in respect thereto the same as though she were sole. Such contracts are valid at law, and may be enforced by or against her in legal actions, like other contracts between persons sui juris.

20. It seems very clear, therefore, that the law of 1872 brings this case within the rules of *Conway v. Smith*, (supra), and that the remedy of the plaintiffs, to whom Mrs. R. became indebted on account of transactions in her business, is at law and not in equity. It follows that the demurrer (to a complaint in equity) was well taken".

—*Meyers v. Rahte*, 46 W. 655, 659.

21. "A married woman, under the laws of this state, who has no separate estate", can "purchase of a third person, upon credit, a farm; take the title in her own name, and hold it for her own use and not for the use of her husband; carry on the farm by means of the agency of her husband, who is employed by her to manage the business, but without any specific agreement as to his compensation; and hold and retain the crops thus raised as her own".

22. And "the crops under such circumstances" do not "become liable for the debts of her husband". —*Dayton v. Walsh*, 47 W. 113, 117.

23. "In general, by the principles of the common law, a feme covert can do no act to bind herself; she is said to be sub potestate viri, and subject to his will and control.

24. Her acts are not, like those of infants and some other disabled persons, voidable only, but are, in general, absolutely void ab initio".

25. "If a wife join her husband in the execution of a defective conveyance, such conveyance cannot be enforced as to her". (Changed by Ch. 222, L. 1911). See REFORMATION.

—*Petesoh v. Hambach*, 48 W. 443, 449.

26. "We are satisfied that the courts of New York and this court have given the true construction to the act of 1850, and that the power to convey and dispose of her property by a married woman, * is a general power, applicable to all property owned by her at the time of her marriage, or which she may thereafter acquire, and also to property owned by a married woman at the time the act of 1850 took effect", and she may convey without the husband joining in the conveyance.

27. Our married woman's act. Ch. 44, L. 1850, "is an exact transcript of the law of New York upon the same subject, as the same was amended in 1849".

—*McKesson v. Stanton*, 50 W. 297, 307.

28. The cases of *Conway v. Smith*, 13 W., *Todd v. Lee*, 15 W., *Meyers v. Rahte*, 46 W., and *Dayton v. Walsh*, 47 W., all supra, among others, are discussed, followed and approved, and it is held;

29. "Where a married woman owns a farm, and herself and husband

are engaged together in the 'business' of carrying on the same, and they purchase goods for the use, benefit and enjoyment of themselves and family upon the credit of such property being her separate estate, she as well as her husband thereby becomes liable therefor in an action at law in all respects as if she were unmarried.

30. And this is so, whether the evidence of the contract is wholly written or wholly oral, or partly written and partly oral.

31. The rights, powers and remedies expressly given to a married woman by the statute, include within them, by necessary implication and as incident thereto, the legal right and power of doing such things, making such contracts and resorting to such remedies as are necessary or convenient to the beneficial enjoyment of the rights, powers and remedies thus expressly given". (Quoted with approval in *Kriz v. Peege*, 119 W. post). —*Krouskop v. Shontz*, 51 W. 204, 217.

32. "From the repeated decisions of this court it logically follows that a married woman, having at the time no separate estate, may purchase property of any person, other than her husband, entirely on credit, and thereby make herself liable in an action at law for the contract price. (Cases cited, supra)". —*Cramer v. Hanaford*, 53 W. 85, 87.

33. Where neither the married woman "nor her separate estate was in any way interested in or connected with" the consideration, "but her signature to the note was given merely as surety or accommodation maker for another, it is quite obvious that the contract was not such as she was enabled by the statute to make, and hence is enforceable, if at all, only in equity". And it is held not enforceable at law, but not decided whether in equity. —*Kavanagh v. O'Neill*, 53 W. 101, 106.

34. The court sustains what it "has repeatedly held that, in a contest between the creditors of a husband and wife, if the wife claims ownership of the property by a purchase, the burden of proof is upon her to prove, by clear and satisfactory evidence, such purchase, and that the purchase was for a valuable consideration, paid by her out of her separate estate, or by some other person for her. (Many cases)."

35. "The mere recitation of the fact in the bill of sale itself, without any other evidence thereof", "was not sufficient evidence that a valuable and sufficient consideration was in fact paid. *Sillyman v. King*, 36 Ia., 207,". (Rule changed by amdt. of Ch. 86, L. 1895, to sec. 2342. *Ripon H. Co. v. Haas*, 157 W. post). —*Horton v. Dewey*, 53 W. 410, 413.

36. The foregoing in *Horton v. Dewey*, 53 W. supra (But see note thereto) is approved, and it is further said: "Inadequacy of consideration may be a badge of fraud, and may always be considered in connection with other facts in determining whether a deed was not made with intent to defraud creditors".

—*Fisher v. Shelver*, 53 W. 498, 504.

37. "In this state a married woman, in possession of her mental faculties, has the right to sue and be sued respecting her separate property.

38. Since she may bring such action, she certainly has the right to settle and discontinue the same. This right, of course, may be temporarily suspended by the intervening rights of attorneys and others, but here there is failure to show any such intervention."

39. She may so discontinue "without the presence", "and against the wish and protest of such counsel", especially on her husband's advice in the absence of fraud. —*Dolloff v. Curran*, 59 W. 332, 335.

40. As "she may own separate property, then her possession of it is evidence of her ownership of it as such." It is an elementary principle that a person in the actual possession of goods and chattels may recover in trespass against a mere wrong-doer without other proof of title. (Cases)".

41. "When the rights of creditors are not involved, she may prove her title by gift from her husband to either real or personal property. This has been so often decided by this court that it is no longer open for argument in this state". —*Cummings v. Friedman*, 65 W. 183, 184.

42. Subsequent marriage does not revoke her will previously made. See REVOCATION. * —*Will of Ward*, 70 W. 251.

43. While a married woman "is entitled to the name of her husband", "we are aware of no law that will invalidate obligations and conveyances executed by and to her in her baptismal name, if she chooses to give or take them in that form". —*Lane v. Duchac*, 73 W., 646, 654.

44. Contest between creditors, as to property purchased in the name of the wife with the husband's money, and be declared void as to the husband's creditors. See HUSBAND AND WIFE.

—*Gettelmann v. Gitz*, 78 W., 439, 442.

45. As to partnership of a married woman with her husband, and as to separate estate therefor, and her contracts. See HUSBAND AND WIFE.

—*Fuller & Fuller Co. v. McHenry*, 83 W., 573, 578.

46. The case of *Rogers v. Weil*, 12 W., supra, and numerous subsequent cases, are followed to the effect that personal judgment for deficiency against a married woman, cannot be upheld, where she signs a note and mortgage with her husband, and it does not appear "that she signed said note on account of her separate property or estate, or to charge the same, or that she had any separate estate."

47. "The power of a married woman to bind herself at law is limited to such contracts and engagements as are necessary or convenient to the

use and enjoyment of her separate estate. *Fuller v. Fuller Co.*, 83 W., 573 (See HUSBAND AND WIFE); (other cases, *supra*.)

—*Gaynor v. Blewett*, 86 W., 399, 401.

48. A married woman, signing a judgment note with her husband, as surety, having no separate estate, except an interest in a benefit certificate, is not liable in an action at law. *Kavanagh v. O'Neill*, 53 W., *supra*.

49. The "rule may be stated in short thus: In the absence of an enabling act, the contracts of married women are cognizable only in equity.

50. Therefore, except as varied by the married woman's act, so called, of this state, (secs. 2342-45), such contracts cannot be enforced at law.

51. The scope of such statutes only includes contracts necessary or convenient for the use and enjoyment of a married woman's separate estate, or the carrying on of her separate business, or in relation to her personal services.

52. They have no relation whatever to contracts solely of suretyship for debts of others. *Emerson-Talcott Co. v. Knapp*, 90 W., 35. As to such contracts, the rights and remedies of married women are governed by the common law".

—*Mueller v. Wiese*, 95 W., 381, 383.

53. While it has been held "that a married woman, having no separate estate", may acquire such by purchase "entirely on credit", and be liable, (cases *supra*),

54. It is held, having no such estate or business, she cannot bind herself to repay money loaned to her, to enable her husband to go into business.

—*Gallagher v. Mjelde*, 98 W. 509, 510.

55. "A married woman has not capacity to bind herself at law by contract, except as regards her separate property or business.

56. It follows, as has often been decided by this court, that a married woman's note, given solely for the purpose of securing or paying the debt of a third person (here, her husband), is void at law and not enforceable in equity against her separate property in the absence of some equitable considerations rendering such enforcements, under the circumstances, just. *Krouskop v. Schontz*, 51 W. *supra*; *Kavanaugh v. O'Neill*, 53 W. *supra*; *Emerson-Talcott Co. v. Knapp*, 90 W. 35; *Mueller v. Wiese*, 95 W. *supra*".

—*Hollister v. Bell*, 107 W. 198, 199.

57. As to a married woman as owner of realty, "there must attach to her title, and accompany it, all the usual incidents and marks of ownership.

58. If the real estate be a dwelling house, in which she resides, the presence of her husband there as the head of the family cannot in the least detract from her full possession and ownership. *Mygatt v. Coe*, 152 N. Y., 457".

—*Cook v. Bellack*, 109 W., 391, 392.

59. As to a physician's bill contracted by a married woman, and upon which she made payments, she having separate estate, it is held, that she is not "liable at law for a debt that in no way concerned her separate property or business", and judgment against her is reversed, the case not being within any heretofore "decided by this court".

60. "It is not sufficient that a married woman shall merely intend to charge of her separate property; it must concern her separate property or business or personal services". (Approvingly quoted in *Bailey v. Fink*, 129 W., post.)
—*Stack v. Padden*, 111 W., 42, 45.

61. The principle of *Hollister v. Bell*, 107 W., supra, "does not militate at all against the other principle, early decided by this court, that a married woman may make a present charge upon or conveyance of her separate property as security for or in payment of her husband's debt, which will be valid and enforceable as against the property.

62. Having the absolute power to dispose of the whole of such property if she chooses, she may dispose of a part thereof. *Heath v. Van Cott*, 9 W., 516". (Approvingly quoted in *Goll v. Fehr*, 131 W., post). So held.
—*Fitzgerald v. Dunn*, 112 W., 37, 39.

63. Where a note negotiated by the husband "for use in his own business", was signed also by the wife, who further signed a statement thereon that "the above note is made for the benefit of my separate estate, and I hereby charge it with the payment thereof," and her answer alleged "that she executed the note as surety" and that it did not concern her separate estate,—it was competent for her to show such facts, which would sustain "no recovery against her in an action at law".

64. "The memorandum is not a contract. It utterly fails to express a consideration". And neither the complaint nor the evidence showed "that the wife possessed a separate estate".

—*Ritter v. Bruss*, 116 W., 55, 57.

65. Neither at common law nor by statute has a married woman a right of action for alienation of her husband's affections. (Changed by subsequent amdt. by Ch. 17, L. 1905 to Sec. 2345).

—*Lonstorf v. Lonstorf*, 118 W. 159, 161.

66. After reviewing cases, supra, and elsewhere, it is held: "That the possession by a married woman of a separate estate or business, or contemplation by her to engage in business, is not essential to her statutory right to contract, as regards the acquirement of property;

67. That while separate estate is essential to the making of a contract by her merely to charge her separate estate, binding in equity, it is not to make a contract authorized by the statute;

68. That she may incur indebtedness binding upon herself at law, for property vesting in her at the time of the transaction,

69. And that what she may then intend to do therewith, or what she may do therewith in fact, or what information the creditor may have on the subject, so long as he actually parts with, to her, an equivalent for the credit extended, with no restraints upon her as to what she shall do with such equivalent, does not militate against her liability, the contract being within the plain purpose of the statute."

70. A married woman, who became, jointly with her husband, the lessee of realty, she having no separate estate, and she signing the lease wholly "for the benefit of her husband and to aid him", was held liable for rent thereunder. —*Kriz v. Peege*, 119 W., 105, 120.

71. "This court held early that the principal object of the (married woman) act 'was to prevent the property of the wife from being liable for the debts of the husband, and from being sold or controlled by him'. *Wooster v. Northrup*, 5 W. 245."

—*Wallace v. St. John*, 119 W. 585, 591.

72. Following *Stack v. Padden*, 111 W. supra, it is held that "a mere personal promise by a married woman living with her husband to pay for certain family expenses, which in no wise concerned or related to her separate property", "creates no legal liability", and a claim against her estate therefore, is disallowed. The promise was jointly with her husband for their care. —*Breed v. Breed*, 125 W. 100, 102.

73. A married woman, with separate property, is held not liable at law on a note signed jointly with her husband, it not enuring to her or her property's benefit, or affecting her business, or services and not creating an estoppel.

74. "The principles governing the contracts of married women are fairly well settled in this state and may be briefly stated as follows :

75. (1) A married woman, whether possessed of a separate estate or not, may purchase property, real or personal, and give her obligation for the purchase price, which obligation will bind her at law as if she were a feme sole, provided the title of the property purchased passes to her; and this she may do regardless of the purpose to which she intends to devote such property. *Kriz v. Peege*, 119 W. supra.

76. (2) A married woman possessed of a separate estate or business, or who is rendering personal services to some person other than her husband, may make all contracts necessary or convenient for the management or enjoyment of the estate or the carrying on of the business, or relating to her personal services, and such contracts will be enforceable at law. *Mueller v. Wiese*, 95 W.,; *Ritter v. Bruss*, 116 W.; supra.

77. (3) A married woman possessing separate property may bind herself at law by estoppel. *S. D. Seavey Co. v. Campbell*, 115 W. 603.

78. (4) A married woman may, by proper instrument charge her separate property for any obligation, even for her husband's debt, but

this charge is only enforceable in equity. *Mueller v. Wiese*, supra; *Hollister v. Bell*, 107 W. supra; *Loizeaux v. Fremder*, 123 W. 193."

—*Merrell v. Purdy*, 129 W. 331, 334.

79. A married woman, signing a note as maker with her husband, for his debt, the note including her statement,—‘hereby charge my separate estate with the payment of said note’, is held not liable therefor at law.

80. “Mere intention to charge her separate estate, or the existence of equitable grounds for charging it, are not sufficient at law. They are good only in equity. (Many cases, supra and others)”.

—*Bailey v. Fink*, 129 W. 373, 376.

81. Estates of married women are “primarily liable” for funeral expenses. See FUNERAL EXPENSES.

—*Schneider v. Est. of Breier*, 129 W. 446, 447.

82. Daughters’ liability for support of their mother, “enabled them to make a contract in respect thereto”, it operating “to the benefit and advantage of her daughters’ separate estates.”

83. A married woman’s household management did not make her her husband’s agent to allow her to testify. See also CONTRIBUTION.

—*Payne v. Payne*, 129 W. 450, 456.

84. Cases, supra, followed, and held that a married woman may bind herself “in equity in respect to charging her separate property by a mortgage for the payment of the obligation of her husband,”

85. And the law respecting her want of capacity to incur a legal liability as surety for her husband or any other person is not inconsistent therewith”. *Fitzgerald v. Dunn*, 112 W., supra.

—*Goll v. Fehr*, 131 W., 141, 146.

86. “A fully executed release of her interest in real estate, even inchoate, is” sufficient “consideration, whether her executory promise to do so would be or not”.

87. And “neither the statute of frauds nor plaintiff’s marital status (as a married woman) presents any obstacle to the validity of defendants’ promise to pay a sum of money upon a sufficient consideration”. *Watters v. McGuigan*, 72 W., 155; (other cases).

—*Lytle v. Goldberg*, 131 W. 613, 615.

88. A foreign contract of a married woman valid where made, is held enforceable here though invalid if made here. See also CONTRACTS.

—*International H. Co. v. McAdam*, 142 W. 114, 117.

89. The disability of a married woman as to taking “by gift or grant from her husband”, was removed by statute, ch. 86, L. 1895 amending sec. 2342. See HUSBAND AND WIFE.

—*Ripon H. Co. v. Haas*, 157 W. 466, 470.

90. "A married woman is responsible for a tort committed by her when not under coercion by her husband (*Jones v. Monson*, 137 W. 478); and she may doubtless give a valid note in settlement of an action brought against her therefor". —*Huber v. Seeger*, 161 W. 135.

MARSHALLING ASSETS.

Contract rights prejudiced, 11.
 Equality, generally equity, 4.
 Equitable rule stated, 2, 5, 8, 10.
 Failure to plead right, 6.
 Homestead right favored, 3.
 Laches: no knowledge, 9.
 One personalty; one realty, 1.
 Part of premises sold, 7.
 Principle of election, 5.
 Secured claims against estate, 12.
 Burden of collection on est., 15.

Secured claims, etc.—continued
 At expense of estate, 15.
 Federal rule adopted, 14.
 Insolvency; unsecured creditors, 14.
 Receive dividend first, 12, 17.
 Benefit of security also, 13, 17.
 Received payment in full, 14.
 Right to securities cease, 14.
 Same status as unsecured, 16.
 Securities over sufficient, 12, 17.

1. Where A. has a lien upon two funds and B. upon one of them, equity will require A. to satisfy his lien as far as may be out of the fund upon which B. has no lien, though one security may be personalty and the other realty.
 —*Goss v. Lester*, 1 W. 43, 54.

2. "It is a familiar rule, that where a creditor has a claim upon two funds, on one of which another person has also a claim, and such other person will be prejudiced by allowing such creditor to satisfy his debt out of the fund subject to both claims, a court of equity will compel the creditor to take satisfaction out of the fund to which he alone has a claim, in the first instance". See HOMESTEAD.

—*White v. Polleys*, 20 W. 503, 505.

3. "The policy of the law of 1870 (sec. 3163) seems to favor the homestead right as against the equities of creditors arising under" the "equitable rule" of *White v. Polleys*, 20 W. supra. So held.

—*Hanson v. Edgar*, 34 W. 653, 656.

4. "It is the aim of a court of equity, as regards marshaling assets, to do equity; and equality is generally equity".

5. "Says Chief Justice Marshall: 'The principle on which the court proceeds is, that a creditor having his choice of two funds ought to exercise his right of election in such a manner as not to injure the other creditors who can resort to only one of these funds'. *Alston v. Munford*, 1 Brock. 279. This principle has often been applied in this court, as between creditors".

6. "The difficulty, however, in enforcing that principle here is; that

there is no foundation laid for any such relief in the answer of W. Had he amended his answer, on the trial even, asking, by way of counter-claim or cross bill, that an account be taken", "relief might possibly have been granted".

—*Scott v. Webster*, 44 W. 185, 195.

7. "The doctrine is well settled, 'that equity will not permit a prior mortgagee, knowing that portions of the mortgaged premises have been subsequently conveyed or incumbered by the mortgagor, to deal with him arbitrarily, to the prejudice of the interests of such subsequent incumbrancers or purchasers, by releasing those parts of the land on which he has the only lien, and attempting to enforce his entire claim out of those portions in which such others had become interested'. *Deuster v. McCamus*, 14 W. 308, 311".

—*Kelley v. Whitney*, 45 W. 110, 118.

8. "Plaintiff had security on two funds: defendant upon one of them. The rule ordinarily would be that defendant would require the plaintiff to exhaust his remedy against the fund upon which he had no security."

9. But where, the plaintiff, "in good faith", and "without notice that defendant had any interest in either", "disposed of the fund upon which defendant has no claim",—"the laches of" the defendant "precludes him now from insisting that the value of" such disposed fund "shall first be applied" by plaintiff.

—*Provident L. & B. Assn. v. Carter*, 107 W., 383, 386.

10. The general doctrine "that when a creditor has two funds of his debtor available for the payment of his claim, while to a general creditor only one of them is available, equity will compel resort by the first creditor in the first instance to the fund in which his right is exclusive",—

11. "Is not applicable to situations that will prejudicially affect his contract rights". In *re Meyer*, 78 W. 615, 623; (many cases).

12. "The rule was stated in *People v. Remington*, 121 N. Y. 328, after a full review of the authorities, thus: 'The creditor is entitled to prove against the estate for what is due to him, and to receive a dividend upon that amount.

13. If the collateral securities are more than sufficient to satisfy any deficiency in the payment of the debt from the dividends, the personal representatives may redeem them for the benefit of the estate'.

14. In *Merrill v. Nat. Bank*, 173 U. S., 131, in a masterly opinion by Mr. Justice Field, in which the leading authorities in his country and England were reviewed, the rule thus stated was adopted", and it was further said: "'When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before'". "We must adopt that rule".

15. And it is held, that "the holder of the collateral has a right to throw the burden" of collection "thereof onto the receiver by refusing to incur any expense in the matter and looking wholly to the trust fund, though still retaining the security", and the expenses of the receiver therein were held properly chargeable to the trust fund.

—*Harrigan v. Gilchrist*, 121 W. 127, 344-348.

16. Following and approving *Harrigan v. Gilchrist*, 121 W. supra, it is said,— "It was there held", that "one who holds security for the payment of his claim has, nevertheless, to the extent of the full face of such claim at the date of the creation of the trust, the same status regarding the distribution of the trust fund as an unsecured creditor ;

17. That he is entitled to dividends accordingly and to the benefit of his security as well till the avails from both shall have been sufficient to fully discard the indebtedness, the residue of the security, if any there be, to be then covered into the trust fund".

—*Corbett v. Joannes*, 125 W. 370, 379.

MASSES.

See CHARITABLE TRUSTS.

MASTER AND SERVANT.

See also ENTIRE CONTRACTS. SERVICES.

Condonation of fault, 3.

When presumed, 3.

Reasonable commands, 7.

Duty to obey them, 7.

Servant: business himself, 1.

Advance master's interests, 2.

Discharged before time, 1.

Whole time to master, 2.

Substantial insubordination, 8.

Substantial, etc.—continued

Ground for discharge, 8.

Unreasonable hours, 4.

No extra compensation, 5.

Voluntarily does do, 15.

Wrongfully discharged, 6.

Action: damages for breach, 6.

Not for contract wages, 6.

Paid to that time, 6.

1. "It is well settled that if a servant, without the consent of the master, engage in any employment or business for himself or another, which may tend to injure his master's trade or business, he may lawfully be discharged before the expiration of the agreed time of service".

2. This is true notwithstanding "he has given his whole time and attention to the business of his master", "for the reason that the servant would yet have an interest against his duty", which is "not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests".

—*Dieringer v. Meyer*, 42 W. 311, 313.

3. "In *Ridgeway v. Hungerford Market Co.*, 3 Ad. & Ellis, 171, Lord Denman, C. J., declared that where the servant was guilty of misconduct in June, and the master, knowing it, retained him until November, 'a condonation might be presumed'. This was dictum, to be sure, but we think it was good law". See also SERVICES.

—*Bast v. Byrne*, 51 W. 531, 536.

4. "A servant is not required to work during unseasonable hours, unless the contract or nature of the employment makes it reasonable that he should do so.

5. If he voluntarily does so, however, it is no ground for extra compensation, and much less for claiming a breach of contract by the other party".

—*Kopitz v. Powell*, 56 W. 671, 673.

6. "Where an employee is wrongfully discharged, having been paid in full up to that time, his remedy is by action for damages for breach of the contract of employment and not by action for wages under the contract. (Cases).

7. An employer has the right to give all lawful and reasonable commands", and "the employee's duty is to obey" them.

8. "Any inexcusable and substantial insubordination" "is good ground for discharge". (Cases). Distinctions, and legal effect, on the facts, succinctly set forth.

—*Green v. Somers*, 163 W. 96, 99.

MAY.

Discretionary when, 2.

Not public or third persons, 2.

"May" and "must"; same section, 4.

Indicates ordinary meaning, 4.

Means must or shall, 1.

Public officers, for public, 2.

Public rights concerned, 1.

Ordinary use, permissive, 3.

1. "May means must or shall only in cases where the public interests or rights are concerned; or where the public or third persons have a claim de jure that the power should be exercised". Chancellor Kent in 5 Johnson, Ch. R. 113.

2. "When public corporations or officers are authorized to perform an act for others, which benefits them, then the corporations or officers are bound (shall) to perform the act". "But where the act to be done is not clearly beneficial to the public or third persons, the exercise of the power is held to be discretionary".

—*Cutler v. Howard*, 9 W. 309, 311.

3. "The word 'may', in its ordinary and common use, is certainly permissive and not mandatory".

4. The "use of the words 'may' and 'shall' in the same section" of

the statute is held to indicate their use in their ordinary and distinctive meaning. *Cutler v. Howard*, 9 W. supra, approvingly quoted.

—*Equitable L. A. Soc. v. Host*, 124 W. 657, 669.

MEDICAL WORKS.

See BOOKS OF SCIENCE.

MEMORANDUM.

See WRITINGS.

MENTAL CAPACITY.

See INCOMPETENTS. INSANE PERSONS. TESTAMENTARY CAPACITY.

MINOR.

See INFANTS.

MISTAKE.

See also EQUITY. FRAUDULENT ORDERS. NUNC PRO TUNC. REFORMATION. SETTLEMENT. VACATING JUDGMENTS.

Accounts; name over, 7.

Administrator: judge's order, 1.

Amend records:

Agreement; estate settlement, 40.

Corrected twelve yrs. later, 41.

Judgment different, 40.

To conform as pronounced, 41, 47.

Conform as pronounced, 47.

After considerable time, 49.

Appear by the record, 48.

England and many states, 50.

More liberal rule here, 50.

Everything subject to mistake, 51.

Not mere remembrance, 48.

Question as to a judgment, 51.

Regardless of time limit, 47.

County court procedure, 61.

Error in actual entry, 24.

After year expiration, 25.

Incident to general powers, 2.

No power; judicial determination, 52.

Such by statute or appeal, 52.

Amend records—continued

N. E. half to east half, 54.

Extrinsic evidence to aid, 56.

Merely correct evidence of, 54.

No rights intervened, 54.

Personal to de bonus testatoris, 8.

Recollection of judge, 9.

At subsequent term:

Clerical errors, 3.

"Contestant;" word omitted, 21.

Matters of form, 6.

Clerical errors:

At subsequent term, 3.

"Contestant;" word omitted, 21.

Duty to disregard such, 15, 39.

"From" instead of "for," 13.

Given name; in appeal bond, 14, 23.

"Him" for "them," 32.

"Plaintiff" for administrator, 39.

"The" for "no;" "receive" for "recover," 4.

Corrected at any time, 4.

Disregarded collaterally, 4.

Clerical errors—continued

- Year 1761 for year 1861, 10.
- Error disregarded, 10.
- Contract: clear mistake, 11.
- Amount of promissory note, 26.
- Avoid or rescind, 11.
- Clearly and satisfactorily, 26.
- Preponderance insufficient, 27.
- Have ascertained the facts, 12.
- Mutual as to land value, 42.
- Not law or legal effect, 35.
- Final judgment, ignorance, fraud, 53.
- Misled by the court, 1, 22.
- Power to relieve, 22.
- Mistake of law:
 - Definition: fully stated, 17.
 - Clearer and most satisfactory, 18.
 - Family lawyer on facts, 16.
 - Fraud or imposition, 36, 37.
 - Legal effect of omission, 38.
 - May have relief, 37.
 - Relief refused in such case, 19.
- Mistake of fact: definition, 43.

Mistake of fact—continued

- Ignorance, not negligence, 46.
- Ignorance unconscious, 44, 53.
- Waiver of inquiry, is not, 45.
- Rules stated; relief granted, 28.
- Of fact, not of law, 34.
- Omission or insertion, 31.
- Reducing to writing, 30.
- Set aside settlements, 29.
- Vacate orders:
 - Fraud: irregularly made, 5.
 - Must be of fact, not law, 34.
 - Not after the term, 33.
 - Except mistake, etc., 33.
- Vacation; amendment, rules, 60.
- Will: not after probate, 20.
- Prove sec. 22, instead of 21, 55.
- Extrinsic evidence, 56.
- Words misplaced:
 - Interfering word, rejected, 59.
 - Necessary inference, read, 58.
 - "Not" in appeal bond, 57.
 - Rules apply to statutory paper, 59.

1. Where he makes a mistake under the direction of the judge, the administrator is entitled to indulgence. See EXECUTORS AND ADMINISTRATORS.

—*Bowen v. Burnett*, 1 Pin. 658, 662.

2. Court may amend its records "as incident to the general powers of the court."

—*Brunson v. Burnett*, 2 Pin. 185, 190.

3. "Clerical errors may be corrected even at a subsequent term."

See RECORDS.

—*Hill v. Hoover*, 5 W. 386, 388.

4. A clerical error of "the" for "no" and "reecive" for "recover", "are such mistakes as the court could at any time have corrected, and as must have been disregarded at every stage of the action," and must be disregarded when it is collaterally called in question.

—*Morrison v. Austin*, 14 W. 601, 603.

5. "The county court, sitting as a court of probate, may, at any time, in furtherance of justice, revoke an order which has been irregularly made or procured by fraud."

—*In re Fisher*, 15 W. 511, 521.

6. A mistake in a judgment in matters of form, may be corrected at a subsequent term. See VACATING JUDGMENT.

—*Aetna Life Ins. Co. v. McCormick*, 20 W. 265.

7. In name over entries of accounts, a mistake may be explained by evidence. See ACCOUNT BOOKS.

—*Schettler v. Jones*, 20 W. 412.

8. "The change of the judgment, by amendment, from a judgment against the plaintiff personally to one against her *de bonis testatoris* was one which it was competent for the court to make. The object was to correct a mistake in the original entry, so as to conform the record to the judgment which was in fact pronounced, and not to change such judgment".

9. (This amendment having been made on the recollection of the judge and not shown by the record, is criticised in *Packard v. Kinzie Av. H. Co.*, 105 W. post, as "an extreme case").

—*Wyman v. Buckstaff*, 24 W. 477, 479.

10. An error in the published notice of sale reading "1761" instead of "1861" was disregarded, the court holding that "the place, the day of the month, and the month being designated, no one would be misled as to the year when stated in that manner".

—*Jensen v. Weinlander*, 25 W. 477, 479.

11. "Where a party enters into a contract under a clear bona fide mistake, ignorance or forgetfulness of facts material thereto, he may, on that account, avoid or rescind such contract, provided the rights of innocent third parties will not be prejudiced by such avoidance".

12. "And, in such case, it is not material to inquire whether such party might not, by reasonable diligence, have ascertained correctly the facts which he had forgotten, or in regard to which he was so mistaken or in ignorance as aforesaid". —*Johnson v. Parker*, 34 W. 596, 601.

13. "We think that we would be abundantly justified by authority in reading from instead of for, if it were necessary".

—*Ready v. Sommer*, 37 W. 265, 268.

14. "Obviously, a clerical mistake" in the given name of an administrator in an appeal bond is held not "sufficient to defeat the bond".

15. "It is always the duty of all courts, where it can be done, to overcome and disregard such clerical errors".

—*Appeal of John Mullins*, 40 W. 154, 156.

16. Where the facts as to the title were fully stated to the parties by the family lawyer, and the sale was on his own erroneous advice as to ownership, the court says:

17. "We think it comes most clearly and directly within the definition of a mistake of law found in the very able and elaborate opinion of Chief Justice Dixon in the case of *Hurd v. Hall*, 12 W. 113: 'A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment upon facts as they really are.'"

18. "Whatever may be the confusion and apparent contradiction of decisions elsewhere, the law is well settled and made definite and certain at least in this state, as to what constitutes a mistake of fact and a mistake of law", and the foregoing definition "is the clearest and most satisfactory to be found anywhere".

19. Being "purely and essentially a mistake of law" relief is refused.
—*Birkhauser v. Schmitt*, 45 W. 316, 320.

20. "A court of equity should not reform a will by correcting a mistake therein, after the will has been admitted to probate". See REFORMATION.
—*Sherwood v. Sherwood*, 45 W. 357, 362.

21. Where the judgment as to costs generally failed to state as intended, "contestants' costs", it is said: "There is no rule of law in the way of making the correction at a term subsequent to the rendition of the judgment. The omission sought to be supplied is not the omission of the court. The proper judgment was directed". "This is the rule of *Aetna Ins. Co. v. McCormick*, 20 W. 265" (cited under VACATING JUDGMENT.)
—*Will of Cole*, 52 W. 591, 592.

22. "The equitable powers of the county court to relieve a party misled by itself, seems to be ample. *Brook v. Chappell*, 34 W. 405; *Appeal of Schaeffner*, 41 W. 260; *Catlin v. Wheeler*, 49 W. 520; *Application of Wilbur*, 52 W. 297".
—*Gardner v. Est. of Callaghan*, 61 W. 91, 96.

23. A mistake in a Christian name may be corrected by parol in an action, as a clerical error. See PARTIES.
—*Cleveland v. Burnham*, 64 W. 347, 354.

24. The "cases fully establish the power of the circuit court to correct any mistake made in the actual entry of the judgment, which is in conflict with the judgment as propounded by the court,

25. And they also establish the rule that such mistake may be corrected after the expiration of a year after notice of the judgment rendered".
—*Williams v. Hayes*, 68 W. 248, 253.

26. To correct a mistake in the amount of a promissory note, "the party alleging the mistake must prove it clearly and satisfactorily, and, some courts hold, beyond a reasonable doubt.

27. A mere preponderance of evidence is not sufficient. To be more weighty, convincing, or satisfactory than the evidence of the other party is not the rule; for that would be simply the rule of preponderance. (Many cases)".
—*Parker v. Hull*, 71 W. 368, 371.

28. "We suppose the doctrine is well settled that courts relieve against mistakes, as well as frauds, in written instruments.

29. A mistake is a ground for setting aside settlements;

30. Or, where there is a material mistake in a written instrument, either through the error of the draughtsman in reducing the agreement to writing,

31. Or by the omission or insertion of a stipulation contrary to the intention of the parties, courts relieve against and correct a mistake."

—*Lusted v. C. N. W. Ry. Co.*, 71 W. 391, 396.

32. "Him" for "Them", a clerical error, held to be disregarded. See SURVIVING PARTNER.

—*Garland v. Hickey*, 75 W., 178, 181.

33. "The court had no power to vacate the order dismissing the appeal after the term at which it was entered, unless it was so entered 'through mistake, inadvertence, surprise, or excusable neglect'. See. 2832. *Whitney v. Karner*, 44 W., 563; *Quaw v. Lameraux*, 36 W., 626; *Black v. Hurlbut*, 73 W., 126.

34. It must be a mistake of fact and not of law. *Kalekhoff v. Zoehrlaut*, 43 W., 374; *Carmichael v. Argard*, 52 W., 607."

—*Main v. McLaughlin*, 78 W., 449, 451.

35. In *Neff v. Rains*, 33 W., 689, reformation was not granted because "it was in effect held that there was no mistake in the contract, as a matter of fact; and that, if there was any mistake, it was merely one of law as to the legal effect of the contract, since the contents were well known to the person executing it. Such is undoubtedly the law, even in equity, where the party executing the contract knows its contents, and the same conforms to his agreement. *Storrs v. Barker*, 6 Johns., Ch. 166, 10 Am. Dec., 316, and notes.

36. It was said by Marshall, C. J., that, 'although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake of law is beyond the reach of equity'. *Hunt v. Rousmanier*, 8 Wheat., 215.

37. The rule seems to be firmly established that, where the mistake of law is occasioned by fraud, imposition, or misrepresentation, a party suffering thereby may have relief in equity. (Many cases)."

38. "In the case at bar the defendant appears to have been induced to execute the deed containing the covenants upon which the action is brought by the imposition and misrepresentations," omitting by mistake to make it subject to a lease on the advice of the attorney of the other party as to the legal effect of such omission, "and hence a proper case is presented for relief in equity." (Approvingly discussed in *Moehlenpah v. Mayhew*, 138 W., 561, 573.),

—*Kyle v. Fehley*, 81 W. 67, 71.

39. Where the action was brought as administrator of an intestate, but the complaint referred to "the plaintiff", where his intestate was meant, and the answer recognized such clerical error, which was appar-

ent, the mistake "should have been disregarded or corrected as of course and without terms or delay". —*Chandos v. Edwards*, 86 W., 493, 495.

40. Where the interested parties, represented by counsel and guardian ad litem, at the final settlement, and without a construction of the will, agreed orally with the county judge, that judgment assigning the estate should be entered "substantially in the language of the will", and "the order and judgment" entered, "were substantially different", giving the widow greater powers "to dispose of the whole estate,"—

41. On petition to the county court, by the former minor, as remainderman, and after the decease of the widow, some twelve years later, it is held, that the facts alleged, if proven, "authorize the correction of the order and judgment so that the same will conform to the one actually pronounced and ordered". *Est. of Leavens*, 65 W. 440, and *Est. of O'Neill*, 90 W. 480 (See FRAUDULENT ORDERS).

—*Hall v. Hall*, 98 W. 193, 200.

42. It is doubtful whether a mutual mistake as to value of realty, would justify a rescission of the contract. See PROMISSORY NOTES.

—*Union & P. Bank v. Jefferson*, 101 W. 452, 455.

43. "The most philosophical definition" "of the mistake of fact which will warrant rescission", "we have found is that presented by Pomeroy (*Eq. Jur.* 839): 'An unconscious ignorance or forgetfulness of the existence or non-existence of a fact, past or present, material to the contract'. This definition contains several elements, each of which, (as above suggested), must be explained and qualified in its present application.

44. Thus, the ignorance must be unconscious; that is, not a mental state of conscious want of knowledge whether a fact which may or may not exist does so. *Kerr, Fraud & M.* 432".

45. But, "where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry into it, or waives an investigation after his attention has been called to it, he is not in mistake, in the legal sense". *Hurd v. Hall*, 12 W. 112, 127.

46. And "ignorance must not be due to negligence, although there be no actual suspicion with reference to the fact in question. (Citations); *Conner v. Welch*, 51 W. 431". Mistake and instances, discussed.

—*Kowalke v. Milwaukee E. R. & L. Co.*, 103 W. 472, 476.

47. Mistakes, where the judgment "was not made to accord with" the decision "as actually pronounced by the court", "can be corrected by the court in which they occurred, regardless of the time limit upon the power of the court to correct judicial errors". (Many cases *supra*).

48. As to such mistakes, "the rule in many jurisdictions is that a mistake, to be subject to correction by amendment, must appear in

some way by the record, and not by the mere remembrance of the judge or some other person or persons concerned in the transaction.

49. Probably the better rule is to so confine the practice, especially after the lapse of a considerable length of time”.

50. This is the rule in England and many of the states, though “a more liberal rule has prevailed here”. *Williams v. Hayes*, 68 W. supra.

51. “The mistakes that may be corrected under the practice indicated, include everything that may be the subject of mistake. As to a judgment, the test is, Does it, as entered, conform to the decision made or judgment pronounced?”

52. There is no power to correct errors in the actual judicial determination under the guise of correcting mistakes. Such errors must be corrected” according to the statutes or on appeal.

—*Packard v. Kinzie Av. H. Co.*, 105 W. 323, 325.

53. In ignorance mutually “of fact as to fraud and forgery” in final judgment, relief was granted. See SETTLEMENT.

—*Maldaner v. Beurhaus*, 108 W. 25, 31.

54. A clerical error, “the northeast half” instead of “the east half” in a foreclosure judgment, appearing by the record as such, “was competent for the court to correct in accordance with the facts, and without regard to time, since the rights of third persons had not intervened”, and such correction “will not have the effect to change the judgment pronounced in the slightest degree, but merely correct the record evidence of such judgment”. *Packard v. Kinzie Ave., H. Co.*, 105 W. supra.

—*Bostwick v. VanVleck*, 106 W. 387, 389.

55. Extrinsic evidence was held properly “admitted to prove that by mistake the lands described in the will were in fact located in sec. 22 instead of sec. 21 as stated in the will.”

56. “A will or deed with a description otherwise uncertain should be construed with reference to the actual rightful state of the property at the time of its execution, and extrinsic evidence of that state is admissible to aid in the construction”. *Whitney v. Robinson*, 53 W., 309 (See CONSTRUCTION OF DEEDS); (other cases)”.

—*Hanley v. Kraftczyk*, 119 W., 352, 353.

57. Where in the bond, on appeal from the refusal of supervisors to lay out a highway, under secs. 1276-7, that ‘such order’ ‘so appealed from shall (not) be reversed’, “the word ‘not’ of the statute, was omitted, making the bond nonsensical”, it is held,—

58. “There is no reason” “why the logic of the rule that a word which is in place by necessary inference should be read as there,

59. And that any interfering word should be rejected as surplusage, does not apply very strongly to a statutory paper where the evidence is

conclusive that failure to insert the proper word was a mere inadvertence". So held, and judgment reversed, on such point.

—*Marlatt v. Chipman*, 160 W. 193, 196.

60. Established rules of vacation and amendment of judgments, restated. See VACATING JUDGMENTS.

—*Fischbeck v. Mielenz*, 162 W. 12, 15.

61. (As to amendment of records in county court under various conditions, and the procedure with forms applicable,—see ZIMMERMAN'S PROBATE PRACTICE, Ch. 30.)

MODIFICATION OF WILLS.

See DESCENT AND DISTRIBUTION. PROBATE OF WILLS. TRUST VARIATION.

MONEY.

See also LIABILITY. TENDER.

Bankers and money-dealers, 15.
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 Only bank-notes so issued, 12.
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 Not necessary to money, 10.
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 Distinct from chattels, 21.
 U. S. bonds; certificates, 21.
 Paper, coined, money, 4.
 Recovery for conversion, 24.
 Statute as to money, 16.
 As here set forth, 16.
 Not commodities, 16.

1. "Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it.

2. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin.

3. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money.

4. The common term, paper money, is in a legal sense quite as accurate as the term coined money”.

5. “To be money, part of the circulating medium, it is not essential that currency should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. *Sears v. Dewing*, 14 Allen, 413; *Mather v. Kinike*, 51 Pa. St. 425”.

6. “Almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These constitute the circulation of the country—its money; and the general term, currency, includes both.

7. Currency, therefore, means money—coined money and paper money equally. But it means money only;

8. And the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good.

9. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender.

10. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money”.

11. “The term currency does not necessarily include all bank-notes in actual circulation; for all bank-notes are not necessarily money”.

12. “Currency includes only such” “bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin”.

13. “National bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender”.

14. “This construction of the term, currency, might, perhaps, properly be extended to the term current funds. It must extend to the latter term whenever it is used in the legal sense of money.

15. Bankers and money-dealers cannot, by choice or use of terms, give the character and attributes of money to anything not money—to anything of less value than money”.

16. “The legislature has doubtless power to make negotiable paper other than for the payment of money (*Price v. Ins. Co.*, 43 W. 267); but where a statute is plainly intended to apply to money, every term used to indicate money, not commodities, must be held to signify money in the sense in which that term is here used”.

17. In *Platt v. Bank*, 17 W. 223, (which is criticised but not expressly overruled), "the certificate of deposit was payable in 'current funds'", and therefore held not negotiable. Here the certificate of deposit "payable 'in currency', which also means money", is held, "therefore, clearly negotiable under the statute of Anne".

18. But it is also held that the amendment, ch. 5, 1868, also makes the certificate in this case negotiable, and that "perhaps the amendment was in answer to" a suggestion of Dixon, C. J., in the *Platt* case, "and was intended to overrule *Ford v. Mitchell* (15 W. 305), *Platt v. Bank*, (17 W. 223), and *Lindsey v. McClelland*, (18 W. 481)". Per Ryan, C. J.
—*Klauber v. Biggerstaff*, 47 W. 551, 557.

19. The deposit of money "is a loan to the bank, and the depositor becomes the creditor of the bank for the amount of his deposit.

20. When, therefore, the agent deposits money of his principal to his own credit in a bank", he takes all the risk, "unless it be done with the consent of the principal". See PRINCIPAL AND AGENT.

—*Sargeant v. Downey*, 49 W. 524, 528.

21. "Obligations for the payment of money", as U. S. Bonds and certificates of deposit, "in common parlance, are treated as money", in distinction from goods and chattels. See CONSTRUCTION OF WILLS.

—*Wolf, Extr. v. Schaeffner*, 51 W. 53, 60.

22. "In the language of Lord Ellenborough, C. J.: 'An action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another'. (Cases)

23. Of course, this language does not apply to a voluntary gift, but only to a case where the defendant has received money which, in equity and good conscience, he ought to pay to the plaintiff".

—*Glendale I. Assn. v. Harvey L. Co.*, 114 W., 408, 414.

24. As to administrator's recovery for conversion, on wrongfully obtained money from his intestate. See ACTIONS BY EXTR. OR ADMR.

—*Meyer v. Doherty*, 133 W., 398, 403.

MONUMENT.

Amount found reasonable, 1.

Expenditure before administration, 1.

1. An expenditure before administration granted, by a sister of the deceased, of five hundred dollars in a \$15,000 estate, an appropriate amount, for a monument, not being necessary, is not "enforceable against the estate". See ADMINISTRATION EXPENSES.

—*Samuel v. Est. of Thomas*, 51 W. 549, 552.

MORTALITY TABLES.

See COMPUTATION OF ESTATES, ETC.

MORTGAGES.

See also DEEDS. LAND CONTRACT. POWER. SALE OF REALTY.

- Administrator; not liable, 49.
- Not necessary party, 53.
- Administrator's realty sale, 12.
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- Assignment; without note, 60.
- Claims:
 - Failure to present notes, 11, 48, 50.
 - Bar to deficiency judgment, 48.
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- Discharge by quitclaim, 34, 68.
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- Not contradict by parol, 69.
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- Fee passes by foreclosure, 30.
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- Not independent property, 35.
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- Bill of sale as security, 51.
- Clear and satisfactory, 41.
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- Purchase money mortgage, 24.
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- Remedies, note, mortgage, 43.
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Rests upon time due, 19.

Signature of wife:

Homestead; invalid without, 3, 5.

Two promises to pay, 75.

Without witnesses:

Good between the parties, 13.

Recorded; not constructive notice, 13.

1. "The mortgage is only an incident to the debt. Whenever the debt is assigned, it carries with it the mortgage as an incident to it. The mortgage does not carry with it the debt, but the debt carries with it the mortgage".

—*Martineau v. McCollum*, 3 Pin. 455, 456.

2. The mortgagor or his tenant cannot remove a fixture as against the mortgagee. See **FIXTURE**.

—*Frankland v. Moulton*, 5 W. 1.

3. The mortgage on the homestead "would not be valid, even as against the husband, without the signature of the wife".

—*Williams v. Starr*, 5 W. 534, 550.

4. A mortgage securing several notes due at different times, the notes are to be paid out of the security by priority, and not ratably. See **PAYMENTS**.

—*Marine Bank v. Inter. Bank*, 9 W. 57.

5. A mortgage by a husband on a four story store homestead building without the wife's signature, is invalid. See **HOMESTEAD**.

—*Phelps v. Rooney*, 9 W. 70.

6. "The transfer of the notes (secured by mortgage) carries with them the interest in the mortgage". without a formal assignment of the mortgage.

—*Rice v. Cribb*, 12 W. 179, 182.

7. A mortgage can be satisfied by the co-executor alone. See **EXTRS. & ADMRS.**

—*Wier v. Mosher*, 19 W. 311.

8. A mortgage of the homestead and other lands defectively executed is void as to the homestead. See **HUSBAND AND WIFE**.

—*Hait v. Houle*, 19 W. 472, 475.

9. "The six years statute of limitation constitutes no bar to a suit to foreclose the mortgage, although it might have been pleaded to a suit upon the notes", no judgment for deficiency being asked for or included.

—*Wiswell v. Baxter*, 20 W. 680, 681.

10. Notes secured by mortgage may be transferred by the holder by endorsement without transferring any interest in the mortgage, if that is the agreement.

—*Rolston v. Brockway*, 23 W. 407, 408.

11. Failure to present as claims, notes secured by mortgage, "does not bar the holder's right to pursue his remedy by foreclosure, and enforce his specific lien upon the property subject to the mortgage".

12. The "right of the holder of the mortgage was not cut off by the administrator's sale under the license" by the court, there being no mention of the mortgage in the deed or in the proceedings.

—*Edgerton v. Schneider*, 26 W. 385, 389.

13. In case of a mortgage without witnesses being recorded, the record thereof is not "constructive notice to a subsequent purchaser"; but the mortgage is good as between the parties. See also DEEDS.

—*Gilbert v. Jess*, 31 W. 110, 116.

14. A mortgagee cannot release a portion of the mortgaged premises to the hurt of a subsequent mortgagee or purchaser of another part of the premises. See MARSHALLING ASSETS.

—*Kelley v. Whitney*, 45 W. 110, 118.

15. Where notes are "paid and satisfied, the mortgage (securing them) was also satisfied and discharged".

—*Jaffray v. Crane*, 50 W. 349, 354.

16. "The general rule, and the one which has been recognized by several decisions of this court, is, that where a mortgage is given to secure several notes or installments belonging to different persons, the proceeds of the mortgage should be applied first to the payment of the notes or installments first falling due, and so in their order according to the time of their maturity.

17. This rule seems to be supported on the ground that the several holders of such notes or installments are separate and distinct mortgages, and that they are subsequent mortgagees whose notes or installments subsequently fall due, and respectively in such order. (Cases)".

18. While there is conflict among the authorities elsewhere, this "must now be considered the settled law upon the subject in this state".

19. "The above rule rests entirely upon the priority of the time when the several notes or installments become due.

20. In this case, all of the several notes, by the terms of the contract, are to become due at the same time, on the failure to pay interest, although, by other terms, expressed as well in the contract, they are to become due at different times"; and there being a "default in the payment of interest, there is but one time of payment in all or any of the notes, and that is 'at once'. This being so, the general rule as to priority of right depending upon priority of time does not prevail."

21. "In *U. S. Bank v. Covert*, 13 Ohio, 240, the precise question is decided, and it is held that upon a failure to pay a certain smaller note a larger note became due also, according to a condition in the mort-

gage, and that therefore 'both the note then payable and the larger note became due together, and both should be satisfied by the sale'. In this case it was held, also, that, without this condition, the general rule would prevail''.

22. In *Marine Bank v. International Bank*, 9 W. supra, the foregoing Ohio case "was directly approved as containing the true rule when upon a condition all of several notes should become due at the same time".

23. "In *Church v. Smith*, 39 W. 492, the same principle is recognized, and it was held in effect that the owner of the first note given for the purchase money of the land, on strict foreclosure of the land contract by the owner of the other notes which fell due subsequently, by reason of default in the payments, was entitled only to a proportionate and pro rata share in the land, and had no priority of right over the owner of the other notes."

—*Pierce v. Shaw*, 51 W. 316, 318.

24. Where J. furnishes the money and takes a mortgage on premises purchased by M. of his father, who receives the money, such mortgage is a purchase money mortgage, though signed also by M's wife, and "in substance and legal effect the transaction was the same as though the mortgage had been executed to the father for the purchase money, and by him assigned to the plaintiff", J.

25. And where a mortgage "was substituted for the original mortgage for the accommodation of M. and his grantees", it "is necessarily a security for purchase money also. The substitution did not and could not change the character of the original transaction.

26. Without the signature of the wife, the first mortgage would have been a valid lien upon all the land; for, when it was executed, no part of the land was the homestead of the mortgagors. Neither would the wife have had any right of dower against the mortgage, because it was for purchase money. See 2163".

27. Likewise, "The substituted mortgage," though without the wife's signature would not be "less valid or paramount as against those claiming under the mortgagors".

—*Jones v. Parker*, 51 W. 218, 223.

28. "In the language of Harris, J., in *Holcomb v. Holcomb*, 2 Barb. 23, 'the object of the bill (to foreclose) is to vest in the purchaser under the sale, made by virtue of the decree of foreclosure, the same title which the mortgagor had at the time of the execution of the mortgage'. See *Tallman v. Ely*, 6 W. 244".

—*Whitney v. Robinson*, 53 W. 309, 314.

29. "A note and mortgage is personal property both in this state and in the state of New York, and presumably in the state of New Jersey, and upon the death of the owner in another state, the title vests in his administrator appointed at the place of his death, or, if he die testate, in the executor appointed there. *Doolittle v. Lewis*, 7 Johns, Ch. 46-9".

—*Hayes v. Frey*, 54 W. 503, 517.

30. In this state "the fee no longer passes to the mortgagee, even upon condition broken, and can only pass by means of the mortgage, by foreclosure and sale. *Wood v. Trask*, 7 W. 566, and other cases in this court.

31. On the other hand, when the mortgagee has gone into the possession of the mortgaged premises under the mortgage, the mortgagor has not sufficient title in fee or otherwise, to bring ejectment against him and obtain the possession (*Tallman v. Ely*, 6 W. 244; *Hennesy v. Farrell*, 20 W. 42);

32. And to the extent of the mortgagee's interest, whatever it may be called, and for his protection, the possession of the mortgagor and those holding under him is the possession of the mortgagee, and they are estopped from denying his title or of claiming adversely to him. *Avery v. Judd*, 21 W. 262.

33. Whatever interest in the land the mortgagee obtains, less than the fee, under these decisions, and whatever it may properly be denominated, it is certainly an interest, and a substantial interest, which may pass by a conveyance.

34. By our statute (sec. 2203), 'conveyances of land, and of any estate or interest therein, may be made by deed', etc. It follows, therefore, that, according to the old or the modern theory of mortgages, a quit-claim deed by the mortgagee will operate as a discharge of the mortgage." (Quoted and approved in *Latton v. McCarty*, 142 W. post).

—*Mason v. Beach*, 55 W. 607, 612.

35. "A mortgage is not property at all independent of the debt it secures. The extinguishment of the debt ipso facto et instanti extinguishes the mortgage". The record entry of the release is merely evidence thereof. *Martineau v. McCollum*, 2 Pin. supra.

36. After transfer of the note by blank endorsement, and delivery therewith of the mortgage, without record thereof, a subsequent assignment thereof and recording the same, while "in possession of" the first vendee, the second vendee does not "become the bona fide holder" by so purchasing for value.

—*Fred Miller B. Co. v. Manasse*, 99 W. 99, 102.

37. By a deed, of a homestead, absolute on its face, given by husband and wife to secure a debt, taking a land contract back, "the legal title did not pass," and on payment of the debt no deed back was necessary, but all that the grantee "was entitled to demand was a satisfaction," of such "mortgage lien of record,"

38. And a deed thereof by such grantee by direction of the husband, the wife consenting in advance, to a third party, he having knowledge, "did not transfer title to the property," and a prior satisfaction of the land contract of record by the husband divested the original grantee "of his entire interest in the premises."

—*Cumps v. Kiyō*, 104 W., 656, 659.

39. "Whatever form a conveyance of real estate may take, it may be shown in equity, by parol, to be a mortgage, if that was its purpose in fact", "whether the question be raised by a direct action for equitable relief or be incidental to legal relief." That "the mortgage feature was omitted from it by fraud or mistake", need not be shown. (Cases)

40. An absolute deed and contemporaneous transactions evidenced by writings, referring to such deed but not as to its being security, are held to be a mortgage,

41. Though "there is no doubt but that a conveyance, absolute in form, cannot be turned into a mortgage without clear and satisfactory evidence that it was so intended by the parties thereto."

42. "It does not require any particular form of words to make a mortgage. Mere form has very little to do with the matter. It is a contract whereby an interest in property is pledged as security, which creates the relation of mortgagor and mortgagee." (Approvingly quoted in *Brown v. Johnson*, 115 W., 430, 439.)

—*Jordan v. Est. of Warner*, 107 W., 539, 552.

43. The remedy for deficiency in foreclosure is not inconsistent with the remedy at law on the note. See REMEDIES.

—*Carpenter v. Meachem*, 111 W., 60, 63.

44. Power to sell in a will does not confer power to mortgage. See SALE OF REALTY.

—*Bloor v. Smith*, 112 W., 340, 347.

45. "A transfer of property as security, regardless of the form thereof, is a mortgage, and, as regards rights or remedies, must be dealt with as such. (Cases)"

46. If the circumstances show "that the parties intended to create the relation of debtor and creditor between themselves or to recognize that relation as existing as a basis for a mortgage", such purpose is effectuated without an "express promise to pay which generally characterizes the creation of such principal relation. (Cases)."

47. "Parol evidence is admissible to show that the purpose of a writing, or several writings taken together, was to create the relation of mortgagor and mortgagee", though not so indicated on the face. (Cases).

—*Beebe v. Wis. M. L. Co.*, 117 W. 328, 332.

48. After the time for filing claims against the estate of a deceased has expired, and no claim on the note having been filed, then "after such an extinguishment of a claim no foundation for a personal judgment remains on the note, though the right to a judgment of foreclosure of the mortgage to enforce the lien still existed," and a deficiency judgment against the executor, "was without authority and therefore erroneous".

—*Pereles v. Leiser*, 119 W., 347, 352.

49. Administrator is not personally liable on notes and mortgage of estate realty. See SALE OF REALTY.

—*Wis. Trust Co. v. Chapman*, 121 W. 479, 486.

50. Failure to file a claim on the note, does not prevent a mortgage foreclosure judgment, nor does a recorded fraudulent release of the mortgage protect innocent holders. See CLAIMS.

—*Franklin v. Killilea*, 126 W. 88, 95.

51. A conveyance by deed or bill of sale, as security, is a mortgage, and may be so shown by written or parol evidence, in equity or at law. (Many cases).

—*Smith v. Pfluger*, 126 W. 253.

52. As to power to mortgage, under power of sale and management. See POWER.

—*Lueft v. Lueft*, 129 W. 534, 540.

53. "Whatever liability there was of the estate on account of the mortgage indebtedness, from any point of view, was manifestly enforceable only by proper proceedings in the county court." "The administrator was not a necessary or proper party to the foreclosure as regards the liability of the estate or any claim enforceable in the county court." See also CONTINGENT CLAIM.

—*In re Est. of Hanlin*, 133 W., 140, 143.

54. Where a deficiency judgment was obtained against the executor as such, on foreclosure proceedings after "the time for filing claim had expired" in the estate, and no claim for the note "was ever filed",—it is not determined "whether the judgment creditor" "would be entitled to allowance of his claim against the estate as matter of right".

55. "It is sufficient that he was entitled to enforce it against the executor as executor of the estate", "and collect it out of any property which might be found belonging to the estate in the possession of the executor".

56. The judgment "is conclusive at least against the executor and could be enforced against him in the usual manner for the collection of judgments".

57. So it being "proper" "to be paid by the executor, it was permissible for the county court to allow the amount of such judgment and order its payment, that being simply a mode of aiding in the collection thereof." (Distinguished in *Schmidt v. Grenzow*, 162 W. post.)

—*Pereles v. Leiser*, 138 W. 401, 403.

58. "A mortgage in this state merely gives a lien upon the land mortgaged for the sum of money secured thereby. *Brinkman v. Jones*, 44 W. 498.

59. A mortgage securing a promissory note passes as an incident upon transfer of the note. *Kelley v. Whitney*, 45 W. 110.

60. And an assignment of the mortgage alone and separate from the

note it was given to secure will not transfer the note unless it is in fact delivered. (Cases).

61. A mortgage is extinguished by payment of the debt it was given to secure. *Fisher v. Otis*, 3 Pin. 78.

62. It therefore follows that the debt secured by the mortgage is the principal thing and the mortgage the incident.

63. Hence a mortgage given to secure a note is not a 'grant' within the meaning of the statute", sec. 2077; which "applies exclusively to real estate" and not "to personal property". So far as prior "cases hold that sec. 2077 applies to mortgages they must be regarded overruled". See also *GIFT*.
—*Tobin v. Tobin*, 139 W. 494, 498.

64. An absolute deed of a homestead "used for the purpose for which it was executed by the wife", to secure the husband's indebtedness, though "her knowledge as to the amount to be secured was wholly indefinite", satisfies "the statute (Sec. 2203)" as to the wife's execution, and is held,

65. Properly foreclosed as a mortgage, and that "it is in no wise essential to the re-establishment of defendant's complete legal title" to require a re-conveyance in the judgment of foreclosure "in case of redemption".

66. "The legal title has at all times remained in the defendants (grantors), and this deed, accompanied by the adjudication that it is a mere mortgage, creates nothing but a lien thereon. *Cumps v. Kiyo*, 104 W. supra.

67. It will be fully discharged by satisfaction of the judgment, which may be recorded in registry of deeds. Sec. 2236".

—*White v. Daniell*, 141 W. 273, 275.

68. The giving of a deed containing 'all the estate, right, title, interest, etc.,' in the premises, "by the mortgagee to a mortgagor or the owner of the equity of redemption operates to satisfy and discharge the mortgage. (Many cases)".

69. And, it is held, "that the parties could" not "by parol evidence contradict their written agreements embraced in the deed," and a finding on such evidence "that this mortgage was a subsisting valid conveyance", was error.

70. But "the discharge of this mortgage, securing payment of an unpaid balance of the purchase money, does not per se establish payment thereof, and it was competent to show that it remained unpaid".

71. "Under these facts",—showing "that \$200 of the purchase money remained unpaid",—"plaintiff clearly had a right to a vendor's lien on the premises for this balance."

72. And the judgment of foreclosure, is modified and allowed to stand, as in effect a foreclosure of such vendor's lien.

—*Latton v. McCarty*, 142 W., 190, 195.

73. How satisfied when given to secure a bond for support, after decease of the mortgagee. See BOND FOR MAINTENANCE.

—*Rosenthal v. Rosenthal*, 146 W. 41, 45.

74. "There is no legal necessity that a bond or note exist as collateral to the mortgage. The covenant to pay a specific sum may be contained in such collateral instrument or in the mortgage itself.

75. There may be two promises, one in the note and another in the mortgage; one on simple contract and the other a covenant under seal. (Citation)".

76. Where the note is barred by the six-year statute, and where, as here, "the covenant to pay is found in the mortgage and the mortgage is a sealed instrument,

77. Not only the right to foreclose but the right to a personal judgment for deficiency would run twenty years from the time of default";

78. "And on the authority of *Endress v. Shove*, 110 W. 133," such judgment was held to include "taxes delinquent by default of the mortgagor, there being an express covenant on the part of the latter to pay those taxes".

79. "The note, although barred, yet may be taken to fix the terms of the interest in the amount secured by the lien."

80. Where the specified interest was eight per cent., and ten per cent. on both matured principal and interest payments after due, this being "the contract of the parties", such interest was allowed, except so much as exceeded "the maximum of ten per cent. per annum simple interest permitted by sec. 1689".

—*Ogden v. Bradshaw*, 161 W. 49, 53.

81. A judgment on foreclosure for deficiency against the heirs of the deceased mortgagor, after estate settlement and no claim therefor filed, is reversed on the authority of *Pereles v. Leiser*, 119 W. supra.

82. "The case of *Pereles v. Leiser*, 138 W. supra, is" not "authority for the right to a deficiency judgment", as there the judgment "against the executor for a deficiency had to be treated as a valid judgment because unappealed from for two years", and the proceeding there "was only another way of collecting the judgment". See also CONTINGENT CLAIM.

—*Schmidt v. Grenzow*, 162 W. 301, 302.

MORTMAIN.

English, mortmain statute, 4.

Deed, year before decease, 4.

In force in Pennsylvania, 5.

Not in other states, 5.

In force, etc.—continued

Not in British colonies, 1.

Not in force here, 2.

Silence of legislature, 3.

1. "The statute of mortmain, 9 George II c. 36", "has never been adopted or in force here". "It does not appear ever to have been held to be in force in any of the British colonies".

2. "If the English statute of mortmain was not in force in Wisconsin while it was part of or appendant to an English colony, it seems very certain that it has never since had any force here. (Citations)".

3. "The poor we have always with us. When charitable bequests in this state begin to outrun reasonable provision for the poor, and seriously impede the alienation of property, it will be time enough for a statute of mortmain. The silence of the legislature hitherto, and the observation of all men, are sufficient to show that the time has not yet come, if it ever should".
—*Dodge v. Williams*, 46 W. 70, 92.

4. ("The statute of 9 George II. c. 36, is now the leading English statute of mortmains. It declares that no lands or monies to be laid out thereon, shall be given or charged for any charitable uses unless by deed, executed in the presence of two witnesses, twelve months before the death of the donor, and enrolled in chancery within six months after its execution, and be made to take effect immediately without power of revocation. The two universities, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, were excepted out of the act".

5. "The statutes of mortmain are in force in the state of Pennsylvania". "In the other states, it is understood that the statutes of mortmain have not been re-enacted, or practiced upon".

—*Kent's Com. Note*, Vol. 2, 281, 6th ed.)

MOTION.

See also ORDERS.

1. "Oral testimony of witnesses upon the hearing of a motion" must be ignored on appeal, and cannot be allowed, there being "no authority for it". "The code does not sanction it, and no such practice exists independently of the code".
—*Carr v. Com. Bank*, 18 W. 255, 256.

MUSICAL INSTRUMENTS.

See HOUSEHOLD FURNITURE.

MUST.

See MAY.

MUTUAL ACCOUNTS.

See ACCOUNT BOOKS.

NAMES.

See PARTIES.

NECESSARIES.

See also HUSBAND AND WIFE. INFANTS. PARENT AND CHILD.

Artificial teeth are, 11.

Definition, legally, 4.

Guardianship:

Spends; admissions, 2.

Necessaries furnished, 3.

Minor child: express promise, 8.

Not on express contract, 9.

Or implied from facts, 8.

Not liable, ipso facto, 6.

Physician's bill:

Wife apart from husband, 10.

Presumption of liability, 7.

Wife not liable, if husband, 12.

Wife: to charge husband, 1.

Competent witness, 5.

1. "In certain cases the law implies an authority on the part of the wife to charge her husband in procuring necessities for herself and family, growing out of his obligation to support her."

—*Savage v. Davis*, 18 W. 608, 613.

2. As to admissions of a ward under guardianship "for wasting his estate by excessive drinking," as to a debt "contracted before the guardianship," it is said: "We see no reason why the admissions were not competent.

3. And if it had been contracted during the guardianship, we are inclined to think they would have been competent, because the debt appears to have been for necessities."

—*McNight v. Est. of McNight*, 20 W. 446, 448.

4. "Necessaries are such articles of food, or apparel, or medicine, or such medical attendance and nursing, or such provided means of locomotion, or provided habitation and furniture, or such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance, and the preservation of her health and comfort".

—*Warner v. Heiden*, 28 W. 517, 519.

5. On either "the implied agency of the wife" or "on the duty which grows out of the marital relation", "we think the wife a competent witness to prove the cruelty and misconduct of the husband, and that he drove her from home without provision for her maintenance and support", in an action by a third party against the husband for necessities furnished.

—*Bach v. Parmely*, 35 W. 238, 240.

6. "A husband is not liable, ipso facto, for necessities furnished his wife without his consent. It is only under special circumstances and conditions that he is liable therefor. (Cases)."

7. "Hence, when a third person gives a wife credit for necessities, there can be no presumption that the husband is liable to pay for them".

—*Brown v. Worden*, 39 W. 432, 433.

8. The father is liable for necessities furnished his minor child, ordinarily only upon an express or implied promise. See PARENT AND CHILD.

—*Judge v. Barrows*, 59 W. 115, 117.

9. As to an infant's liability on implied but not on express contract. See INFANTS.

—*Jones v. Valentines' Sch. of T.*, 122 W. 318, 320.

10. Wife living apart from husband, physician's bill, and wife's testimony. See HUSBAND AND WIFE.

—*Morgenroth v. Spencer*, 124 W. 564, 566.

11. Artificial "teeth come within the class of articles constituting 'necessaries' which a husband may be bound to furnish his wife." *Gilman v. Andrus*, 28 Vt., 241.

12. While "plaintiff had no personal dealings with the defendant's husband," "if the articles were purchased under circumstances indicating that they were supplied her in the usual manner as necessities for which a husband is liable as such", the wife is not liable. So held.

—*Clark v. Tenneson*, 146 W., 65, 67.

NE EXEAT.

See WRIT OF NE EXEAT.

NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTES, ETC.

NEWLY DISCOVERED EVIDENCE.

See TRIAL.

NEW TRIAL.

See TRIAL.

NEXT OF KIN.

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NON-EXPERT.

See EXPERT TESTIMONY.

NON-NEGOTIABLE INSTRUMENTS.

See PROMISSORY NOTES, ETC.

NON-RESIDENT ADMINISTRATOR.

See FOREIGN EXECUTORS AND ADMINISTRATORS.

NONSUIT.

Proper equity practice, 4.
 Upon opening statement, 2.
 Not prevail here, 2.
 Upon plaintiff's evidence, 3.
 Undisputed other facts, 3.

Upon plaintiff's, etc.—continued
 Where conflict of evidence, 3.
 When plaintiff rested, 1.
 Should have been granted, 1.
 Defendant supplies evidence, 1.

1. "There is a class of cases in which, when the plaintiff rested, a nonsuit should have been granted for want of sufficient evidence to support a judgment in his favor. Yet it has been uniformly held that, in any such case, if the defendant gives evidence which supplies the defect in the plaintiff's proofs, the refusal to nonsuit will not work a reversal of the judgment. *Barton v. Kane*, 17 W. 37, and cases cited in V. & B.'s Notes".
 —*Rounsavell v. Pease*, 45 W. 506, 511.

2. "The practice of granting a nonsuit upon the opening statement of the case by counsel for the plaintiff, does not prevail in this state. *Fisher v. Fisher*, 5 W. 472".

—*Smith v. Commonwealth Ins. Co.*, 49 W. 322, 327.

3. While the books say that in considering a nonsuit, "the trial court should look only to the plaintiff's evidence", "that does not mean that a trial judge must shut his eyes to undisputed facts, whether established by one party or the other. It means that the evidence of the plaintiff only is to be considered in case of conflict between that of the defendant and that of the plaintiff where there is room for different reasonable inferences."
 —*O'Brien v. C. St. M. & O. R. Co.*, 102 W. 628, 632.

4. "In a suit in equity the proper practice upon a motion to dismiss at the close of the plaintiff's evidence (in circuit court) is to make find-

ings and render judgment on the merits; not, as in a suit at law, to enter judgment of compulsory non-suit. (Citations)."

—*Spuhr v. Kolb*, 111 W., 119, 121.

NOTES.

See PROMISSORY NOTES, ETC.

NOTICE.

See also JURISDICTION. PUBLICATION. WRITINGS.

Administrator de bonis non, 19.

Adoption: parent affected, 18.

Appearance or consent, 5.

Assignment of estate, 3.

Publication as to account, only, 3.

Foreign heirs not appearing, 3.

Without notice; not conclusive, 16.

Infants: notice ineffective, 6.

Defective or otherwise, 6, 7.

Guardian ad litem necessary, 7, 9.

Not charged with laches; consent, 7.

Unrepresented and unharmed, 14.

Informalities, not vitiate, 2.

Knowledge: unrecorded deed, 13.

Public administrator, 22.

Publication; county court:

Contradictory proof of, 21.

Defective; lapse of time, 15.

Record merely silent, 15.

Publication—continued

Effective for jurisdiction, 4.

Final account; not assignment, 3.

Prescribed by court, 4.

Put a man on inquiry, 1.

Rumor, suspicion, 1.

Rumor, suspicion, insufficient, 1.

Sale of realty: suit nature, 8.

Infants sale; no notice, 10.

Guardian acts; no notice, 12.

Others not entitled to, 11.

Notice as in other suits, 8.

Trustee's, in county court, 20.

Will construction, 4.

Publication; binding, 4.

Will probate; necessary, 5.

Set aside; notice proof, 17.

1. "Whatever is sufficient to put a man upon inquiry is good notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed conversant of it. But mere rumor or suspicion of a defect in the title, will not be sufficient to operate as notice."

—*Lamont v. Stimson*, 5 W. 443, 447.

2. "The general rule in respect to notices is, that mere informalities do not vitiate them, so long as they do not mislead, and the notice gives the necessary information to the proper parties". Held valid as to notice of appeal filed with the clerk instead of served as the statute requires.

—*Black v. C. & N. W. Ry.*, 18 W. 208, 209.

3. Notice by publication for hearing on the final account only, as to foreign heirs not appearing, for the assignment of the estate, is held to be "no notice, either actual or constructive". See JUDGMENTS.

—*Ruth v. Oberbrunner*, 40 W. 238, 269.

4. Before the statute specifically prescribing notice, held that three weeks' notice by publication prescribed by the court, "gave the court jurisdiction of all the persons interested in the proceedings, and binds them by the 'order'", in construction of a will. See CONSTRUCTION OF WILLS.
—*Appeal of Edw. Schaeffner*, 41 W. 260, 264.

5. Under the statute (sec. 3787) appointing a time and place for proving a will, "the object and purpose of the notice are, that all persons interested may appear and contest the validity and probate of the will; and if such notice is not given, and any party interested does not appear or otherwise consent to the proceedings, as to such party, at least, they are invalid".

6. "The defective publication or the want of personal notice or appearance, as to them (infant heirs), are quite immaterial.

7. If the notice had been sufficient as to all persons of proper age, and the proceedings otherwise regular, the infant heir would not be bound unless represented by guardian, and such infant could not be charged with laches, consent or ratification during the time of minority".

8. A proceeding for the sale of realty "is in the nature of a suit, and the defendants must have notice as in other cases of suits at law or in equity, and the want of notice would be attended with the same consequences."

9. "Although the statute is silent as to the appointment of guardian (ad litem) to represent infant heirs and other persons under disability at the probate of wills, such appointment is incidental and necessary in all cases where notice to persons interested in the estate is required; and, if not so represented, the proceedings as to such persons will be void". See also JURISDICTION.
—*O'Dell v. Rogers*, 44 W. 136, 168.

10. "That the legislature could authorize the sale of the lands of minors or insane persons to pay debts, or for their support, without notice to any one, is perfectly clear from the nature of the case.

11. In the absence of any statutory provision declaring that certain persons should be considered interested in such proceedings, no one would have any interest in the estates of such wards which would entitle them to any notice of a proceeding to sell them".

12. And when "the guardian represents his ward and acts for him" in the sale of real estate, no notice to the ward is required. See INCOMPETENTS' SALE OF REALTY.
—*Mohr v. Porter*, 51 W., 487, 504.

13. "Knowledge of an outstanding unrecorded conveyance" by a purchaser prevents him from taking advantage of or being protected by such failure of public notice by record. See also DEEDS.

—*Rowell v. Williams*, 54 W. 636, 639.

14. Where minor heirs were unrepresented, and unharmed, probate proceedings were held valid. See JURISDICTION.

—*Melms v. Pfister*, 59 W. 186, 193.

15. Where the proof of publication showed blank weeks of publication, in a proceeding of probate otherwise correct, fifteen years after, "the validity of the probate" was presumed, the record being merely silent. See JURISDICTION.
—*Portz v. Schantz*, 70 W. 497, 505.

16. The final judgment under sec. 3940, "is not conclusive as against those claiming under the will, without notice or opportunity of being heard. *Bresee v. Stiles*, 22 W., 120; (other cases)". See also JUDGMENTS.
—*Jones v. Roberts*, 84 W., 465, 471.

17. Probate of a will is set aside, on failure of record proof, and of oral proof to establish a sufficient notice. See JURISDICTION.
—*Heminway v. Reynolds*, 98 W. 501, 506.

18. The effect of no notice in adoption proceedings, is only as to the parent not notified. See ADOPTION.
—*Parsons v. Parsons*, 101 W. 76, 81.

19. As to notice unnecessary on appointment of an administrator de bonis non. See ADMR. DE BONIS NON.
—*Hubbard v. C. & N. W. R. Co.*, 104 W., 160, 165.

20. Notice to interested parties in a trustee's sale of realty proceeding by county court order, is jurisdictional. See SALE OF REALTY.
—*Bloor v. Smith*, 112 W., 340, 348.

21. A contradictory proof of publication, held insufficient to give jurisdiction. See PUBLICATION.
—*Flood v. Kerwin*, 113 W., 673, 678.

22. The appointment of the public administrator, "may properly be made without notice". See also PUBLIC ADMINISTRATOR.
—*Jordan v. C. & N. W. R. Co.*, 125 W. 581, 587.

NOVATION.

Acceptance be implied, 20.
Appear by circumstances, 23.
Not express, or writing, 23.
Benefit of third person, 18.
Not novation contract, 18.
Case; informal assent, 19.
Case stated; exchange bill, 12.
Case stated; decedent, 1.
Case stated; no notice, 13.
Case stated; order, 9, 10.
Clear case stated, 11.
Definitions; principles, 3, 5.

Definitions, etc.—continued
All three must assent, 17.
Essentials thereof, stated, 21.
Gift not an element, 2.
Civil law different, 2.
New obligation for another, 7, 17.
New contract must be valid, 8.
One debtor for another, 5, 7, 16.
Part of common law, 2.
Pay debt to third person, 6.
Mutual agreement necessary, 17.
All three must assent, 17.
Informal assent, 19.

Note of deceased person, 1.

Agreement to pay heirs, 1.

Not the legal holders, 4.

Notice to payee, essential, 13.

Privity in all cases, 14.

Transfer must be complete, 15.

1. Where the defendant D. was indebted to J., and J. was indebted by note to M. deceased, "and, in consideration of the discharge of the indebtedness of D. to him, D. agreed to pay the indebtedness of J. to" the heirs of M., and such heirs "assented to the substitution;" and it appearing that "M. died intestate, and leaving no debts nor any estate other than this note," and there having been no administration proceedings on his estate; it is held that the agreement cannot be sustained, the heirs of M. not having title to the note. See also PERSONAL ESTATE.

2. The principle involved in the contention that "the agreement might be supported as a gift or donation from J. to the plaintiffs (heirs of M); "may have been recognized by some of the earlier authorities as an ingredient of novation by the civil law, before the doctrine of novation became a part of the common law, and modified by it."

3. "But now all the authorities, both English and American, concur in the holding that the third person in the novation contract should be indebted to the first, and should assent to the discharge of the first, and that all of the three parties should concur in the agreement."

4. "There is no pretense in this case" of a gift of donation "and the only reasonable construction of the agreement is, that the defendants should pay this note, which belongs to the estate of M., to the plaintiffs, assuming that they were the legal holders thereof," and that not being the case "the non-suit was properly granted."

—*Murphy v. Hanrahan*, 50 W. 485, 489.

5. "Novation means simply the substitution of one debtor for another; and unless the arrangement between the parties went to the extent of binding" the party substituted as debtor, "to pay the debt of the defendants (the original debtor), it was not a good novation, and the defendants are not discharged," though the creditor and original debtor agreed to the substitution and though the latter credited the substituted debtor with the amount.

6. "Of course, if a creditor direct his debtor to pay the debt to a third person, and he does so, the debt is thereby discharged. But this is not such a case."

—*Lynch v. Austin*, 51 W. 287, 289.

7. "'Novation means simply the substitution of one debtor for another,'—*Lyon, J.*, in *Lynch v. Austin*, 51 W. supra,—or it is the substitution of a new obligation for an old one, which is thereby extinguished. *Bronson v. Fitzhugh*, 1 Hill 186."

8. "Where there is a novation by the substitution of a new contract for an old one, the new contract must be a valid one upon which the creditor can have his remedy. *Hosack v. Rogers*, 8 Paige, 238; *Clark v. Billings*, 59 Ind. 509."

—*Guichard v. Brande*, 57 W. 534, 536.

9. "P. owes the plaintiff \$300. The defendant owes P. this amount, and P. gives the plaintiff an order on the defendant for it, and he accepts it, and P., at the same time, enters into a written agreement, in the presence and with the assent of the plaintiff, that the defendant shall pay the order. A clearer case of novation could not be stated.

10. The written contract, to the extent of this \$300, was made expressly for the plaintiff's benefit, and he is so much a party to it, and has such a direct interest in it, that he could have sued upon it if no order had been given; and the order makes the case still stronger as to his connection with the contract, for the order is conditional upon the subject matter of the contract. *Murphy v. Hanrahan*, 50 W. supra."

—*Cook v. Durham*, 61 W. 15, 19.

11. "It is a clear case of novation. The defendants owed the laborers more than they had paid them. The laborers owed their boarding-house keepers just that amount. The defendants, by the assent of all parties concerned, retained said amount to be paid to the boarding-house keepers, and the laborers virtually discharged their claims for labor, and receipted them to the defendants, and the boarding-house keepers discharged the laborers on such understanding. This is a void arrangement. The defendants withhold moneys that by this arrangement belong to the boarding-house keepers, or to this plaintiff as their assignee. This is a very common business transaction.

12. In *Sharpless v. Welsh*, 4 Dall., 279, A. placed in the hands of B. a bill of exchange, and ordered B. to negotiate it and pay the proceeds to certain creditors of A.; and B. promised to do so, and notified the creditors of the order. This was held to be a valid novation."

—*Sterling v. Ryan*, 72 W. 36, 40.

13. In a purchase of a car-load of corn, and re-sale, the first vendee mailed an order to his vendees to "return proceeds" to the original vendor, and it is said: "In all such cases, whether it is an attempted assignment of a fund as such or a novation, notice to the creditor or payee is essential.

14. There must be privity between them in all cases, and until the payee has notice of the order or draft the debtor may revoke or countermand it. The money or fund still remains under his control." (Many cases, and supra.)

15. "The transfer must be complete so as to give the creditor or payee the right to sue for it, and the drawee be liable to pay it. (Cases). And this is an indispensable principle in cases of novation." (Cases). Ineffective.

—*Lane v. Magdeburg*, 81 W., 344, 348.

16. "Novation of debtors means the substitution of one debtor for another.

17. It can only take place by mutual agreement, to which the creditor,

the old debtor, and the new debtor assent, and by which the old obligation is extinguished, and a new and valid obligation is created, and takes the place of the old one. (Cases supra)."

—*Bohn Mfg. Co. v. Reif*, 116 W. 471, 480.

18. A novation contract does not enter into "an agreement by one person with another for the benefit of a third", which "is binding regardless of the relations between such other and the third person", there being sufficient consideration.

—*Smith v. Pfluger*, 126 W. 253, 262.

19. Following *Bohn Mfg. Co. v. Reif*, 116 W. supra, novation is sustained where the debtor transferred to a third party realty and personalty on the premise that the transferee would pay a certain promissory note, and where the debtor shortly afterward told the holder of the note "of the arrangement and" he "said it was all right" and "he would accept" such person and release the debtor.

—*Hemenway v. Beecher*, 139 W. 399, 401.

20. "It is not required that acceptance of the terms of novation be shown by express words, but it may be implied from the facts and circumstances of the transaction and the conduct of the parties in relation thereto".

—*Bishop B.-B. Co. v. Keeley*, 160 W. 546, 548.

21. "The essentials of a novation are a mutual agreement between the debtor, his creditor, and a third person by which such third person agrees to be substituted for such debtor and the creditor assents thereto, extinguishing the obligation of such debtor to such creditor and creating one in place thereof of such third person to such creditor. *Hemenway v. Beecher*, 139 W. supra."

22. "It is not necessary to a substitution of debtors that the assent of the creditor to take a new debtor in place of the old one should be given by any writing or by express words.

23. The fact is the vital thing. If that appears clearly by circumstances and the other essentials also appear, they establish a novation". (Cases).

—*T. W. Stevenson Co. v. Peterson*, 163 W. 258, 261.

NUNC PRO TUNC.

Filed after time limit, 1.

On previous oral order, 1, 11.

Guardian ad litem, present, 5.

Jurat to verified petition, 3, 4.

Oral judgment, 1890, 8.

Party died before written, 10.

Proof of service, 1894, 9.

Oral judgment, etc.—continued

Written judgment as of 1890, 9.

Oral pleading amendment, 6.

Proof of service filed, 2.

Sale of realty; defect, 12.

Not to be supplied, 12.

"Superior" to "circuit," 7.

1. Where judgment is delivered orally, "a written decision may be made and filed after the expiration of the time within which the statute prescribes that it shall be done,"—*nunc pro tunc*.

—*Williams v. Ely*, 13 W. 1, 4.

2. Where "through inadvertence" the affidavits of proof of service "of the summons and complaint were not filed at the time judgment was entered; the court, on motion, allowed this proof to be supplied after the appeal was taken, and that those affidavits might be filed as of the day the judgment was entered. We suppose it was entirely competent for the court to supply this omission."

—*Sueterlee v. Sir*, 25 W. 357, 358.

3. A jurat added to a verified petition by the judge in the absence of the parties, *nunc pro tunc*, after judgment, does not cure such defective proceedings, especially where neither order on the petition "recites that the petition presented was a verified petition". See also INCOMPETENTS.

—*Appeal of Royston*, 53 W. 612, 619.

4. Where the notary "omitted to sign his name to the jurat" to the verification of a petition for a writ of certiorari, "the court very properly allowed that officer to sign his name *nunc pro tunc*, to cure the defect. This was an amendment within the discretion of the court. *Lederer v. C. M. & St. P. Ry. Co.*, 38 W., 244".

—*State ex rel. Weber v. Cordes*, 87 W., 373, 378.

5. Appointment of a previous guardian ad litem, who was present, by *nunc pro tunc* order, held "without significance." See ADMR. DE BONUS NON.

—*Hubbard v. C. & N. W. R. Co.*, 104 W., 160, 166.

6. Oral amendment to pleadings, held valid as entered later by a *nunc pro tunc* order. See PLEADINGS.

—*Findlay v. Knickerbocker Ice Co.*, 104 W., 375, 378.

7. Where an execution, on a judgment in the "superior court", was mistakenly issued "with the seal of the circuit court",—after a return thereon, the appointment of receiver, etc., on a creditor's hearing, on motion, the court by order permitted a correction of the error, "to be done with like effect as if originally affixed thereto," and on appeal such order was sustained, following *Corwith v. State Bank*, 18 W., 560.

—*Davelaar v. Blue Mound I. Co.*, 110 W. 470, 473.

8. Where the record in a divorce action, shows, 'upon proofs taken in open court judgment is ordered for plaintiff and against defendant', Sept. 6, 1890, without further record or judgment,

9. On proof of due service being filed, May 19, 1904, the court entered

a formal judgment of divorce on that day, ending with the words 'nunc pro tunc as of the sixth day of September, 1890', and it is held 'binding and effectual';

10. And the plaintiff is held the lawful widow of a husband who died April 15, 1904, she having married him December 8, 1894. See also *SERVICE*.
—*Zahorka v. Geith*, 129 W. 498, 506.

11. As to entry of a written judgment at subsequent term, nunc pro tunc on previous findings and oral order for judgment. See *JUDGMENTS*.
—*Comstock v. Boyle*, 134 W. 613, 617.

12. An "order nunc pro tunc" after sale, to supply a material defect in the order of sale, was held 'invalid'. See *SALE OF REALTY*.
—*Milwaukee T. Co. v. Clark R. Co.*, 146 W., 230, 237.

NUCUPATIVE WILL.

Bear witness to his will, 3.

Not to what he says, 4.

"Bequeath", to personalty, 9.

Common and civil law, 1.

Declaration, such his will, 4, 5.

"Devise", to realty, 9.

Follows English statute, 9.

Ineffective as to realty, 1, 10.

Or to income of realty, 11.

Nuncupative codicil, 7.

Not revoke written will, 7.

Realty income, realty, 11.

Saying nothing to witnesses, 8.

Soldiers in active service, 6.

Different principles, 6.

Strict law compliance, 2.

Void in part; effective, 10.

1. "Nuncupative or unwritten wills were known to both the common and civil law (citations); but never had been regarded with much favor, from their liability to abuse, and generally have not been permitted to pass real estate. (Citations)".

2. "It may be laid down as a proposition, universally sustained by the courts, that to entitle a nuncupative will to probate, all the provisions of the law must be strictly complied with". (Citations).

—*Brunson v. Burnett*, 2 Pin., 185, 190.

3. Under the statute "which declares that no nuncupative will shall be good," 'unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect,' "the only proof as to "bearing witness" is stated to be: "one witness testifies, 'she called us all to witness what she said;' another, 'she asked me if I would not come back and pay attention to what she said.' This is all the testimony which in any way directly touches the point."

4. Held that the statute "is not that the testator shall bid the bystanders to bear witness to what he says *, but that what he so says is his will, or to that effect," and the will was disallowed.

5. "A declaration of the testator that such was his will, or some other equivalent act or fact of equal import, showing that an actual testamentary disposition of the property was intended, must be proved."

—*Dawson's Appeal*, 23 W. 69, 88.

6. "Questions of nuncupation by soldiers in actual service, and mariners at sea, are settled upon very different principles from those which apply to nuncupative wills generally".

—*Doney v. Hastings*, 23 W. 475, 477.

7. While the "proofs introduced are sufficient, probably", to establish "a mere nuncupative will, standing alone", yet, "as a nuncupative codicil, it operates pro tanto as a revocation of the written will", and under the statute providing for revocation in writing such codicil cannot be allowed.

—*Brook v. Chappell*, 34 W. 405, 409.

8. Where the alleged testator, when witnesses were called in after he was asked about it, "without saying anything to the witnesses, or, so far as appears, noticing their presence," simply stated that he wanted all he had left to go to "O's children", held, following in re *Dawson's Appeal*, 23 W. 69, not a good rogatio testium.

—*Owen's Appeal in re Pritchard's Will*, 37 W. 68, 72.

9. The statute, sec. 2292, following the old English statute, uses the word 'bequeathed' as to nuncupative wills. "The word 'bequeath' is commonly used with reference to the disposition of personal property; and the word 'devise' with reference to the disposition of real property. (Citations)."

10. "We must hold that under our statutes a nuncupative will is inoperative to transfer title to real estate. This is in accord with the rulings of other courts under similar statutes. (Many cases). But this does not prevent such will from being effective as to the personal property. *McLeod v. Dell*, 9 Florida, 451."

11. But it does not pass "the income of the real estate" as personal property, as "our statutes treat such rents, issues, and profits as real estate. Secs. 2060-65, 2072, 2073, 2081, 2089; *Scott v. West*, 63 W. 532, 574-585. The adjudications are to the same effect. (Many cases)".

—*In re Davis's Will*, 103 W. 455, 457.

OATH.

See VERIFICATION.

OBITER DICTUM.

See RULES OF PRACTICE.

OBJECTIONS.

- Agency of husband, 10.
- General offer to prove, 10.
- Competency of wife, 13.
- Competency of witness, 16.
- As to evidence, is not, 21.
- Transactions with deceased, 16, 21, 28.
- Deposition:
 - Not made in court, 12.
 - Objection at taking, 12.
- Evidence manifestly improper, 26.
- Court's own motion, exclude, 26.
- In its discretion, 26.
- Objected to or not, 26.
- General, deemed sufficient, 27.
- Though overruled, 27.
- General:
 - Competency of evidence, 4.
 - Is not as to witness, 21.
 - Not to order of time, 4.
 - Evidence manifestly improper, 27.
 - Evidence was received, 22.
 - Evidence was rejected, 22.
 - Not complain as too general, 25.
 - Specific; no application, 25.
 - Not limitation statute, 9.
- Hypothetical question, 20.
- Hypothetical, etc.—continued
 - Objection, specific on request, 20.
- Immaterial evidence, 8.
- Incompetent, irrelevant, immaterial, 18.
- More specific, on request, 18.
- Object of making, 17.
- Question, general, leading, 11.
- Not trial objection, 11.
- When cannot urge, 25.
- Reason for excluding evidence, 19.
- Court to explain on request, 19.
- Rule specifically stated, 15.
- As to when specific, 25.
- Specific:
 - Admission of books, 7.
 - Competency of wife, 13.
 - Ground of intoxication, 14.
 - Order of time, 5.
 - Proper cross-examination, 3.
 - Other objections waived, 1, 7.
 - Specific, no application, when, 25.
- To any evidence given, 6.
- Equivalent to demurrer, 6.
- Waiver of:
 - All objections by specific, 2.
 - Specific overruled, 1.

1. An objection that the witness has based his answer on the testimony of another witness whom he heard testify, "having been properly overruled, the evidence cannot be questioned here because it might have been successfully objected to upon some other ground."

2. "All objections to the mere form of the question were waived by the objection actually taken upon another ground, without mentioning them."

—*Buttrick v. Gilman*, 22 W. 356, 358.

3. "To make such an objection available in any case, it should be made specifically upon the ground that the evidence was not proper cross examination".

4. "A general objection goes to the competency of the evidence, and not to the mere order of time in which it is to be introduced".

5. "Where the objection relates to the latter point (order of time), the attention of the court and the opposite party should be called to it by a specific objection for that reason, so that it may be obviated."

—*Knapp v. Schneider*, 24 W. 70, 72.

6. Upon objection to "any evidence being given under the complaint, on the ground that it did not state facts sufficient to constitute a cause of action", the case "stands in the same attitude that it would on a general demurrer to the complaint". —*Grannis v. Hooker*, 29 W. 65, 66.

7. "It is a general rule objections of the kind (admission of books) must be specific, so as to point out to the court the precise grounds upon which they are made, and if put upon one particular ground which is untenable, no other ground will be allowed to be substituted for it for the purpose of establishing error".

8. "If the evidence erroneously admitted was merely immaterial (objection being made), it is incumbent on the party objecting, to show that he was or might have been prejudiced by it, before he can have any benefit or advantage of his exception."

—*City of Ripon v. Bittel*, 30 W. 614, 620.

9. Where "the objection is a general one", it will not suffice as to the statute of limitations. See LIMITATION OF ACTIONS.

—*Heath v. Heath*, 31 W. 223, 228.

10. Where it is sought to prove act of agency by the husband, but the offer is general and not specific, under objection, "it would not have been error had the court rejected him without qualification". See HUSBAND AND WIFE.

—*Menk v. Steinfort*, 39 W. 370, 375.

11. Where "no such ground of objection * was taken on the trial", the supreme court will not consider whether the "question was improper for the reason that it was too general, and was leading".

—*Smith v. Ehanert*, 43 W. 181, 182.

12. An objection to an interrogatory "at the taking of the deposition", but "not made to the court when the deposition was read", is not available.

—*Kasson v. Noltner*, 43 W. 646, 653.

13. "In the absence of such objection" to the "competency of" his wife "to testify as a witness for the defendant", "the alleged error is not well assigned".

—*Byrnes v. Clark*, 57 W. 13, 20.

14. Objections to competency "on the ground of his intoxication," must be taken at the examination, to be available. See WITNESSES.

—*Dickinson v. Buskie*, 59 W. 136, 138.

15. "The rule is that where an objection is made on an untenable ground, or on a ground that works no prejudice, and is overruled, such ruling furnishes no cause for reversing a judgment, because the admission of the evidence against objection on some other ground would have constituted harmful error. *Coggsell v. Davis*, 65 W. 191".

—*McDermott v. Jackson*, 97 W. 64, 70.

16. As to transactions with deceased party or agent, to be available, "the objection should be to the competency of the witness to testify."

Union Natl. Bank v. Hicks, 67 W. 194; McCormick v. Herndon, 67 W. 652 (See TRANSACTIONS WITH DECEASED PERSONS).

—*Sucke v. Hutchinson*, 97 W. 373, 375.

17. "The object of making objections is not" only for appellate purposes, but "one of the objects is to enable the counsel putting the questions to avoid error and more effectually prove his case or defense":

18. Where objections to numerous questions, were because "incompetent, irrelevant and immaterial", and plaintiff's counsel requested "more specifically the 'grounds of his objection',"—"the defendant's counsel should have been required to make more specific objections, if he had any; or, at least, have been required to state the theory upon which he regarded such questions objectionable."

19. "When counsel on either side is unable to comprehend the ground or reason for excluding evidence", on request, "it becomes the duty of the court to indicate such ground or reason specifically."

—*Colburn v. C. St. P. M. & O. Ry.*, 109 W., 377, 382.

20. As to an objection to a hypothetical question, that it was incompetent, "it was the duty of counsel", on request, to "make his objections specific enough to advise the court of the alleged imperfections in the question", to predicate error on its overruling.

—*Davey v. City of Janesville*, 111 W., 628, 633.

21. An objection "to the competency of the evidence, and not to the competency of the witnesses to testify", "was not sufficient to exclude the evidence" as to transactions with a deceased person under sec. 4069. McCormick v. Herndon, 67 W. 648. (See TRANSACTIONS WITH DECEASED PERSONS.)

—*Wells v. Chase*, 126 W. 202, 206.

22. In the cases "where there was a general objection" and "the evidence was received", "it was held proper because of competency of the court to do so, the objection not being specific";

23. But "if, in the face of a general objection, only, the court rejects the evidence the ruling will not be reversed on appeal if it appears that the evidence was objectionable upon any specific ground.

24. There, it is to be presumed, the specific infirmity was the deciding factor, and it was competent for the trial court to take efficient notice thereof though it was not bound to do so. * (Cases)".

25. "This is elementary: 'The rule that the objection should be specific has no application, however, where a general objection is sustained. In that case the party against whom the ruling was made cannot urge that the objection was too general'. Jones, Ev. (2d. ed.) 894 (897); (citations)".

26. "Where evidence offered is manifestly improper the court may, in its discretion, exclude the same whether objected to or not; (citations);

27. And, further, where it is manifest that the evidence is not proper in any circumstances, a general objection, though overruled, will be deemed to have been sufficient. (Citation)".

—*Rosenberg v. Sheahan*, 148 W., 92, 95.

28. The objection to "the admission of testimony" as to transactions with a deceased person, it is indicated, must be properly taken to be available. See also TRANSACTIONS WITH DECEASED PERSONS.

—*Gardner v. Young's Est.*, 163 W. 241, 246.

OFFERS.

See CONTRACTS. ESTOPPEL. SALE OF REALTY.

OFFICERS.

See also COUNTY JUDGE. RECORDS.

Acts by de facto officer, 32, 33.

In a de jure office, 32.

Valid as to third persons, 33.

Appoint court attendants, 28.

Attorneys:

Officers of the court, 3.

Quasi, of the state, 3.

Corporate:

Essence of; are trustees, 5.

Ministerial; are agents, 5.

Officer does, principal does, 26.

Though unauthorized, 26.

Power of president, contract, 13.

As against innocent persons, 18.

Assumed in the past, 14.

Express, or by board, 14.

Outside of authority, 16.

Regular course of business, 15.

Was managing officer, 17.

Contract of employment, 17.

Responsible, abuse of power, 27.

Rule as to directors, 6.

Signed by president and secretary, 19.

Presumed to have power, 19.

Signing corporate name, 11.

Better to sign direct, 12.

With official title, 12.

By the officer, 11.

County Court:

Cannot be abolished, 31.

Void act abolishing, 30.

Acts of de facto officer, 32, 33.

As to de jure office, 31.

Color of right conferred, 33.

Valid as to third persons, 33.

Void superior court, 31.

Defray own expenses, 4.

Jury, exception to rule, 4.

Deputy Clerk:

Power to make certificate, 7.

In name of the clerk, 9.

Signed by the deputy, 9.

Presumption clerk absent, 8.

Sign judgment roll, 2.

Not stating absence, 2, 7.

Furnish certified copies, 20.

Entitled to reasonable pay, 22.

Absence of statutory fees, 22.

Penalty imposes duty, 20.

Regardless of use to put to, 21.

Increase of duties, 29.

Without pay increase, 29.

Notary falsifying certificate, 25.

Presumption:

Not to violate the law, 9.

Salary: officer of no term, 23.

County board's refusal, 24.

Writ regular upon face, 1.

1. "All mere ministerial officers should be amply protected in the due and legal discharge and performance of their duties", and the officer is "exonerated in complying with the mandate of his writ, where that writ is in all respects legal and regular upon its face, and he has no knowledge to the contrary." —*Sprague v. Birchard*, 1 W. 457, 469.

2. Deputy clerk is held to have the power to sign a judgment roll, the clerk having "power to appoint a deputy to perform his duties in his absence", and that it was not necessary to state the absence of the clerk. —*Sexton v. Rhames*, 13 W. 99, 101.

3. Attorneys as officers of the court, are quasi officers of the state. See ATTORNEY AND CLIENT. —*In re Ole Mosness, Esq.*, 39 W. 509, 510.

4. "As a general rule, officers take their offices cum onere, and must defray their own personal expenses, such as hotel bills, railroad fares, etc.", but the case of an officer in charge of a jury as to hotel bills, is held "an exception to that rule". —*Fernekes v. Suprs.*, 43 W. 303, 304.

5. "A distinction is recognized in the books between corporate officers, whose offices are of the essence of the corporation, and whose offices are merely ministerial. Courts of equity deal with the former as trustees; with the latter as agents".

6. "The general rule applicable to the directors, regarded in the light of trustees, was settled in the case of the Taylor Orphan Asylum, 36 W. 534. (Cited under TRUSTS). The court adheres to the rule of that case." —*Cook v. Berlin W. M. Co.*, 43 W. 433, 439.

7. It need not "appear affirmatively, from the certificate itself, that the clerk was absent from his office so as to give the deputy power to make the certificate.

8. The presumption of law certainly is that the clerk was absent, and that the circumstances were such as to give the deputy the right to act for the clerk. That rule of law was expressly affirmed in *Sexton v. Rhames*, 13 W. supra, and *Huey v. VanWie*, 23 W. 613.

9. In the absence of all proof upon the point, the court surely will not presume that officers have violated the law in the performance of their official duties". The certificate in this case, "was made in the name of the clerk, but signed by the deputy clerk."

—*Delaney v. Schuette*, 49 W. 366, 367.

10. "The clerk (of court) is not a judicial officer, and in the absence of the required proof from the record there is no presumption that" an affidavit "was presented to him". —*Reed v. Catlin*, 49 W. 686, 690.

11. While the signing of an appeal bond, 'The City of Fond du Lac, by J. B. B., Acting Mayor', "would doubtless have been a technically correct method of execution of a corporate obligation,

12. It is now well settled that, where it appears in the body of the instrument that the corporation is the grantor or obligor, then the instrument is well executed by the corporation if signed simply with the signature of the proper officer or officers, with his or their official title or titles; and, indeed, this method is now almost universally used. (Citations.) —*Fond du Lac v. Est. of Otto*, 113 W., 39, 42.

13. "The general rule is that the president of a corporation ex officio has no power to contract for the corporation. 2 Cook. Stock. 716.

14. Such authority may be expressly given by the articles of incorporation, or by the board of directors, or may arise from having assumed and exercised the power in the past.

15. Being invested with such authority within the lines mentioned, he may enter into such contracts as pertain to the regular course of the corporate business under his direction, and no more.

16. When he goes outside of his express or implied authority, his acts will not be binding upon the corporation. (Many cases)".

17. But where "the inference is plainly justified from the testimony", "that he was its managing officer when he was at home", then "as such he would have the power and authority of similar agents under like circumstances",—and to make a contract of employment.

18. "The court is committed", "in the numerous decisions to the effect that, as against an innocent person who would otherwise be prejudiced, a corporation will be bound by its contracts regardless of the doctrine of ultra vires".

19. "In a very recent case, *Marvin v. Anderson*, 111 W. 387, this court applied the doctrine that where a paper purports to have been executed by the president and secretary of a corporation, it will be presumed that they possess power to do so". (Last two paragraphs, by Marshall, J., concurring, p. 389). —*Meating v. Tigerton, L. Co.*, 113 W. 379, 381.

20. "The imposition of a penalty for failure to do a particular thing", as under section 4148, to furnish certified copies of records, "by implication imposes a duty to do that thing".

21. The statute "imposes upon public officers the duty of furnishing them regardless of the use to which the applicant therefor may desire to devote the papers".

22. Where there are no "specific statutory fees", "such officer is unquestionably entitled to reasonable pay for such services upon common-law principles and by implication from the statute imposing the duty". —*Musback v. Schaefer*, 115 W. 357, 359.

23. We are not "called on to decide whether", "there is a public policy, enforceable by the courts, beyond the control of the legislature,

which must constrain us to a holding that the salary of an officer having no term cannot be changed while he continues to hold the office, notwithstanding the statute (Sec. 694) authorizes the county board to fix that salary from time to time”.

24. “The county board having fixed” the salary of the register in probate, “that salary, by the very terms of sec. 694, ‘shall be paid at the end of every month’”, and a subsequent resolution of the board that “it shall not be paid, is direct negation of the statute”, and ineffective.

—*Roberts v. Erickson*, 117 W. 324, 327.

25. The testimony of a notary, falsifying his own certificate, held admissible, but to “receive little weight”. See *UNDUE INFLUENCE*.

—*Winn v. Itzel*, 125 W. 19, 25.

26. “The rule is even more important with the agent (officer), of a corporation than of an individual that what he does, within the scope of the business intrusted to him, his principal does, within the eye of the law, however unauthorized or even forbidden.

27. This is on the principle that he who places it within the power of an agent to injure innocent third persons should be held to responsibility for abuse of that power rather than the innocent stranger”. (Cases). See also *COMMISSIONS OF BROKERS, ETC.*

—*Arnold v. Natl. Bank of W.*, 126 W. 362, 367.

28. As to inherent power of courts of record to appoint “necessary court attendants”. See *PROBATE COURTS*.

—*Stevenson v. Milwaukee Co.*, 140 W. 14, 19.

29. “The duties germane to a public office may, within reasonable limits, be increased without giving the incumbent thereof a right to extra compensation. (Cases)”. —*Burgess v. Dane Co.*, 148 W., 427, 440.

30. Where under a void act recreating a superior court and abolishing a county court (See *State ex rel. Richter v. Chadbourne*, 162 W. 410, under *PROBATE COURTS*), C. was appointed superior judge and performed the duties of county judge after ousting R. the county judge, it is held:

31. “The attempted creation of the superior court and the transfer thereto of the jurisdiction of the county court did not affect the existence of the county court as a *de jure* office”, as under the constitution, art. 7, secs. 2 and 14, the “function” of probate courts “cannot be abolished by the legislature”. “Judge C.’s entrance into, and continuance in, such office meets all the requirements of a *de facto* officer as defined by this court in *Ekern v. McGovern*, 154 W. 157, 220, (quoting)”.

32. “The reason of the rule that acts done by a *de facto* officer in a *de jure* office are valid rests upon grounds of public policy”. “Given a

de jure office and a de facto incumbent thereof, there is a valid exercise of the powers of the office.

33. The fact that Judge C. acted under the name of Judge of the superior court instead of the county court is immaterial. His so acting was under the color of a right conferred". "The functions that belong to an office and not its name determine its identity. (Case)". Held, Judge C.'s "acts are valid as to third persons."

—*In re Woolcott*, 163 W. 34, 37.

OMISSIONS.

Afterward written in:

- Agent exceeds instructions, 23.
- Applied to; husband and wife, 24.
- Homestead inserted, 24.
- Authority is implied, 29.
- Authorize by parol, 3.
- Instrument under seal, 1, 3, 23.
- Intention of the party, 2.
- Without authority; validity, 4, 23.
- Name: no blank space, 28.
- Summons signature, 30.
- Note, signed in blank, 9.
- Accommodation of party, 10.
- Altered before negotiated, 11.
- May have others sign, 13, 14.
- Unless otherwise agreed, 15.
- Originally by two or more, 16.
- Valid when negotiated, 10, 11.
- Written part to stand, 12.
- Corporation officer; authority, 26.

Note, etc.—continued

- Filled with any name, 17, 18.
- Inserted \$450, instead of \$45, 21.
- Alteration not vitiate, 21.
- Non-negotiable; signer held, 22, 23.
- Order or bearer; endorsed, 17.
- Party delivered to agent, 9.
- Rule completely stated, 19.
- Agent of signer of note, 20.
- Implied authority to fill, 19.
- Usual stipulations, only, 9.
- Papers signed in blank, 6.
- Agreement to be inserted, 6.
- False representations, 7.
- Filled as agreed, valid, 8.
- Unauthorized insertions, 6, 7.
- Will; not supplied, 5.
- Remainder, omission supplied, 27.
- "To" supplied; trust change, 25.
- "Year" in acknowledgment, 2.

1. "Notwithstanding the instrument may be under seal, and notwithstanding the technical rules of the early common law", it is held in the case of blanks in a note and mortgage that "if it be manifest that it was the intention of the party by whom the instrument was executed, at the time of its execution, that the name of the payee or mortgagee should be afterwards supplied and written in by the person to whom the instrument was delivered, then the rule of law is, that the name may be so supplied and written in, and complete effect given to the instrument according to such intention".

—*Van Etta v. Evenson*, 28 W. 33, 38.

2. The omission of "the year when the execution of the deed was acknowledged" is held immaterial. See DEED.

—*Chase v. Whiting*, 30 W. 544, 548.

3. It was "competent for the grantors to authorize E, by parol, to insert the name of the grantee in the deed after they had signed and acknowledged the same".

4. "But we know of no rule or principle of law which makes the deed valid and operative to convey the title to a stranger, whose name has been inserted therein as grantee by the custodian of the deed, without authority from the grantor and in direct violation of his positive orders".

—*Schintz v. McManany*, 33 W. 299, 301.

5. The rule allowing parol testimony in cases of fraud or undue influence "does not authorize the probate court, or any other court, to supply omissions in the will". See REFORMATION.

—*Sherwood v. Sherwood*, 45 W. 357, 362.

6. Where the terms of an agreement "are verbally agreed upon, and a paper is signed in blank (or partly so), to be filled up by one of the parties, it is incumbent upon him to fill up the paper in the exact terms talked of and agreed upon"; otherwise, "it never became a contract", and the agreement "still rests in parol, and may be proved by parol testimony".

7. In case of signing under false representations, "the instrument would be void", and "it is immaterial whether the fraud consists in misrepresenting the contents of the perfected instrument", "or inserting, over the signature in blank of the parties sought to be charged, stipulations which they never made or authorized, as in the present case."

8. "If one agree to the terms of a contract, and sign it in blank, and leave it with another to fill up, and it is filled up as verbally agreed to be done, he is bound by it. It is a valid contract".

—*Rounsavell v. Pease*, 45 W. 506, 508.

9. "We think the rule is, that a party who signs a note in blank makes the person to whom it is delivered for negotiation his agent, not only for the purpose of filling the blanks in the note, but to do any other thing necessary to make the note so signed accomplish the purpose for which it was intended, with the limitation that he shall not insert in such note any contract or stipulation not usually found in a promissory note".

10. A note so signed and in blank delivered "for the accommodation of the person to whom he delivers it", is not a valid contract until "negotiated by the holder";

11. "Until such negotiation takes place, the contract is imperfect", and "there can be no doubt that the holder might fill up the same with an amount, date and time of payment, and then alter the same in either of these respects before he negotiated the same, without vitiating the note in the hands of a bona fide holder".

12. The holder of a note so delivered can "not change the nature of the instrument indicated by the blank so signed, or erase or change the parts of the instrument which were written or printed at the time of such signing".

13. "The real question to be determined in this case is, whether a person who signs a note in blank as maker, for the accommodation of the person to whom he delivers it, must be held, as between him and a bona fide holder for value, to have impliedly authorized the person to whom the same is delivered, to have the same signed by another party or parties, as joint makers with him.

14. We think, both upon principle and authority, that the persons for whose accommodation such note is signed, may, before the same is negotiated by him, procure the same to be so signed by another person or persons, without vitiating such note in the hands of a bona fide holder".

15. It is probably otherwise, if the original signer stipulates that there shall be no other signer, with the knowledge of the holder "that the accommodation maker had stipulated against such further signature".

16. And it is not here decided what the law would be in case such note was originally signed in blank "by two or more joint accommodation makers", where the question of contribution to each other might arise.

17. "All the cases hold that a note signed in blank may be filled up with the name of any person as payee, and may be made payable to order or bearer, and consequently may be endorsed by the person to whose order it is made payable, either at or before its negotiation".

—*Snyder v. Van Doren*, 46 W. 602, 606.

18. The rule of *Snyder v. Van Doren*, 46 W. supra, is followed, and, as "almost universally adopted, is clearly stated in the case of *Bank v. Neal*, 22 How. 107, as follows:

19. "When a party to a negotiable instrument intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument;

20. And, as between such party and innocent third parties, the persons to whom it was intrusted must be deemed the agent of the party who committed such instrument to his custody; or, in other words, it is the act of the principal and he is bound by it."

21. So held, and innocent parties protected, where the party intrusted with the blank note, inserted \$450, instead of \$45 as directed; and changing figures \$45 on the margin to \$450, held not an alteration to vitiate the note.

22. "If it be admitted that the note sued is not negotiable, still the rule is the same as to the liability of the person signing the same in blank. See *Vliet v. Camp*, 13 W. 198, 205; *Van Etta v. Evenson*, 28 W. 33; *Frazier v. Gains*, 58 Tenn., 92, 96".

—*Johnston M. Co. v. McLean*, 57 W. 258, 264.

23. The "well-established legal principles" of *Johnston Harvester Co. v. McLean*, 57 W., and *Van Etta v. Evenson*, 28 W., supra, to the effect "that authority may be given by parole to fill material blanks in a mortgage or other sealed instrument, as well as in negotiable paper, and that, when such authority is given, and the agent exceeds his instructions in filling the blanks, and negotiates the instrument with innocent third persons, the principal will be bound by the acts of his agent, although unauthorized",—

24. Is applied to the case of a husband and wife, where the husband fraudulently inserted the wife's homestead description in a blank mortgage signed by her with him, and "acknowledgment was not essential".
—*Nelson v. McDonald*, 80 W., 605, 607.

25. "We do not think that it was intended to create a trust", "but that, upon a fair construction, the word 'to' is to be supplied after the word 'and', in the third and fourth paragraphs of the will, so that she took under it a legacy," "free from any trust."
—*Schinz v. Schinz*, 90 W., 236, 243.

26. Where a note "with blanks not filled up" is intrusted with an officer of a corporation, he has "implied authority to fill up the blanks," being "apparently in charge of its business," following the rule of *Johnston H. Co. v. McLean*, 57 W., and *Snyder v. Van Doren*, 46 W., supra, and *Bank of Pittsburg v. Neal*, 22 How. 96.
—*Johnson v. Weed and G. Mfg. Co.*, 103 W., 291, 295.

27. "The ellipsis or omission of the testator" to express his intention in his will as to a remainder, is supplied. See *AFTERBORN CHILD*.
—*In re Donges's Est.*, 103 W. 497, 504.

28. As to insertion of name, there being no blank space therefor, and as to blank being necessary. See *PROMISSORY NOTES, ETC.*
—*Smith v. Willing*, 123 W. 377, 387.

29. "The general rule is that when one delivers an instrument, whether the same be required to be under seal or not, so executed as to, in form, give it full validity upon the filling up of blanks, authority for the holder thereof to do that is implied".
—*Friend v. Yahr*, 126 W. 291, 299.

30. The omission of the attorney's signature to the copy of summons served, was held not jurisdictional but a mere irregularity, the accompanying complaint supplying the omission as to name and address. *Lee v. Clark*, 53 Minn., 315; *Contra: Hoitt v. Skinner*, 99 Ia., 360.
—*Harvey v. C. & N. W. R. Co.*, 148 W., 391, 392.

OMITTED CHILD.

At probate application, 2.
 Or after will admitted, 2.
 Undetermined which, 2.
 Belief son was dead, 3.
 Son at probate of will, 3.

Revocation: will and probate, 3.
 Not collaterally, 3.
 In action at law, 3.
 Remedies in county court, 1.

1. It is said that the statutes "clearly contemplate" that an "after-born child, or child omitted by the testator from his will through 'mistake or accident', shall have the remedies provided for in the county court".

2. It is said that "it would seem to be eminently proper" that a claim by a child omitted by mistake "should be presented and heard at the time of the application for probate", but it is not determined whether necessarily so, then or later "in the county court, or by proper action after the will has been admitted".

3. In this case, where the omission relied upon was because of "the alleged mistaken belief of the testator, at the time of executing the will, that his son was then dead", and where the son appeared at the probate proceedings, it is held, that if there can be a necessary "partial or absolute revocation of both the will and the probate", "at all in a case like this, where the will has been admitted to probate,—of which we express no opinion,—it would seem that it should be done in some direct proceeding, or proceeding calling into exercise the equitable powers of the court, and not by collateral attack in an action at law to try the naked legal title. *Holden v. Meadows*, 31 W. 284; (other cases)". See also *PROBATE OF WILLS*.
 —*Newman v. Waterman*, 63 W. 612, 620.

OPENING AND CLOSE.

See *AFFIRMATIVE*.

OPINION EVIDENCE.

See *EXPERT TESTIMONY*.

OPTIONS.

See also *CONTRACTS*.

Accepted within time, 2.
 Expires at limit, 3.
 Interest in land, 1.
 Enforceable if exercised, 2.
 Offer to sell; time, 4.

Tender of money; office, 5.
 Decease before action, 6.
 Performance against heirs, 6.
 Sufficient acceptance, 5.

1. "One having an option in writing for the purchase of land has an interest therein", and such option is enforceable when duly exercised. See also *CONTRACTS*. —*Wall v. M. St. Paul & S. S. R. Co.*, 86 W. 48, 57.

2. "A mere option does not ripen into a contract, and become a binding obligation upon the grantor, unless accepted by the holder within the time limited therein, and according to its terms (*Cheney v. Cook*, 7 W. 413; *Atlee v. Bartholomew*, 69 W. 43);"

3. "Rights under such an option expire on the date limited, without notice or declaration of forfeiture (*Cummings v. T. of Lake R. Co.*, 86 W. 382; *Nelson v. Stephens*, 107 W. 136-145).

4. While the option may be but an offer to sell, yet if the seller, for a good consideration, agrees that he will not withdraw his offer until a specified time, he is bound. *Peterson v. Chase*, 115 W. 239, and cases cited."

5. "The plaintiff's tender of the money at the office" designated in the option and within the time limited, "was a sufficient election of his intention to purchase", and, he was held,

6. Entitled to specific performance in an action against the seller's administrator and heirs, the seller having died shortly after giving the option and before any action thereon.

—*Mueller v. Nortmann*, 116 W. 468, 470.

ORDERS.

See also FRAUDULENT ORDERS. JUDGMENTS. RECORDS.

Construed as judgment, 8.
Form, not determine, 8.
Decision; oral, written, 9.
Clerk to enter oral, 10.
Effective as written, 11.
Entry: appeal purposes, 6.
Not necessarily recorded, 7.
Final order, what is, 13.

Judge at chambers, 1.
Not entered of record, 5.
Oral, is in fact, 4, 9, 11.
Before findings filed, 14.
"Ordered judgment", is, 2.
Revoke, at any time, 3.
Writing, evidence of, 12.

1. "An order of a judge at chambers is of no effect until it is properly served."

—*Spaulding v. R. R. Co.*, 11 W. 157, 158.

2. An entry of a legal paper properly signed as "ordered judgment, etc. * is not a final judgment, but an order for a judgment" and execution cannot be issued thereon. —*Lincoln v. Cross*, 11 W. 91, 95.

3. "The county court, sitting as a court of probate, may, at any time, in furtherance of justice, revoke an order which has been irregularly made or procured by fraud".

—*In re Fisher*, 15 W. 511, 521.

4. Where the parol "testimony is most clear, positive and conclusive that" an "order was actually made by the probate court, but through inadvertence was not signed", it is held, "that the failure to sign did not defeat the order; that it took effect as the decision of the court, notwithstanding that omission. The judicial act performed was in deciding upon the application and announcing such decision."

5. "Properly, the order in question should have been entered of record. But the failure to do this, or to sign the order, did not have the effect to nullify or destroy the decision which was actually made". In this case the decision was for a widow's allowance made five months before the hearing. See also *WIDOW*. —*Baker v. Baker*, 51 W. 538, 548.

6. "When a written order is drawn up and signed by the judge and filed with the clerk, who enters a brief statement thereof in his minute book, showing the substance of the order, this is an entry of it within the meaning of the statute", sec. 3042, as to appeals from orders.

7. An order need not be "recorded at length upon the order book", before it is considered entered. —*Uren v. Walsh*, 57 W. 98, 103.

8. An order is construed as a judgment, and such question "cannot always be solved by mere form." See *APPEAL*.

—*Swarthout v. Swarthout*, 111 W., 102, 106.

9. "An order or judgment is the decision of the court. It may be formulated in writing by the judge, or declared by him orally.

10. In the latter event the duty rests upon the clerk to write the substance upon the records.

11. This was done in this case (an order for change of venue), and thereupon the order became entered as completely as if written out by the judge himself and signed by him. (Cases).

12. The writing is, at most, the evidence of the decision in fact rendered. *Findlay v. Knickerbocker I. Co.*, 104 W., 375". (Approvingly quoted in *Wallis v. First Nat. Bk.*, 155 W., post).

—*Allen v. Voje*, 114 W., 1, 8.

13. "In *Kingston v. Kingston*, 124 W. 263, the court said: 'A final order in a special proceeding, within the meaning of the statute, is one which determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein'."

—*Sioux L. Co. v. Ewing*, 148 W. 600, 602.

14. Though sec. 2863 requires written findings, "a valid judgment may be pronounced and pronounced orally in actions tried by the court, before any written findings and conclusions are made and filed".

—*Wallis v. First Nat. Bank*, 155 W., 533, 538.

ORPHAN.

See GUARDIAN AND WARD. INFANT. KIN.

PARENT AND CHILD.

See also BOND FOR MAINTENANCE. CUSTODY AND COMMITMENT. INFANTS. SERVICES.

Custody:

- Aunt as against father, 60.
- Abuse, profanity, etc., 60.
- Child left to uncle; father dec'd., 9.
- Guardianship; care to mother, 12.
- Mother then entitled, 9, 11.
- No support means, 10.
- Child's welfare; court determines, 35, 36, 39, 42, 67.
- Child's welfare, primary, 38, 39, 42, 67.
- Father be unfit, 43, 61.
- Given to mother, 43.
- Coarse and vulgar speech, 43.
- Though poorer, 43.
- Circuit court proceedings, 54, 61.
- After county court, 61.
- Parents right to care, custody, 65.
- Unless clearly improper, 66.
- Welfare of child considered, 67.
- Remarried mother given, 63.
- Deceased father's request, 64.
- For brother; not control, 64.
- Fitness shown; adultery, 63.
- Taken from parents, 54, 61.
- Common law right; absolute, 31.
- Modern rule more humane, 32.
- Father; if unfit, to mother, 44.
- Child's welfare; to mother, 44.
- Father may lose right, 38.
- By neglect, abuse, etc., 38.
- Incompetent, unsuitable, 45.
- Father; paramount right, 3, 33.
- If not rendered unfit, 4.
- Court give to another, 33, 35.
- Or child's welfare, not, 33, 35.
- Under statute also, 34, 35.
- To nurture; fourteen years, 4.
- Given to aunt, habeas corpus, 36.
- Father able and suitable, 36.
- Indentures void, father unfit, 8.
- Child between 7 and 14 yrs., 8.
- Infant fourteen, choose himself, 6, 7.
- Not compel parental rights, 7.

Custody—continued

- Mother, custody in divorce, 54.
- Attempted testamentary appt., 57.
- Dies testate; grandmother, 54, 55.
- Suitableness of father, 56.
- Creditable since divorce, 56.
- From marriage time, 56.
- Neglect since divorce, 59.
- Paternity suspicion, 58.
- Mother, same right, if widow, 5, 11.
- Otherwise, if remarried, 6, 63.
- Court then to choose, 6.
- Unsuitable; instances not, 43, 46, 47, 56, 60.
- Deed parent to minor, 73.
- Emancipated; father may, 15.
- Child's property rights secure, 17.
- Express agreement; circumstantial, 62.
- Though insolvent at time, 16.
- Gift: to child, upheld, 18.
- Effective when executed, 18.
- Father cannot revoke, 19, 20.
- Rule, method, conditions, 37.
- Infant; bind father, 70.
- Automobile accident, 70.
- Physician's services; another, 70.
- Necessaries. See Support of child.
- Personal injury: child's action, 40.
- Not medical attendance, 41.
- Physician might; necessities, 41.
- Voluntary, father and brother, 41.
- Not recover for minority, 40.
- Presumptions:
 - Child working for father, 21.
 - Acting for him, 21.
 - Not agency as to torts, 49.
- Services:
 - After arriving at age, 2.
 - No contract; no pay, 13, 14.
 - Father's right before age, 3, 40.
 - Child hold property, 17.
 - Deal with himself, 17.
 - May emancipate child, 15.
 - Though insolvent, 16.

Support of child:

- Father's offer if given custody, 68.
 - Does not relieve him, 68.
 - Though improperly detained, 69.
- Mother's agency; bind father, 22, 69.
- Mother for past support, 29.
 - Case is one of equity, 29.
 - Mixed facts; case stated, 28.
- Mother had no expectations, 30.
 - Not depend upon contract, 30.
- Out of child's estate, 29.
- Widow charged with custody, 29.
- Parent bound to support, 1, 22, 68.
 - Permit a stranger to, 1, 72.
- Rule; implied, allowed, knowledge, 72.
- Rule succinctly stated, 23.
 - Father ready to supply, 25.
 - Implied promise relation, 72.
 - Necessaries furnished, 23.

Support of child—continued

- Parent's omission of duty, 24.
 - Before others acting, 24.
- Stepson in parental relation, 71.
 - Rule of allowed necessities, 72.
- Step-father liable; physician, 71.
 - Special exigency, 71.
- Venue, where child, not father, is, 74.
 - Removal by mother, 75.
- Torts of child:
 - Father liable, he permits, 26, 50.
 - Morally and legally, 26.
 - Similar acts shown, 27.
 - Father, no general liability, 48, 51.
 - Agency: is proved, 49, 51, 53.
 - Not presumed, 49.
 - Parent not able to prevent, 52.
 - Service for father, insufficient, 53.

1. Parents are bound to support minor children. "When a parent permits a stranger" (stepfather) to support them without objection, the law will imply a promise on his part to pay for the same. (But, see *Judge v. Barrows*, 59 W. post.) —*McGoon v. Irvin*, 1 Pin. 526, 532.

2. Where "the ordinary relation of child and parent did not subsist", and there was an understanding that the services were not rendered gratuitously, a child might recover for labor after arriving of age without an express contract. —*Fisher v. Fisher*, 5 W. 472, 474.

3. "The father has a legal and paramount right to the custody and services of his child."

4. "The child should, if within the age of nurture, which is fixed at fourteen years, be delivered over to him (the father), unless there be something in his situation or conduct which renders him unfit for the trust".

5. "If the father be dead, and the mother still a widow, the same rule applies to her. But if the mother be married again and her husband living, the old rule prevails."

6. "The infant, if of sufficient age, must choose for himself; if not, the court will choose for him. In such case the mother is considered by her subsequent marriage as having lost her right of guardianship for nurture". (But, see amdt. of ch. 278, L. 1915, to sec. 3964).

7. "But when the infant is above the age of fourteen years, he must, it seems, in every case, choose for himself. The court will not compel him, upon habeas corpus, to submit to parental authority".

8. In this case, the indentures being void for failure to mention the profession, trade or employment, and the father being an improper person, and the child being "between the ages of seven and fourteen", to-wit twelve years, the court says: "It is probable, therefore, that the

county judge should have examined the girl and have given her the privilege of determining for herself whether she would go with her father or remain with the respondent". Dixon, C. J.

—*In re Goodenough*, 19 W. 274, 277.

9. In the case of an infant two years old in the custody of an uncle, left by the father who had separated from his wife a year before his death in the army, and the uncle being appointed guardian without notice to the mother, it was held that "On the death of the father the mother became its lawful guardian", and the child was given to her.

10. "That the mother has no means to support and maintain the child", furnished "no just cause for depriving her of its custody".

11. "The guardian by nature, on the death of the father, is the mother. She has a right to the person of the child, unless it appears that she is an unfit person to have control of it."

12. An order of the circuit court on appeal, held the guardianship "was improperly and irregularly made" and that the child be delivered into the custody, care and keeping of the mother without in terms revoking the guardianship of the uncle. Sustained though "perhaps the order did not go as far as it should." —*Ramsay v. Ramsay*, 20 W. 507, 508.

13. "The father was under no legal obligation to pay for" services performed during the year after the son became of age, there being no prior "arrangement or understanding that the services which had been already rendered were to be paid for."

—*Kaye v. Crawford*, 22 W. 320, 322.

14. A son working at home after arriving at age, is not entitled to recover compensation without an express agreement. See SERVICES.

—*Pellage v. Pellage*, 32 W. 136, 142.

15. "It is a well-settled principle of law, that a father may emancipate his minor son, and by agreement with him relinquish the right he would otherwise have to his services. *Monaghan v. School Dist.*, 38 W. 100.

16. And this he may do although insolvent at the time. *Atwood, trustee, v. Holcomb*, 39 Conn., 270; *Lackman v. Wood*, 25 Cal. 147".

17. It follows, therefore, that such an infant son "had the right to acquire the property (piano) in controversy, by purchase or otherwise"; "and hold it as against his father or his father's creditors, and give it, if he saw fit, to his infant sister."

—*Wambold, by Gdn. v. Vick*, 50 W. 456, 457.

18. While "the presumption in all cases is strongly in favor of the continued possession of the father as the head of the family", as to gifts "between members of the same family", yet, "when such a gift by the father to his child is fully executed by delivery, it will be upheld. The

case of *Pierson v. Heisey*, 19 Ia., 114, is strongly in point". See also *Kerrigan v. Rautigan*, 43 Conn., 17.

19. "There may be authorities which hold that such a gift may be revoked, but they have not the weight of reason", and the court approves "of those authorities which hold that it cannot be done".

20. In this case the gift was "sought to be avoided" "by a subsequent mortgagee of the father, on the ground that the giving of the mortgage was a revocation of the gift," and the gift was upheld. See also *RES GESTAE*.

—*Kellogg v. Adams*, 51 W. 138, 146.

21. "The presumption is that a minor child, living with his father, and using his team and conveyance in and about the business of such father, is acting on his behalf and upon his directions until the contrary is made to appear by evidence". —*Gerhardt v. Swaty*, 57 W. 24, 37.

22. Where, as in *McGoon v. Irvin*, 1 Pin. supra, "the children were not living with the father at the time, but necessarily absent from him and with the mother", "the law seems to imply an agency on the part of the mother to bind the father for such necessities. *McMillen v. Lee*, 78 Ill. 443".

23. "A father is liable for necessities furnished his infant child only upon an express promise, or upon proof of circumstances from which a promise may be implied. (Cases).

24. Where the infant is sub potestate parentis, there must be a clear and palpable omission of duty to support, on the part of the parent, in order to authorize any other person to act for and charge the expense upon the parent. *Tompkins v. Tompkins*, 11 N. J. Eq. 512; *Townsend v. Burnham*, 33 N. H. 270.

25. Where the father is ready to supply such necessities, he cannot be bound by the contract for the same with a third person without express or implied authority from the father to make the contract. *Johnson v. Smallwood*, 88 Ill. 73". —*Judge v. Barrows*, 59 W. 115, 117.

26. Where a "father permitted his young sons (8 years old) to shout, use abusive language, and discharge firearms at persons who were passing along the highway in front of his house", and an injury happened "from that cause he was not only morally but legally responsible for the damage done."

27. It was proper to show previous similar acts in the presence of the father, "to connect the father with the acts."

—*Hoverson v. Noker*, 60 W. 511, 513.

28. In this case, the mother and father lived separately, the mother had supported the child from infancy, the child died when five years old, leaving real estate only, of the value of about \$900, received a year before its decease, from the grandfather, and the father and mother were its sole heirs; administration was granted, after partition, some seven

years after the child's decease, and a claim of the mother for the support of the child, was disallowed in the county and circuit courts, but ordered allowed by the supreme court;

29. It is said: "The rule in all cases is one of equity, and when it would seem equitable and just, an allowance out of the infant's estate will always be made, even for past support, especially to the mother when she is a widow and charged with the custody of her children in the place of the father".

30. "The fact that the mother for a considerable part of the time supported the child when it had no estate, and she could not have had any expectation of an allowance therefor, can make no difference in equity, as her right to any allowance in such a case does not depend upon contract, either expressed or implied, or an implied assumpsit". See also CLAIMS.

—*Pierce v. Pierce*, 64 W. 73, 76.

31. "By the common law, as interpreted in some of the old cases, particularly in England, the father had almost an absolute right to the care and custody of his minor child, without much regard to his fitness therefor or the welfare of the child.

32. Modern adjudications, both here and in England, have greatly modified the rule, and have incorporated in the law more sensible and humane elements.

33. It is now well settled, at least in this country, that although prima facie the father is entitled to the care and custody of his infant child, yet, if he be an unfit person therefor, or if it be for the welfare of the child that its nurture be permitted another, the court before which the matter is pending on habeas corpus may, in the exercise of a sound judicial discretion, deny such custody to the father, and give it to another."

34. "The exercise of such discretion in a proper case is not inconsistent with the" "provisions of sec. 3964".

35. "This statute leaves open the inquiry as to the suitability of the parent for that purpose; and it seems quite obvious that if, for any cause, the welfare of the infant demands that its care and custody be withheld from the parent and given to another, the parent is not a suitable person to have such care and custody, within the meaning of the statute. It was so held, in effect, in *In re Goodenough*, 19 W. supra."

36. And on habeas corpus, in this case, the child was retained in the custody of an aunt, though the testimony showed that the father "is now entirely able to support his child, and that he is a person of good character and repute." (Followed in *In re Gdnshp. of McChesney*, 106 W., post.)

—*Sheers v. Stein*, 75 W., 44, 50.

37. Rule, method and conditions set forth, in gift to minor child. See GIFT.

—*Second Nat. Bank v. Merrill*, 81 W., 142, 148.

38. The dominion and right of the father over his minor children, as a "primary right may be lost or forfeited by him by abandonment, neglect,

or abuse." "The necessities and well-being of the social state", and "the interest of society and the physical and the moral necessities of the child," make the subject "one of appropriate legislation" as to depriving the parent of his natural rights. (Many cases).

39. This principle finds expression in the statute (sec. 3964.) "The state intervenes only upon the destitution and necessity of the child, and in all cases of controverted right to its custody its welfare is a matter of primary consideration." See also ADOPTION.

—*Schlitz v. Roenitz*, 86 W., 31, 37.

40. In an action for personal injuries, "compensation for loss of time during her minority from inability to labor by reason of the injury," was held properly refused. "It does not appear that she was emancipated, and of course her services during that time belonged to her father and not to her."

41. Allowance for expenses "incurred by her brother in her behalf for medical attendance and medicines in consequence of such injury", was also refused as "for moneys voluntarily paid and liabilities voluntarily incurred by her brother or her father. *Taylor v. Hill*, 86 W., 105 (See ACCOUNTS OF GUARDIANS.)" The physician, however, "might have recovered therefor as for necessities".

—*Peppercorn v. City of Black River Falls*, 89 W., 38, 40.

42. "In all such controversies", as to custody, "the welfare of the children is the primary consideration which must control the judgment of the court."

43. The parents being separated, the father found unfit, though his parents are wealthy and willing to provide for them, the custody of a son and a daughter, aged 8 and 7 years, is awarded to the mother, though she can give them fewer advantages, and under provocation of the husband may have used profane language, and though her mother living with her was "of coarse and vulgar speech",—the children's mother otherwise appearing "a fit and proper person to have the care and custody of the children."

44. Custody may be awarded to father, or if unfit, to the mother, "but, if it be for the welfare of the children" they may "be committed to the care of another." *Sheers v. Stein*, 75 W., 51; (other cases, *supra*).

—*Johnston v. Johnston*, 89 W., 416, 420

45. The cases, *supra*, hold "that the statute (sec. 3964) secures to the father", as to his child, "the right to its care and custody, if he is competent to transact his own business and not otherwise unsuitable;

46. And that he is not rendered unsuitable by the fact that there are those attached to the child, having or desiring its care and custody, who occupy a higher position in the social scale, or are able to give or secure to it advantages in life better than those of the station to which it was born."

47. So held, and that, being "of a somewhat cold, reserved, and unsympathetic nature", and "never exhibited much love or affection for such child," does not establish unsuitableness, as a matter of law.

—*Markwell v. Pereles*, 95 W. 406, 415.

48. "The law is well settled that no general liability of the father for torts of a minor son exists.

49. Such liability in general results only from the rule of respondeat superior when the fact of agency for the father is proved, and no presumption of agency results from the domestic relationship. (Citations)''.

50. As to *Schaefer v. Osterbrink*, 67 W. 495, a case of "a minor in driving his father's team upon the father's business", and *Hoverson v. Noker*, 60 W. supra, a case of customary misconduct on the father's premises "to the father's knowledge",—"these cases are predicated on the assumed power of control by a parent over his children, and the latter upon the responsibility of one who maintains on his premises anything known to be dangerous or having a tendency to injure others.

51. But, apart from these exceptional aspects of the question, proof is essential of the conferring of authority to do something for the father, within the scope of which is the tort alleged;

52. And, as Mr. Schouler sums up the subject, it is always a defense to show that the parent was not able to prevent the act complained of.

53. It is not sufficient that the child was engaged in some undertaking beneficial to the father, or which he desired to have accomplished, unless such engagement be in accordance with directions or authority from the father. *Winkler v. Fisher*, 95 W. 355; *Moon v. Towers*, 8 C. B. (N. S.) 611''.

—*Kumba v. Gilham*, 103 W. 312, 315.

54. Where the mother, in divorce proceedings was given the custody of infant girls, and died testate six years later, attempting to appoint the grandmother testamentary guardian, the children still being under fourteen, and with whom they had been given a good home,—on application of the father in circuit court for the guardianship and custody, the grandparents contesting, it was held, in effect,—

55. That the grandmother, on the evidence, was suitably given such guardianship and custody;

56. That the suitableness of the father, though he had lived a creditable life since the divorce, was properly to be considered from the time of the marriage of the parties;

57. That it is not determined whether the mother in such case has the right to name a testamentary guardian, though "such is the effect of some adjudications elsewhere," *Wilkinson v. Deming*, 80 Ill. 342, but that such attempted appointment is proper to be considered as to the propriety of appointing the grandmother so named;

58. That a groundless suspicion expressed by the father as to the paternity of his children is entitled to weight in considering his suitability; and

59. That his neglect of the children, subsequent to the divorce, and failure to visit them when ill, and attend the funeral upon decease of one of such children, though given opportunity, is a proper consideration and may sustain a finding of absence of fatherly love for them; (cases supra).
—*In re Grdnbsp. of McChesney*, 106 W. 315, 321.

60. Where "the father was weak mentally to an extent rendering him incapable of doing business intelligently," "very excitable, and accustomed to swear at his children," drove "them from his presence by profanity and abuse," and they "were becoming unmanageable";—such conduct "certainly renders him unsuitable", and the custody of two girls aged seven and nine, was properly given to "their maternal aunt", quoting and following *Markwell v. Pereles*, 95 W., supra.

—*Lemmin v. Lorfeld*, 107 W., 264, 266.

61. Appointment of guardian by the circuit court, after proceedings in county court, etc., and custody taken from parents. See CUSTODY AND COMMITMENT.
—*In re Stittgen*, 110 W., 625, 628.

62. "The status of a person in his minority, as to whether emancipated by his parents or not, may be shown by an express agreement or circumstantial evidence".
—*Grotjan v. Rice*, 124 W. 253, 262.

63. Where the father, having the custody of children under divorce proceedings, died, the remarried mother is given guardianship and custody, on finding of fitness, notwithstanding "adulterous relations with a person who had resided at the home of her first husband" twelve years before, which conduct she then confessed to, and which was condoned by her then husband,—her conduct since being blameless.

64. The request of the deceased parent for the appointment of his brother is held entitled to weight but is "not bound to control the court in determining the question of suitability between the person so designated and those who sustain the parental relationship to the child.

65. The courts have always recognized the sanctity of the parental relations and the parent's right to the care and custody of the children,

66. Unless it clearly appears that the parent is an improper and incompetent person to be entrusted with them.

67. In considering this question the welfare of the child is always to be kept in mind".
—*Gnbsp. of Tank*, 129 W. 629, 632.

68. An instruction that a father's offer to support his minor children on their surrender to his custody by the wife does not relieve him from liability for their support,

69. Even if they are improperly detained from him by his wife, since he can obtain custody of them, if entitled to it, by appropriate legal proceedings,—"is good law." *Zilly v. Dunwiddie*, 98 W. 428 (See DIVORCE).
—*Beilfuss v. State*, 142 W. 665, 666.

70. "An infant son using his father's automobile", it is held, has no authority to bind his father for a physician's services engaged by the son to treat a person injured by such son.

—*Habegger v. King*, 149 W. 1, 3.

71. Where "defendant stood in the position of parent to his stepson," "had assumed the obligation of providing the boy with necessities", and "a special exigency" "existed requiring medical" treatment, and defendant had knowledge of the situation and treatment of the boy by plaintiff, and "interposed no objection thereto," it was held the stepfather was liable "for the value of the services rendered" such minor,

72. "Within the principle that the law implies a promise where a parent, with full knowledge of the facts and without objection, allows and approves of his child being furnished with necessities. We consider the instant case to be within the rule approved in *McGoon v. Irvin*, 1 Pin., supra, and *Zilley v. Dunwiddie*, 98 W. 428 (See *DIVORCE*)".

—*Monk v. Hurlburt*, 151 W., 41, 45.

73. A deed from parent to minor child held effective. See *CONSTRUCTION OF DEEDS*.

—*Jones v. Caird*, 153 W., 384, 386.

74. "The place where the children were, not where the father was, during the period complained of, fixes the venue of a prosecution for nonsupport of children. (Many citations)".

75. "The removal of the minor children by the wife to another county, even without cause for such removal, would not justify the father in refusing to support them. *Beilfuss v. State*, 142 W. supra".

—*Adams v. State*, 164 W. 223, 226.

PAROL.

See also *CONTRACTS*. *FRAUDS*, *STATUTE OF*. *WRITINGS*.

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1. Parol proof should be excluded where it afterward develops that the party had a writing. —*Campbell v. Moore*, 3 W., 767.

2. A parol agreement at the time of or prior to the written agreement cannot vary the latter. See CONTRACTS.

—*Cooper v. Tappan*, 4 W. 362, 369.

3. A parol contract for real estate, with part payment, without delivery of possession, will not take the case out of the statute of frauds.

—*Blanchard v. McDougal*, 6 W. 167.

4. "Not competent to show by oral testimony this agreement or understanding, made at the time the note was given, for the purpose of varying or controlling its legal effect".

—*Gregory v. Hart*, 7 W. 532, 539.

5. A parol agreement "which preceded the written contract" cannot control or vary the latter, as "by every sound principle of law applicable to contracts, where no fraud or mistake exists, the written contract must control".

—*Reed v. Jones*, 8 W. 392, 413.

6. That a deed may by parol evidence be shown to be a mortgage, unless fraud or mistake is shown at the making, "cannot be sustained upon principle, and if established by authority too firmly to be shaken, it must be regarded as an invasion upon the statute which cannot justify still further encroachment".

7. In this case a deed was not allowed to be shown by parol to have been an express trust without consideration.

—*Rasdall v. Rasdall*, 9 W. 379, 392.

8. Priority of endorsements may be shown by parol. See PROMISSORY NOTES, ETC.

—*Cady v. Shepard*, 12 W. 639.

9. Parol evidence is admissible to show that a deed absolute on its face is a mortgage.

—*Plato v. Roe*, 14 W. 453.

10. "Although no parol evidence would be permissible to change the legal effect of the conveyances themselves, yet it may be admitted to show upon what consideration they were made, and to show the whole transaction, where the conveyances constitute only a part".

—*Frey v. Vanderhoof*, 15 W. 397, 401.

11. "Verbal agreements for the sale of lands are enforced in equity, where there has been such a part performance that it would operate as a fraud upon either party to allow the other to repudiate".

12. "The delivery of possession" and "the relinquishment of further litigation, and the neglect to stay further proceedings" are applied under this rule to take the case out of the statute of frauds.

—*Paine v. Wilcox*, 16 W. 202, 214.

13. Parol evidence is admissible to show that a surety signed as principal. See SURETIES.

—*Riley v. Gregg*, 16 W. 666, 671.

14. "The time in which a written contract is to be performed may be enlarged, or the manner of performance changed, by a subsequent parol agreement; and a performance according to such parol agreement discharges the written contract".

—*Webster v. Tibbits*, 19 W., 438, 444.

15. Parol evidence is admissible to show consideration. See CONSIDERATION.

—*Peterson v. Johnson*, 22 W. 21, 27.

16. "If the contract in question was, by its terms, executory, then as already said, the principle is plain that forbids the introduction of parol evidence to change it from a contract of that nature to one which was executed. This point was directly ruled in *Fitch v. Archibald*, 29 N. J., Law R. 160, and is recognized as correct in *Terry v. Wheeler*, 25 N. Y. 523." Dixon, C. J.

—*Godfrey v. Germain*, 24 W. 410, 416.

17. "Additional consideration to that expressed, and consistent with it for the purpose of sustaining a deed", may be shown by parol.

—*Hannan v. Oxley*, 23 W. 519, 522.

18. An agent can make a contract for the sale of real estate, on parol authority. See SALE OF REALTY.

—*Smith v. Armstrong*, 24 W. 446, 451.

19. Evidence of a verbal agreement at the making of a note is admissible to show partial or total failure of consideration. See CONSIDERATION.

—*Smith v. Carter*, 25 W. 283, 287.

20. "Notwithstanding what was said in the opinion in *RasdaU's Am'rs. v. RasdaU*, 9 W. 379, as to the admissibility of parol evidence to prove an absolute deed a mortgage, upon principle, it has since been frequently

held by this court that the admissibility of such evidence has been so long established by authority as to have become a rule of property, which ought not to be changed by the judicial department". Paine, J.

—*Wilcox v. Bates*, 26 W. 465, 466.

21. Oral proof that a note "was to be surrendered" at the decease of the payee, in payment of services of the maker, does not contradict the note, and is admissible.

—*Jilson v. Gilbert*, 26 W. 637, 645.

22. "A parol partition of land carried into effect" is "valid and binding upon the parties". See PARTITION.

—*Buzzell v. Gallagher*, 28 W. 678, 681.

23. An oral promise to indemnify a surety is valid, "relying upon this promise alone".

—*Vogel v. Melms*, 31 W. 306, 312.

24. Part performance, even full payment, is held insufficient to enforce a parol agreement to purchase lands. See PART PERFORMANCE.

—*Horn v. Ludington*, 32 W. 73, 76.

25. An oral promise by a residuary legatee to the testator, held to create a trust. See JURISDICTION. TRUSTS.

—*Brook v. Chappell*, 34 W. 405, 411.

26. It is elementary "that parol testimony is inadmissible to vary, contradict or add to a contract which has been reduced to writing, and that, in the absence of all allegation of fraud or mistake, it will be presumed that the written agreement expresses the final intention of the parties upon the subject matter of the contract".

—*Hull v. Brown*, 35 W. 652, 656.

27. In a contract by an agent it may be shown by parol "that a person not a party thereto has rights under it because it was entered into for his benefit". See PRINCIPAL AND AGENT.

—*Stowell v. Eldred*, 39 W. 614, 627.

28. "In a number of cases which have come before this court, the doctrine has been laid down, that parol proof was admissible to show that a deed absolute on its face was in fact only a mortgage. (Cases)".

29. "But in these cases and other like cases it was apparent that the conveyance, though absolute in form, was really intended to stand as a security for the payment of a debt, and therefore the courts impressed upon it the character of a mortgage."

30. "But it is obvious that the doctrine of these cases does not extend to the case where the parties, by some subsequent parol agreement, attempt to convert an absolute deed, or an absolute assignment of a land contract, into a conditional one."

—*Richardson v. Johnsen*, 41 W. 100, 103.

31. A writing which "is only used as evidence of a fact," may be explained by parol. See WRITINGS.

—*Clifford v. Baessman*, 41 W. 597, 600.

32. Endorsement of a note in blank, cannot be varied by parol. See PROMISSORY NOTES, ETC.

—*Charles v. Denis*, 42 W. 56, 58.

33. An agent who signs as principal, may be shown by parol to be the agent; but, the party signing cannot so be shown not "to be personally a contracting party".

—*Weston v. McMillan*, 42 W. 567, 570.

34. A contract signed in blank, fraudulently filled in, is void, and the agreement "still rests in parol, and may be proved by parol testimony." See OMISSIONS.

—*Rounsavell v. Pease*, 45 W. 506, 509.

35. A signor to a note may be shown to be a surety, by parol, where the creditor knows the fact. See SURETIES.

—*Irvine v. Adams*, 48 W. 468, 474.

36. Contemporaneous or previous agreements, or of conversation or declarations at the time, are "conclusively presumed" to have been included within the written contract, and parol testimony of the same is inadmissible. See CONTRACTS.

—*Cooper v. Cleghorn*, 50 W. 113, 120.

37. The rule as to parol evidence is "clearly and satisfactorily stated in the opinion by Chief Justice Shaw, in *Underwood v. Simonds*, 12 Met. 275: 'The rule of law is well established, that parol evidence cannot be admitted to alter, vary or control a written contract, nor to annex thereto a condition or defeasance not appearing on the contract itself.'"

38. "Parol evidence is, undoubtedly, competent to show a total or partial failure of the consideration of a note or other written contract; or

39. Where only part of the contract is reduced to writing, to prove the portion which the parties have allowed to rest in parol;

40. Or to contradict a mere receipt which does not purport to contain the contract out of which it arose;

41. Or to show the manner in which, or the fund out of which, a note or obligation is to be paid, provided it does not vary the contract expressed in writing;

42. Or to show a consideration different from that expressed in the writing;

43. Or to prove the oral agreement of the parties, if the writing does not profess to state it, but is made merely for the purpose of passing title pursuant to the agreement.

44. This court has approved of the admission of parol evidence for many of the foregoing purposes. (Many cases)."

"The admission of parol evidence for the various purposes above indicated does not constitute an exception to the general rule first stated.

45. It is received on the ground that the agreement to which it relates has not been reduced to writing. If the parties have reduced their contract, and the whole of it, to writing, and the instrument is free from ambiguity, or uncertainty, the courts have universally applied the rule, and excluded parol testimony to vary the terms of the contract. No court has done so with greater fidelity than has this court. (Many cases)."

46. "Of course, the foregoing remarks have no application" where fraud or mistake is involved. "To prove the fraud or mistake, parol evidence is freely received, and necessarily so.

47. But, as a sort of compensation for this apparent departure from the general rule, the existence of the alleged fraud or mistake can only be established by the most clear and convincing evidence. As it is put in some cases, it must be proved beyond a reasonable doubt. A mere preponderance of evidence is not sufficient."

—*Hubbard v. Marshall*, 50 W. 322, 325.

48. The exclusion of oral evidence in connection with written is confined to three classes, and outside of these it may be admitted. See WRITINGS.

—*Teegarden v. T. of Caledonia*, 50 W. 292, 295.

49. A tenant in common can have specific performance of a parol contract of sale of his co-tenant's interest in land. See SPECIFIC PERFORMANCE.

—*Littlefield v. Littlefield*, 51 W. 23, 31.

50. While a verbal promise before the written contract, to build a shop and place machinery therein, is not admissible to vary the written contract, yet it is admissible "to show the intention" on the question of fixtures. See FIXTURES.

—*Taylor v. Collins*, 51 W. 123, 126.

51. A contract in the form of a receipt cannot be contradicted by parol. See SALE OF PERSONALTY.

—*Schultz v. Coon*, 51 W. 416, 419.

52. The lessor in an oral lease for five years, is held entitled to specific performance by reason of such a part performance that repudiation by the lessee would operate as a fraud on the lessor. See SPECIFIC PERFORMANCE.

—*Seaman v. Aschermann*, 51 W. 678.

53. A written agreement not within the statute of frauds may subsequently be modified by parol. See AGREEMENT.

—*Brown v. Everhard*, 52 W. 205, 207.

54. "This court has adhered strictly to the rule that a written contract cannot be varied or changed by parol proof. (Cases cited, supra)."

55. Where a vendor makes an entry in his memorandum book, of the

terms of the sale, signs it, and the vendee's agent also signs it in his own name, both parties are bound by it as a written contract, and parol evidence to show that the sale was made by sample, is not admissible to vary it. See also *PRINCIPAL AND AGENT*.

—*Weiner v. Whipple*, 53 W. 298, 303.

56. To make applicable the principle, "that when only part of an entire agreement is reduced to writing, the residue may be proved by extrinsic evidence", "it must appear from the writings themselves that the whole agreement was not reduced to writing, and that the writings are incomplete to express the entire agreement".

57. "It is clear, from all authorities on the question, that when the contract is reduced to writing, and the writing purports to contain the whole contract, and it is not apparent from the writing itself that anything is left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible".

58. And it was held, that a deed containing an agreement for support, with a maintenance bond secured by mortgage, contained the whole agreement, and that parol evidence, to show that a considerable amount of personal chattels in possession of the grantee was included as a part of the consideration, was not admissible. *Hubbard v. Marshall*, 50 W. *supra*.
—*Hei, Admr. v. Heller*, 53 W. 415, 418.

59. "The doctrine that a deed absolute on its face may be proved to be in fact a mortgage", is "applicable to bills of sale of personal property," and a subsequent lien holder not a party may make such showing.
—*Mfrs. Bank v. Rugee*, 59 W. 221, 223.

60. Where "the written contract shows only a part of the transaction and is silent as to the terms of the sale, such evidence is competent to supply the defect. (Many cases.)"

61. "What should be the terms of the contract of sale seems to have been omitted. But if the written contract was obscure or doubtful on this point, parol evidence would be competent to make it certain. *Musgat v. Pumpelly*, 46 W. 660.

62. But on the ground that the contract expressed or implied cash terms, then the testimony was equally proper to show a change of the contract, or a new one in that respect. *Brown v. Eberhard*, 52 W., *supra*.
—*Magill v. Stoddard*, 70 W. 75, 77.

63. Parol evidence of an executory contract mentioned in a written contract, in an action for specific performance of the latter, was held "competent, 'not to vary the terms of a written contract or to explain patent ambiguities in it,

64. But to facilitate the construction of terms obscure in themselves, in relation to the subject matter, on the face of the contract.' " *Lyman v. Babcock*, 40 W. 503.

65. "Such evidence is proper, 'in order to ascertain the nature and qualities of the subject to which the instrument refers.' (Citations)".

—*Stout v. Weaver*, 72 W. 148, 150.

66. Under Sec. 2302, requiring a trust in lands to be "in writing, subscribed, etc.," a parol agreement at the delivery of a deed that the grantee grandfather "should take the deed and dispose of the lands for the benefit of" certain children, "did not make such parol trust absolutely void, but, at most, voidable at the election of the grandfather. *Karr v. Washburn*, 56 W., 303; *Main v. Bosworth*, 77 W., 664; *Randall v. Constans*, 33 Minn., 334. Such voidable and executed parol trust has frequently been sustained as against the creditors of the trustee. *Hyde v. Chapman*, 33 W., 391; (other cases)".

—*Begole v. Hazzard*, 81 W., 274, 277.

67. "The rule is well established that when only a part of an entire agreement is reduced to writing, the residue may be proved by extrinsic evidence. (Many cases).

68. So, when the time and manner of paying the consideration for a conveyance is not expressed, or is only partly expressed in the writings, it is competent to prove the same by parol. (Many cases)".

—*Beckman v. Beckman*, 86 W., 655, 660.

69. A receipt which "includes the elements of a contract", cannot be varied or explained by parol. See SETTLEMENT.

—*Conant v. Est. of Kimball*, 95 W. 550, 555.

70. Want of consideration between the original parties to a promissory note may be proved by parol. See PROMISSORY NOTES.

—*Remington v. Detroit D. M. Co.*, 101 W. 307, 309.

71. "The principle is quite well settled that parol evidence is admissible to show that a written contract, not under seal, of which there has been manual tradition, was not to become a binding contract until the performance or occurrence of some condition precedent resting in parol. *Nutting v. Minnesota F. Ins. Co.*, 98 W. 26; (other citations)"; but "such a defense is subject to suspicion", and "the rule should be cautiously applied and the facts clearly proven. *Reynolds v. Robinson*, 110 N. Y. 654.

72. Furthermore, it is to be observed that the rule is that it may be shown that the contract is not to become binding until the happening of some event or ascertainment of some fact, but not that the contract is to be presently binding and to become void on the happening of some event.

73. If a contract is executed and delivered with intent to take effect, it is not to be thereafter avoided by virtue of a condition annexed to

the delivery by parol". (Quoted and followed in *State ex rel. Jones v. Chamber of C.*, 121 W. 110, 114).

—*Thorne v. Aetna Ins. Co.*, 102 W. 593, 596.

74. Parol evidence is admissible to ascertain intention in a contract which is obscure. See AMBIGUITY.

—*Boden v. Maher*, 105 W. 539, 543.

75. Distinction as to admissibility of parol evidence as to consideration in a deed. See CONSIDERATION.

—*Cuddy v. Foreman*, 107 W., 519, 526.

76. Parol evidence to construe contracts, is proper only in case of ambiguity, and then "does not extend to mere conversations" leading up to the agreement. See also AMBIGUITY.

—*Johnson v. Pugh*, 110 W., 167, 170.

77. A simple deed, or a promissory note, is not presumed to include the whole contract, and parol evidence is held admissible. See CONTRACTS.

—*Brader v. Brader*, 110 W., 423, 431.

78. Parol proof to declare an express trust in land, must clearly show fraud apparent. See TRUSTS.

—*Duncan v. Duncan*, 111 W., 75, 77.

79. "An oral agreement to devise lands in consideration of services to be performed is not taken out of the statute of frauds by the mere performance of the services, although they be of a personal nature. *Ellis v. Cary*, 74 W., 176; *Martin v. Martin's Est.*, 108 W., 284 (See SERVICES)."

80. "In the case of *Ellis v. Cary*, it is intimated that, if the promisee under such a contract were put in possession by the promisor under the contract, a proper case for specific performance would arise".

—*Rodman v. Rodman*, 112 W., 378, 384.

81. "Manual delivery" of a contract may "be proved to have been on a condition", by parol. See CONTRACTS.

—*Golden v. Meier*, 129 W. 14, 19.

82. While a (land) contract may "be taken as the complete and final agreement" "at the time of its signature, it nevertheless constituted no obstacle to the making of a new, different, or substitutionary agreement thereafter by mutual consent".

83. "Any such subsequent arrangement would constitute a new contract, resting mainly in parol, and therefore provable by all ordinary means of evidence.

84. If, as is found to be the fact, it consisted in re-adoption of a plan agreed upon or discussed before the written contract, the details

of such plan could be proved to throw light upon the terms of the later oral contract,

85. Although inadmissible to prove that the written contract did not correctly express the agreement between the parties existing at the time of its execution. *Lathrop v. Humble*, 120 W. 331".

86. In a deed "mere declarations, recitals, or acknowledgments, of existing facts, not contractual at all" "are not conclusive, nor exclusive of other evidence".

87. While a statement of consideration is "necessary to exist in order that the conveyance might take effect", yet it "may be proved, aliunde, to have been greater or less or different in character, as property or services instead of money, and the like,

88. So long as it is not inconsistent with the existence of some consideration to support the conveyance. (Many cases)".

—*Jost v. Wolf*, 130 W. 37, 40.

89. "The original contract (in writing) was not of a character required by the statute of frauds to be in writing, hence it might be modified or added to by subsequent parol agreement of the parties.

90. Nor need the modification rest on any new consideration: the original consideration is imported into the modification. (Cases)".

—*Wis. S. F. Co. v. D. K. Jeffris & Co.*, 132 W. 1, 11.

91. "A written agreement may be modified after its execution by parol.

92. The modification need not rest on any new consideration. *Kelly v. Bliss*, 54 W. 187 (See RESCISSION OF CONTRACT; other cases).

93. But it is an essential part of this rule that the parol negotiations effective for modification must take place after the written instrument was executed and in effect".

94. A "bill of sale of the personal property was" in escrow at the time of "the parol agreement" for modification, and therefore "before the final execution of the written bill of sale and," such parol agreement "merged in that writing," and could not modify it. (Cases).

—*Schoblosky v. Rayworth*, 139 W. 115, 117.

95. Parol evidence is admissible "to show what the parties meant" by an ambiguous term. See CONSTRUCTION OF CONTRACTS.

—*Burton v. Douglass*, 141 W., 110, 116.

96. "Where there is a distinct oral agreement" and "a written one covering the same subject", the former may be shown "as a matter of defense to a claim under the writing in case of the adverse party seeking to use such writing, for a dishonest purpose. (Cases)". See also FRAUD.

—*Lepley v. Andersen*, 142 W. 668, 670.

97. A "subscription card is a unilateral contract. It contains the promise of one party only. In such case the promise or agreement of

the other may be shown by parol where it does not contradict the contract. (Cases)".

98. In this view, as well as the fact that the purchase and agreement to re-purchase the stock "constitutes but an entire original contract" (*Vohland v. Gelhaar*, 136 W. 75; see *FRAUDS, STATUTE OF*),—"the court did not err in receiving parol testimony to prove the promise to re-purchase".
—*Hankwitz v. Barrett*, 143 W. 639, 642.

99. "It is a familiar rule that where there is an entire verbal contract and a writing merely made in part execution thereof, the balance may be established by parol. (Cases)".

—*Nelson v. Kress*, 145 W., 38, 44.

100. "Among" "exceptions" to "the rule that excludes parol evidence" to "contradict a written contract", "are the following:

101. (1) If the writing is shown by competent evidence to have been a mere part of an entire oral contract, and the oral contract is not inconsistent with and does not contradict the writing,

102. And the writing does not on its face plainly purport to contain the entire contract, then parol evidence of the oral contract is admissible. *Corbett v. Joannes*, 125 W. 370; *Cuddy v. Foreman*, 107 W. supra; (other cases).

103. (2) Where there is a distinct contemporaneous parol agreement, and one of the parties seeks to make use of a written agreement for purposes inconsistent with the parol agreement and under such circumstances as to render such use fraudulent. *Braun v. Wis. R. Co.*, 92 W. 245; *Juilliard v. Chaffee*, 92 N. Y., 529".

104. "A case cannot be brought within the first exception by oral evidence of the language used by the parties in their negotiations or in their alleged contract,

105. Where relief is not sought on the ground of fraud or mistake and the parties stand upon the contract and do not seek a rescission or reformation.

106. The boundary lines of the second exception are not yet well settled, but it includes a case where the pleading makes a claim that the written agreement is being made use of for purposes inconsistent with a parol agreement and under such circumstances as to render such use fraudulent".

107. "It is well settled law, however, that in the case of writings oral evidence may be given of extrinsic facts, conditions, and circumstances existing at the time of the writing and before,

108. And forming no part of the negotiations or of the language used by the parties in their alleged oral contract. *Colt v. Paulson*, 145 W. 214, and cases cited".

109. "Having properly decided that the writing did not contain the whole contract between the parties,

110. It then followed that the real transaction might be sifted to the bottom and all that was said and done by the parties with reference to

the purchase and sale became admissible". See also FRAUDS, STATUTE OF. SPECIFIC PERFORMANCE. —*Kipp v. Laun*, 146 W. 591, 597.

111. "The court properly received (parol) evidence of the negotiations leading up to the making of the written agreement for the purpose of showing the consideration paid", it reciting 'one dollar and other good and valuable considerations'.

112. "Such evidence did not tend to vary or contradict the written instrument, but only to explain it. *Klueter v. Jos. Schlitz B. Co.*, 143 W. 347". —*Frame v. Attermeier*, 147 W. 485, 488.

113. "Where the writing is but a part execution of an entire verbal contract; the parties having elected to permit the rest to remain in parol", "the latter can be established aliunde the writing" "outside the general rule as to varying, etc".

114. "That, however, is limited by the proviso that the part of the entirety not embodied in the writing must not contradict it, nor the writing clearly indicate that it was intended to embody the entire verbal contract". —*Hannon v. Kelly*, 156 W. 509, 512.

115. Where a written contract is required, and such contract be lost, the contents may be proven by parol "clearly and satisfactorily shown". See LEGACIES. —*Dilger v. Est. of McQuade*, 158 W. 328, 330.

116. A written contract not within the statute of fraud, sec. 2307, may be modified by parol. See FRAUD, STATUTE OF. —*Foley v. Marsch*, 162 W. 25, 30.

117. "The weight of authority seems to be to the effect that, where a controversy arises between a party to a contract and a third person, neither is concluded by the contract, but may show, (by parol) what the actual transaction was". But "we do not pass upon the question". —*Nelson v. Goddard & Co.*, 162 W. 66, 69.

PARTIAL PAYMENTS.

See PAYMENTS.

PARTIES.

See also HUSBAND AND WIFE. TRANSACTIONS WITH DECEASED PERSONS. WITNESSES.

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 - Probate proc.; legatees, heirs, 40, 41.
 - Husband and wife of, 42.
 - Representative capacity, 37, 43.
 - Testify to receiving letters, 7.
 - Genuineness of letter, 8.
- Witness fees: not recover, 2.

1. "Consent can and does give jurisdiction of the parties"; but not of the subject matter.

—Walker v. Rogan, 1 W: 597, 626.

2. A party cannot recover witness fees and mileage in his own behalf.
—*Grinnell v. Denison*, 12 W. 402.

3. On an administrator's wrongful sale or pledge for his own debt, the creditors or distributees are the proper parties, and not the administrator or his successor, to prosecute the action for recovery. See EXTRS. & ADMRS.
—*Stronach v. Stronach*, 20 W. 129, 133.

4. "The general rule in equity is undoubted that, in suits affecting trusts, the parties beneficially interested must be made parties".

5. "But this rule is subject to several exceptions"; as in case of too numerous parties and where "their rights are such as may be fairly and fully represented and tried without joining them".

—*Board of Suprs. v. Mineral Point Ry.*, 24 W. 93, 127.

6. "The personal transaction or communication (with deceased persons) of the statute, no doubt, means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other".

7. "We must hold that it was admissible" for a party to testify that he had received by mail a certain letter purporting to be written by the testator before his decease to the party.

8. Such party may also testify to "the genuineness of the letter", if familiar with the handwriting of the deceased.

—*Daniels v. Foster*, 26 W. 686, 692.

9. "All persons having an interest in the subject matter", should be made parties to an action, and "none but parties and privies are concluded by the adjudication." See JUDGMENTS.

—*McCoy v. Quick*, 30 W. 521, 527.

10. "The real defendant who pays a judgment recovered against a nominal party, which is afterwards vacated, may maintain an action in his own name to recover back the money so paid".

—*Mann v. Aetna Ins. Co.*, 38 W. 114, 117.

11. The administrators are not proper parties in an action to restrain the issue of tax deeds. See DESCENT AND DISTRIBUTION.

—*Marsh v. Board of Suprs.*, 38 W. 250, 252.

12. "Every person is presumed to have two names, one Christian name and one surname". "Parties should sue and be sued by their Christian and surnames", and the use of initials is stated to be "a loose and vicious practice".

13. Where the name is not known "in that case the defendant may be designated by any name".

—*Kellam v. Toms*, 38 W. 592, 601.

14. "The general rule doubtless is, that in suits respecting the trust property, brought either by or against the trustees, the cestui que trust as well as the trustees are necessary parties;

15. But there are exceptions to this rule", as when a cestui que trust's share "is definitely ascertained, and there is no reason why he should not have a separate action for its recovery".

—*Hubbard v. Burrell*, 41 W. 365, 372.

16. A suit to recover legacies "is properly brought jointly by the legatees whose legacies depend upon the same right, and would be alike affected by the judgment.

17. All of the legatees and executors are necessary parties to such a suit, either as plaintiffs or defendants, because interested in the subject matter of the litigation;

18. And those who seek the same relief are properly made plaintiffs, and those who controvert their right to the relief demanded are properly made defendants. (Cases)". —*Catlin v. Wheeler*, 49 W. 507, 519.

19. The testimony of parties "may be more or less influenced", and their credibility is to be considered. See IMPEACHMENT OF WITNESSES.

—*Stewart v. Stewart*, 50 W. 445, 448.

20. In "an equitable action for the purpose of subjecting trust property to sale for the payment of equitable liens thereon, all the lien holders or cestui que trusts are proper parties to the action and may join as plaintiffs;

21. And this is especially so where all their liens are based upon the same contract and grew out of the same transaction".

—*Wier v. Simmons*, 55 W. 637, 645.

22. The court may allow, but the adverse party has not the right to "a broader range of cross examination" of a party. See CROSS EXAMINATION.

—*Norris v. Cargill*, 57 W. 251, 255.

23. "The summons and complaint are each entitled 'M., G. & C. Zwickey', as plaintiffs, and the judgment is entitled" with given names written out.

24. "In civil proceedings in this state it is a common practice to use initials for the entire Christian name, as our records will show.

25. It may be the better practice—as we think it is—to use at least one entire Christian name in the entitling of causes (*Kellam v. Toms*, 38 W. supra), but as the general usage is not to do so, we must hold that an initial stands for the full Christian name".

—*Zwickey v. Haney*, 63 W. 464, 466.

26. "There is no principle better settled than that when a grant or any instrument is made to a person by a wrong Christian name, either

by mistake or fraud, it may be proved by parol and corrected in any action, legal or equitable. (Many cases discussed)''.

27. "There is no difference between the application of this principle to wills and to contracts. 1 Greenl. Ev, 287. Such mistakes are classed as latent ambiguities, to be explained by parol. 297."

28. "Where any claim is made by the person whose name is so inserted, and any vested interests are to be disturbed, and there is any doubt about the mistake, then it would be proper to file a bill in equity to make the correction, and make the parties interested, parties".

—*Cleveland v. Burnham*, 64 W. 347, 354.

29. A married woman named by her maiden name R. in a mortgage executed after marriage, "is not a fictitious person, but a person in esse.

30. True, since her marriage she is entitled to the name of her husband, Z., but we are aware of no law that will invalidate obligations and conveyances executed by and to her in her baptismal name, if she choose to give or take them in that form".

—*Lane v. Duchac*, 73 W. 646, 654.

31. "It is a general rule in equity that in a suit respecting trust property, brought against the trustee, the cestui que trust is a necessary party."

32. Notwithstanding Sec. 2607 may seemingly permit a trustee of an express trust to "be sued alone, without joining the other beneficiaries" and regardless of a remark in *Swift v. State L. Co.*, 71 W., 476, indicating that under the statute he might "be held to represent all beneficiaries", which remark "was uncalled for, and is not to be taken as authority," it is held that,—

33. "According to the chancery rule, which is still in force, the beneficiaries are indispensable parties to an action against the trustee, and the relief asked in this case cannot be granted in their absence."

—*Biron v. Scott*, 80 W. 206, 211.

34. A legatee not interested in the construction of a trust clause in a will cannot bring a proceeding to construe it;

35. An executor who declines as such, not specifically as trustee, is "an essential party", in the construction of a personal trust clause. See CONSTRUCTION OF WILLS. —*Sawtelle v. Ripley*, 85 W., 72, 75.

36. Credibility when party is called as a witness by the adverse party. See IMPEACHMENT OF WITNESSES.

—*Garny v. Katz*, 89 W., 230, 231.

37. Where a husband sues in a representative capacity, in behalf of himself and his wife, both having a real interest, but not nominal parties, "we hold, therefore, that in such a case as this both the husband

and wife are competent witnesses under the statute," though, "by the common-law rule neither of them could testify."

38. "Where the husband sues in a representative capacity as *prochein ami* or administrator, he is not thereby such a party in interest as to exclude his testimony or that of his wife. *Leavitt v. Bangor*, 41 Me., 458; *Bonett v. Stowell*, 37 Vt., 258."

—*Strong, Admr. v. City of Stevens Point*, 62 W., 255, 262.

39. In a proceeding to establish a lost will, not only were the residuary legatee "and the other legatees named in the will parties to the proceedings, but the several heirs at law were also parties to the proceedings;"

40. "Undoubtedly, a proceeding to admit a will to probate is a proceeding in rem; but it is also, under our statute, a proceeding in personem, to the extent that when the will is duly proved," such probate "is 'conclusive' upon all legatees, devisees, and heirs at law, as to the due execution of the will and that it was not obtained by fraud or undue influence. (Cases)."

41. "Being parties, they were not disqualified" as witnesses, "but as they each and all claim a share or interest" in the estate, they are disqualified as to personal transactions with the deceased. Sec. 4069. (Cases).

42. And the husband or wife of such parties, is not a "competent witness for or against the other in an action or proceeding to which such witness is not a party, (cases)," not being "or could be an agent for such a purpose," and therefore not "within any exception to the general rule at common law."

43. (But competent when the interest of the spouse as a party is merely nominal, see *Robinson, extr. v. McGinnis*, 145 W., post; or, is a party in a representative capacity merely, see *Gordon v. Sullivan*, 116 W. 543, under HUSBAND AND WIFE).

—*In re Valentine's Will*, 93 W., 45, 50.

44. Where the "executrix was the party who actually made the contest", on a claim in the name of 'estate of S. P. R.', instead of in her name as personal representative,—the error was not "of substantial importance", being a defect "of nomenclature simply".

—*Estate of Robinson v. Hodgkin*, 99 W. 327, 332.

45. "Where a person is known by two different names it seems a very proper way to designate him in legal proceedings, in order to avoid the danger of a misnomer or variance" to give both names linked by the word 'alias', "an abbreviated form of the words 'alias dictus', meaning 'otherwise called'." *Anderson Law Dict. tit. 'Alias'*.

—*Packard M. Co. v. Laev*, 100 W. 644, 645.

46. "It is well settled that, where the issue on trial involves the intent of a party, such party may, in his own behalf, testify to his intent or his absence of intent. (Many cases)". —*Fischer v. State*, 101 W. 23, 26.

47. "The legatees and devisees are parties on the one side, and the heirs at law the parties on the other side, in probate proceedings. In re Valentine's Will, 93 W. supra, quoting Hall v. Allen, 31 W. 691".

48. The adverse party may waive "any right to object to his competency" of the witness under sec. 4069. See TRANSACTIONS WITH DECEASED PERSONS.
—*Will of Hoppe*, 102 W. 54, 55.

49. Parties not in being with possible future interests, "for all the purposes of litigation affecting the jurisdiction", are represented by the parties in being. See TRUST VARIATION.

—*Ruggles v. Tyson*, 104 W. 500, 506.

50. A plaintiff may be refused a discontinuance, and another plaintiff allowed to be substituted. See DISCONTINUANCE.

—*Linden Land Co. v. Milwaukee E. R. & L. Co.*, 107 W., 493, 502.

51. "However necessary a party may be to the general purpose of an action, it is not commenced against him until he is actually and by name brought in". *Levy v. Wilcox*, 96 W., 127.

—*Gager v. Paul*, 111 W., 638, 648.

52. A trustee in an action construing a trust, is held to represent and bind unborn issue, subsequently born. See TRUSTS.

—*Perkins v. Burlington L. & I. Co.*, 112 W., 509, 521.

53. "A person may adopt whatever name he pleases in his business dealings, and, if he uses such adopted name, he will be bound by it. (Citations)". So held as to signature to a subscription as Nalty Family".

—*Hodge v. Nalty*, 113 W., 567, 572.

54. One as executor may recover from an insurance company, though he as guardian has already been paid the amount, being a different party. See INSURANCE.

—*Stoll v. Mutual B. L. I. Co.*, 115 W. 558, 564.

55. An executor named in a will is merely "a nominal party to the proceeding", for probate. See TRANSACTIONS WITH DECEASED PERSONS.

—*Anderson v. Laugen*, 122 W. 57, 62.

56. "Two lines of precedents exist in this state: one to the effect that the wife of a defendant is not a competent witness for the defense in an action against her husband and another in favor of the latter where her testimony is of such a nature that it would aid her husband as well as his co-defendant. (Cases); In re Valentine's Will, 93 W., supra.

57. The other is, where one of the spouses sues or defends in a representative capacity the other is a competent witness in the action. *Gordon v. Sullivan*, 116 W. 543 (See HUSBAND AND WIFE).

58. Strictly speaking, neither of these precedents covers the instant

case", where the competency of the wife, not a party, as a witness is in question, her husband, personally, with "no substantial interest in the result" being a co-defendant of another party.

59. "We adopt the rule that one of the spouses may be a witness in behalf of a co-defendant of the other spouse when such defendant spouse has only a representative or a nominal interest in the action,

60. Even though said defendant spouse be subject to costs in case of defeat.

61. We consider the custodian of personal property who is made defendant in replevin with his principal, the owner of such property, as one having only a nominal interest".

—*Robinson v. McGinnis*, 145 W., 476, 477.

62. Where a guardian ad litem appeared for minors in a contested claim in the county court, the executor also contesting, and notice of appeal was not served on such guardian,—after "the ordinary time" he was permitted "to waive all irregularities in that regard", and "the guardian participated in the second trial". Held:

63. "The whole case was removed to the circuit court on the seasonable service of notice of appeal upon the personal representative of the deceased. He stood for all interests.

64. The guardian did not appear in the county court contest as matter of right. There is no rule of court or statute or unwritten law affording such right.

65. It was proper for such court to recognize the interests of the minors in the special way it was done, but that did not give their special representative any control of the litigation.

66. He was not a party in interest as in *Tyson v. Tyson*, 94 W. 225 (See GUARDIAN AD LITEM; the action there affected the title of infants as "owners of a valuable interest in the real estate in question"). However, being recognized to specially conserve the somewhat remote interests of minors, the ordinary duties of the position, as suggested in *Tyson v. Tyson*, *supra*, applied.

67. This was not a case where a guardian was essential to jurisdiction. The only necessary party adverse to the claimant was the personal representative.

68. All interested in the estate, in the collective sense, really the estate itself, vitalized by such representative, was the only adverse party to the claimant in the matter of hearing on claims".

69. "The guardian ad litem was permitted to appear after the nature of *amicus curiae*",—"not an adverse party within the meaning of the statute (sec. 4033), who is entitled to recognition as such in appeal proceedings. 2 Ency. Pl. & Pr. 159.

70. However", "it was competent for the guardian, by permission of the court, to waive any irregularity there might have been in failing to recognize him as a party in the appeal proceedings.

71. Such irregularities are waivable either expressly or by conduct. *Kasson v. Est. of Broecker*, 47 W. 79 (See *APPEAL*)”.

—*Est. of Koch*, 148 W. 548, 571.

PARTITION.

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 Will: may be construed, 10.
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1. “A parol partition of land carried into effect by possession taken by each party of his respective share according to the partition, is valid and binding upon the parties, and sufficient to protect the several possession by each, of his share thereof.”

2. The legal title “remains the same as before; but such partition leaves each co-tenant seized of the legal title of one half of his allotment and the equitable title to the other half, with the right to the possession of the whole of his allotment in severalty”.

—*Buzzell v. Gallagher*, 28 W. 678, 681.

3. At common law “property held in common can only be divided by the consent of the owners, or by a proceeding in a court of equity;” but the right of severance always existed “as to all property in its nature severable”.

—*Newton v. Howe*, 29 W. 531, 535.

4. The rule as to severable personal property “cannot be applied to this property. The horse, buggy and harness are incapable of division, as a matter of course, and it is impossible for the court to say that the plaintiff might have the possession of them to the exclusion of his co-tenants”.

—*Wright v. Pratt*, 31 W. 99, 104.

5. A partition action is equitable, and partition cannot be had “where the legal title is disputed and doubtful”.

—*Deery v. McClintock*, 31 W. 195, 206.

6. "A court of equity will not interfere to make partition while the legal title is in dispute, but will leave the parties to their legal remedies first to settle the question of title". (31 W. 195.)

—*Hardy v Mills*, 35 W. 141, 146.

7. Partition of real estate in the county court, is subordinate to "the payment of claims against it." See CLAIMS.

—*Pierce v. Pierce*, 64 W. 73, 75.

8. After judgment for partition and sale of realty, including the homestead, on petition to stay and dismiss as to the homestead, the question not being as to the right "to sell the interest or title of the heirs in remainder or reversion after the homestead right of the widow," it is held,—“that the court had no jurisdiction to subject to either partition or sale the homestead of the said widow, V., or to divest her thereby of her title to the same.” “It would require positive legislation to subject the widow’s homestead to the uncertain tenure of the capricious action of the heirs, whenever they might wish to have a partition or sale of the lands.”

9. (The subsequent amendment of sec. 3101, by ch. 283, L. 1909, apparently does not disturb this decision, but appears to include ordinary life estates under the same rule, and presumably allows partition of the remainder or reversion). —*Voelz v. Voelz*, 88 W. 461, 463.

10. Construction of the will of a common ancestor of the parties, may be had to determine "the size of the interest of each." "The case is clearly distinguishable from *Deery v. McClintock*, 31 W., supra", where defendant "set up a paramount title to the lands". See also CONSTRUCTION OF WILLS.

—*O'Hearn v. O'Hearn*, 114 W., 428, 430.

11. Under the statute, sec. 3101, as then existing, it is held that a widow in possession of a homestead, cannot maintain an action of partition of such homestead and unassigned dower in other realty.

12. There is not a joint or common possession, the widow being "in exclusive possession of the homestead", and the "unassigned dower right is not an estate in lands. (Cases)".

13. (Perhaps, the amendment to sec. 3101, by ch. 283, L. 1909, substituting the words "any estate" for "any estate in possession of", was intended to change the rule of this case.)

—*Ulrich v. Ulrich*, 123 W. 176, 177.

14. An action for partition under sec. 3101, "may at least be instituted, notwithstanding the mere pendency of administration". See also REAL ESTATE.

—*Hinman v. Hinman*, 126 W. 191, 195.

15. "Sec. 3101, provides that an action of partition may be maintained 'by any person who has any estate in the lands of which parti-

tion is sought'. This means that he must have some interest in the lands that has vested prior to the commencement of the action. It is not sufficient that such an interest may vest in him in the future".

16. Where no interest vested in the remainderman until the death of the life tenant, held that an heir of such a deceased remainderman could not maintain the action. See also *VESTING OF ESTATES, ETC.*

—*Cashman v. Ross*, 155 W. 558, 559.

17. Under sec. 3101, "such estate or interest must be in him presently in order to entitle him to maintain partition. *Cashman v. Ross*, 155 W. supra; (other cases)".

18. Furthermore, even though the remainder had vested, where the will "directed that no division" "be made until the death of his daughter", "such a provision contravenes no law or sound public policy and must control".

19. "The statutes provide for the investment of shares of absentees, infants, and tenants in dower only, but not for the investment of shares of adult parties to the suit who appear in court". See also *VESTING OF ESTATES.*

—*Greeney v. Greeney*, 155 W. 621, 625.

20. (As to partition in county court and the procedure and forms applicable thereto,—see *Zimmerman's Probate Practice*, Ch. 18.)

PARTNERSHIP.

See *SURVIVING PARTNER.*

PART PERFORMANCE.

See also *PAROL.*

Agreement to accept part, 8.

Inducing other creditors, 8.

Fraud statute, obviated:

Delivery of possession, 2.

Give up further litigation, 2.

Mere part payment, 1.

Payment; no other act, 4.

Full payment, insufficient, 7.

Inducement to so act, 6.

Operate; as fraud, 6.

Other act; possession, 5.

Lease for five years, oral, 10.

Part performed; enforced, 10.

Recovery for:

Contract price governs, 3.

Void entire contract, 11.

Sale, realty and personalty, 11.

Part, validated whole, 11.

Void purchase agreement, 9.

Accept part of goods, 9.

Becomes binding, 9.

1. "Mere payment of a portion of the purchase money, unaccompanied by any other act, is not sufficient," to take the case out of the statute of frauds. *Blanchard v. McDougal*, 6 W. 167.

—*Brandeis v. Neustadt*, 13 W. 142, 152.

2. Part performance, as delivery of possession, or "relinquishment of further litigation" induced by an agreement that would otherwise

result in "an obvious fraud", enables a verbal agreement for the sale of lands, to be enforced. —*Paine v. Wilcox*, 16 W. 202, 217.

3. The special contract price must govern in the recovery for a part performance. See QUANTUM MERUIT.

—*Bishop v. Price*, 24 W. 480, 482.

4. "It is the settled doctrine of this court, that the mere payment of the consideration, unaccompanied by any other act, is not such a part performance of a parole contract for the conveyance of land as will authorize a court of equity to specifically enforce contracts of that character".

5. There must be some other act done to raise an equity in favor of a party to a complete performance, such as the taking of possession of the lands sold under the contract by the purchaser;

6. Or one party must have induced the other so to act that if the contract be abandoned he cannot be restored to his former position, and a refusal to perform the contract will operate as a fraud".

7. Full payment in services rendered and money advanced, is held to be insufficient to compel specific performance.

—*Horn v. Ludington*, 32 W. 73, 76.

8. An "agreement to accept a part" of a debt, which induces other creditors "to relinquish their demands", is binding. See DEBTS.

—*Davenport v. First Cong. Socy.*, 33 W. 387, 390.

9. "If the purchaser of goods under an agreement otherwise void by the statute of frauds, accepts a delivery of the goods, or some part of them, either when the agreement is made, or afterwards, such agreement thereby becomes a valid and binding contract".

—*Amson v. Dreher*, 35 W. 615, 618.

10. Part performance of an oral lease for five years, and otherwise within the statute of frauds, is held to entitle a party to specific performance. See SPECIFIC PERFORMANCE.

—*Seaman v. Aschermann*, 51 W. 678.

11. As to part performance as to realty, of a void entire contract for the sale of realty and personalty, entitling performance as to the whole. See FRAUDS, STATUTE OF.

—*Kipp v. Laun*, 146 W., 591, 602.

PASSIVE TRUSTS.

See TRUSTS.

PAUPERS.

See also CUSTODY AND COMMITMENT.

Definition: of pauper, 14, 15, 17.

"Poor" in the statute, 18.

Insane; support of, 24.

Committed wife, 24.

Pauper; question of fact, 13.

Definition of pauper, 14, 15.

In want, and no means, 17.

Not the poor man, 17.

Question of fact, for jury, 31.

Relief as well as support, 29.

Temporary relief, 13.

Physician's services:

County held not liable, 25.

Unauthorized authority, 25.

Poor houses:

Not fit for children, 1.

Some other asylum, 2.

Possessed of property, 16.

Emergency relief, 20.

Distinction recognized, 21.

Exhaust their resources, 19.

Must apply it; sale, 16.

Not a "poor person," 22.

Effect of support given, 22.

Weak-minded children, 22.

"Relief" as well as "support," 29.

Medical services incurred, 30, 31.

Public support of:

Enforce relative's duty, 3.

Not relieve the public, 4.

Liability of county, 5.

Express or implied contract, 6.

Claim for support, 6.

Public's primary obligation, 4.

"Relief" as well as "support," 29.

Relatives support of:

Common law; derogation, 27.

Statute is exclusive, 27.

Enforce a natural duty, 3.

Past support, action fails, 28.

Record show case proved, 7.

Statute, is prospective, 26.

Town not collect, 26.

Town settlement:

Lose, without gaining, 8.

Notice; liberal construction, 10.

Temporary absence, 11.

First actual relief, 11.

Voluntary absence, 9.

While not pauper, 9.

Town support of:

Liable on request only, 12.

When entitled to "relief," 29.

Question for jury, 31.

Weak-minded children, 22.

Money entrusted to father, 23.

1. Poor houses "are not fit places for children; without means of intellectual, moral or religious instruction, or for the peculiar care needed by children, especially children within the age of nurture."

2. "And it is manifestly better for poor children that they should be supported in some other asylum, where they may have fitting culture and better care; where some person or body may stand to them in loco parentis," like an industrial school, even though intermingled with "vicious children". Ryan, C. J.

—*Milwaukee Ind. Sch. v. Suprs.*, 40 W. 328, 332.

3. "The statute (sec. 1502) contains provisions by which certain persons, having sufficient ability therefor, may be compelled to support in part or wholly their poor relatives. This is a compulsory proceeding to enforce what is deemed a natural duty, but it does not amount to a contract.

4. It is a remedy in aid of a public liability, proper and just enough, but does not relieve the public of its obligation to support its paupers." "The primary obligation remains" upon the public, notwithstanding the

remedy for contribution, though an order of the county judge for contribution by relatives had been made.

5. The county was held liable for a claim for the support of a pauper, there being no agreement between the claimant and the authorities for such support, and the claimant not then knowing the person was a pauper.

6. (In *Patrick v. T., of Baldwin*, 109 W. 342, 347, it is said as to this decision: "In several cases it has been in effect overruled by holdings that a claim against a municipality for the relief of a pauper must be based on an express or implied contract, actually made between the claimant and the proper official").

—*Mappes v. Board of Suprs.*, 47 W. 31, 33.

7. "We are strongly impressed with the idea that, in a special and summary proceeding like this (to compel support of indigent relative, secs. 1502-4), it should appear of record in some way that a case was proved which sustains the order of the officer or court before whom such proceedings were taken. However, we do not determine the proposition".

—*T. of Eaton v. Williams*, 51 W. 99, 100.

8. Under subds. 4 and 7, sec. 1500, "it is clear that a person may lose his or her settlement in any particular town within this state; and yet not have gained one in any other."

9. "We think the voluntary and uninterrupted absence spoken of in said section must be construed to mean an absence, especially if the party resides within this state, during which the party is not a pauper needing and receiving support, and that it does not mean an absence during which the town in which he has a legal settlement supports the absentee as a pauper in some other town in this state".

10. The effect and construction of prior statutes is discussed and liberal construction of the notice provision is indicated.

—*Scott v. Clayton*, 51 W. 185, 191.

11. "It seems clear to us that if" a person was a pauper in the town of her residence, "and if it was the duty of that town to relieve her had she remained there, it is not released from that duty merely because the first necessity for actual relief chanced to arise during her temporary absence" in another town, under sec. 1512.

12. "The defendant town cannot be held liable in this action in any event unless its supervisors, or at least two of them (sec. 4971, subd. 3), requested the plaintiff to board and lodge" the pauper.

—*McCaffrey v. T. of Shields*, 54 W. 645, 647.

13. "This court held, in the case of *Scott v. Clayton*, 51 W. supra, and in *Port Washington v. Saukville*, 62 W. 454, 458, 'that it was in all cases a question of fact, when any temporary support was given to a poor person, whether such person was, at the time the support

was so furnished, a pauper within the meaning of the statute.' And so held in this case.

—*Town of Holland v. T. of Belgium*, 66 W. 557, 559.

14. The court applies the definition,—“the word ‘pauper’ to mean ‘a poor person’; especially one so indigent as to depend on charity for maintenance;

15. Or one supported by some public provision”.

—*T. of Saukville v. T. of Grafton*, 68 W. 192, 195.

16. While a poor person “is possessed of property not absolutely indispensable for daily use, he must apply it to his support by sale or by way of security”. So held, and man and wife not entitled to support, owning a house and three acres of land, valued at \$1200, and incumbered by \$450.

17. “It is the pauper, and not the poor man in the ordinary sense of the term, the man not only in want, but who has no means or resources for relieving it, who is entitled to the statutory aid”.

18. “The word poor in the statute (sec. 1513) has a restricted and technical meaning, and it is practically synonymous with destitute, denoting extreme want and helplessness. Anderson Law Dict. ‘Poor’; State ex rel. Griffith v. Osawkee, 14 Kan., 421.”

19. “Until K. and wife had exhausted their resources they could not be considered as poor persons, within the meaning of the statute for the relief of the poor. (Cases).

20. Doubtless cases of distress may exist urgently requiring aid before the parties can resort to or utilize their limited resources, not in and of themselves affording credit for immediate relief and pressing want”.

21. (Followed in *Coffeen v. Preble*, 142 W. post, and stated of the present case that “the distinction is recognized,” and “exists between that degree of poverty and diligence which will entitle one to support from the town and that which will entitle him to temporary relief in an emergency”).

—*Rhine v. Sheboygan*, 82 W., 352, 354.

22. “Under the authority of *Rhine v. Sheboygan*, 82 W., supra,” the party with some property was held not a “poor person”, but if supported as such by another town, the effect on his legal settlement would be the same as though he was, and his adult weak-minded children come under the same rule.

23. “The father is undoubtedly the proper person to be intrusted with money for the support of an adult child who is so mentally weak that he cannot understand the uses of money”.

—*Ettrick v. T. of Bangor*, 84 W., 256, 261.

24. As to the support of insane, secs. 600, 604e, 604q, are discussed and objects thereof indicated, and judgment for support by husband

of an insane committed wife, in the absence of specific statute, set aside. (Subsequent Amdts. by ch. 376, L. 1905, and ch. 624, L. 1907, greatly alter these sections, and also specifically provide for insane wife's support by husband). —*Richardson v. Stuesser*, 125 W. 66.

25. The county held not liable for physician's services for a poor person, performed on authority from members of the county board and the district attorney. —*Hittner v. Outagamie Co.*, 126 W. 430.

26. Secs. 1502 et al., "are prospective in their character, and do not contemplate that a town or an individual may proceed to relieve a pauper and afterwards recover the amounts expended of the proper relative".

27. "The common law imposes no obligation upon a son to support his pauper parent", and under these sections "a new right has been created and a complete remedy for its enforcement has been provided with it. The law is well settled that in such a case the remedy provided is exclusive. (Cases)".

28. "The supervisors did not utilize the remedy provided by the statute, and hence the present action", for past support furnished, "must fail". —*Saxville v. Bartlett*, 126 W. 655, 656.

29. The statute, sec. 1499, "provides for 'relief' as well as 'support' in case of need", and it is indicated that "the D.'s were poor and indigent persons in need of relief or support", though they owned an equity in property worth about \$300;

30. The issue being whether medical services incurred by the supervisors' authority may properly be re-imbursed, it is held,—

31. That "the question whether the afflicted person was so poor and indigent as to entitle him to relief from the town notwithstanding he had some little property not edible or easily convertible was a jury question. (Cases)". See also *Rhine v. Sheboygan*, 82 W. supra.

—*Coffeen v. Preble*, 142 W. 183, 184.

PAYMENTS.

See also MARSHALLING ASSETS. PAROL. PROMISSORY NOTES, ETC.

Acceptance of like contract, 22.

Appeal from judgment:

Acceptance of conditions, 38, 39, 40.

Questioned decision, 40, 41.

Appeal from another part, 46.

Implied promise to restore, 57.

Not waived by payment, 27, 36.

Recovered on reversal, 37, 57, 58.

Application: several contracts, 1, 13, 72.

Debtor, apply as he chooses, 8, 10.

When payment made, 8.

Neither applies, equity applies, 12, 19.

Not presumption of intention, 73.

Open current account, 16.

Applied to earlier items, 16, 17, 20.

Relieves statute bar, 20.

Application—continued

Pay without designation, 1, 11, 18.

Creditor may apply, 1, 8, 14.

Admitted debts only, 1.

Rules fully stated, 10-15.

Apply only to direct payments, 15.

Creditor; account charged, 15.

Authority to receive, 77.

Demand of securities, 76.

Failure; payor's negligence, 76.

Possession of securities, 78.

Claims:

Admr. pay not purchaser, 3.

Amount actually paid, 4.

Credit on executor's claim, 71.

Defense; not pleaded, 62.

Extinguished; kept alive, 4.

Defense of:

Affirmative defense, 44, 47, 55.

Not under general denial, 44, 56.

Burden upon defense, 47.

Did not shift, 48.

Forged securities, not, 28.

Must be pleaded, 44, 55.

Not in county court, 62.

Realty payment not, 64.

Personalty pleaded, 63.

No payment, in complaint, 53, 56.

Unnecessary to state, 53.

Valid securities, are, 29.

Definition; of "to pay," 59.

"Payment" as discharge, 60, 61.

Demand of securities, 76.

Extinguishes the debt, 7.

Part, pro tanto, 7.

Interest; partial payments, 30.

Limitation statute:

Before or after claim barred, 31, 35.

No payment presumption within, 54.

Open account; early items, 20.

Limitation, etc.—continued

Part payment after, barred, 35.

Part payment relieves, 5, 6.

Negotiable instruments, 81.

Person in possession, 81.

Not in possession, 82.

Authority; burden, 82.

Note not, unless agreed, 9, 49.

Evidence establishing, 52.

Place of payment, 74.

At specified office, 79.

Money deposited, payor's, 80.

Remittance by mail, 75.

Residence of creditor, 74.

Pleadings. See Defense of.

Presumption of:

Ordinarily against, 43.

Overcome by evidence, 32, 34, 70.

Recital in deed, 33.

Twenty years past due, 69.

Protest payment:

Compulsion of process, 23.

Officer's demand sufficient, 25.

Seizure not essential, 24.

Void tax collection, 26.

Receipt in full for part, 21.

Conclusive, when, 21.

Several liable:

Payment by primary debtor, 65.

Accommodation makers, 67.

Makers complete discharge, 65.

Common law perpetuated, 66.

Solido payment right, 51.

Assignee has likewise, 50.

Voluntary:

Excess interest paid, 68.

To secure possession, 68.

Not recovered back, 45, 68.

Taxes before delinquent, 45.

Not to protect, 45.

1. "When a debtor who owes money upon several distinct contracts, makes payments without designating upon which of the contracts he wishes to have the payments applied, the creditor is at liberty to apply them in such manner as he shall think proper". But only on admitted debts or those which may be established by testimony.

—*Stones v. Talbot*, 4 W. 442, 449.

2. "Where there are several notes falling due at different times, and secured by the same mortgage," "when no special equities intervened to vary the rule," "they are to be paid out of the mortgaged property" "in the order of their maturity," and not ratably. Contra, in some states.

—*Marine Bank v. Inter. Bank*, 9 W. 57, 65.

3. It is the duty of the administrator to pay and not to purchase outstanding claims, and "the presumption in all such cases is of payment instead of purchase".

4. The administrator "can only recover of the estate the amounts he actually pays" for outstanding claims, and they will "be considered as extinguished, unless there should be particular reasons making it necessary to keep them alive" even where he pays his own money.

—*Gillett v. Gillett*, 9 W. 194, 197.

5. Partial payments made before the statute has run, takes the case out of the statute of limitations. —*Cleveland v. Harrison*, 15 W. 670.

6. "Part paymnet (of a note) within the period prescribed (six years) takes a case out of the statute of limitations".

—*Eaton v. Gillet*, 17 W. 435.

7. "A payment enters into the very existence of the debt or obligation upon which it has been made. A full payment extinguishes the debt entirely; a partial payment extinguished it *pro tanto*".

—*Parry v. Wright*, 20 W. 483, 485.

8. "A debtor may apply his payment to any debt he chooses. But he must do this when he makes it, otherwise the creditor may apply it".

—*Otto v. Klauber*, 23 W. 471, 474.

9. A promissory note is not a "payment unless expressly so agreed". See also PROMISSORY NOTES, ETC. —*Paine v. Voorhees*, 26 W. 522, 526.

10. "Where the debtor makes any payment to the creditor holding different demands against him, he has the right to apply it to what debt he pleases.

11. If the debtor makes no specific appropriation, the creditor may apply the money as he pleases.

12. And when neither party appropriates the payment, the law will apply it according to its own notion of the intrinsic equity and justice of the case.

13. These rules obviously presuppose a payment made by the debtor to the creditor where the former has the power of exercising an election as to its appropriation.

14. If the debtor neglects to exercise an option either at the time of payment or before the creditor exercises his right, then the act of appropriation devolves upon the latter".

15. "The right to appropriate only applies where payments have been made by debtors to creditors, and where the former have an opportunity of directing application"; not where the creditor simply "charged to himself on the account book", as here, the amounts not being regarded as payments.

—*Jones v. Williams*, 39 W. 300, 305.

16. "The rule with regard to an open current account is well settled, that, where the parties themselves fail to make the application of payments, the law usually applies them to the extinguishment of the earlier items.

17. That rule was recognized and applied in analagous cases in this court in *Robbins v. Lincoln*, 12 W. 1. and *Turner v. Pierce*, 31 W. 342. See also *Fairchild v. Holly*, 10 Conn. 175.

18. The rule, as stated by Mr. Justice Paine in *Robbins v. Lincoln*, is, that where the debtor makes no application of the payment when made; the creditor has the right to apply it as he pleases;

19. And that, in the absence of an application by either party, the court should make such application as will be equitable and just under all the circumstances.

20. In *Stones v. Talbot*, 4 W., and *Jones v. Williams*, 39 W., *supra*, the law in regard to the appropriation of payments is somewhat considered. In this case, upon this open running account, there surely is no injustice in applying the payments made by the defendant to the extinguishment of the earlier items. When this is done, it is obvious the balance of the account does not fall within the bar of the statute."

—*Hannan v. Engelmann*, 49 W. 278, 283.

21. A receipt in full for part in satisfaction for the whole debt is not conclusive, except in case of compromise. See SETTLEMENT.

—*Catlin v. Wheeler*, 49 W. 507, 523.

22. "If it be so expressly agreed", acceptance of a like contract on the same consideration, operates as a payment. See also ACCORD AND SATISFACTION.

—*Jaffray v. Crane*, 50 W. 349, 353.

23. "We think it must be held, on principle and authority, that the payment of a demand under compulsion of legal process, such payment being accompanied by a protest that the demand is illegal and that the payer intends to take measures to recover back the money paid, is not a voluntary payment.

24. And further, to constitute compulsion of legal process it is not essential that the officer has seized, or is immediately about to seize, the property of the payer by virtue of his process.

25. It is sufficient if the officer demands payment by virtue thereof, and manifests an intention to enforce collection by seizure and sale of the payer's property at any time".

26. The foregoing is in reference to payment of a void tax.

—*Parcher v. Marathon Co.*, 52 W. 388, 392.

27. "Payment of a judgment is no waiver of the right to appeal therefrom". See APPEAL.

—*Sloane v. Anderson*, 57 W. 123, 127.

28. "A valid obligation cannot be paid or satisfied by transferring forged securities".

29. "When payment is relied on as a defense, the defendant must prove the payment of money, or something accepted in its stead. If T. had transferred valid securities, the transaction would be regarded in law as equivalent to actual payment."

—*Guichard v. Brande*, 57 W. 534, 536.

30. Rules for computing interest on partial payments, etc., are given. See INTEREST.

—*Case v. Fish*, 58 W. 56, 111.

31. "We thought it our duty, once for all, to construe the statute (sec. 4247) and hold that part payment", either before or after a claim is barred, "in either case is sufficient to take the case out of the statute".

—*Engmann v. Est. of Immel*, 59 W. 249, 259.

32. "The mere inference of payment arising from mere lapse of time is insufficient to overcome convincing proof of non-payment".

—*Delaney, Admr. v. Brunette*, 62 W. 615, 619.

33. "The execution and delivery of the deed acknowledging the receipt of the purchase money, in the absence of any other proof, would be prima facie proof of the payment of such purchase money;

34. But this presumption of payment may be rebutted by other competent evidence which shows that it was not in fact paid. (Many cases)".

—*Crowe v. Colbeth, Admr.*, 63 W. 643, 645.

35. "An unconditional, unqualified, and unequivocal part payment, voluntarily made by the debtor or any person legally liable to pay it, of a debt already barred by the statute of limitations, is sufficient 'evidence of a new or continuing contract, whereby to take the cause out of the operating statute of limitations' ". *Engmann v. Est. of Immel*, 59 W. supra.

—*Marshall v. Holmes*, 68 W. 555, 559.

36. "The law is well settled that payment of a judgment is no waiver of the right to appeal therefrom, or to bring a writ of error to review it. (Cases)".

37. "Money paid under such circumstances may be recovered back on the reversal of the judgment, on the principle that it belongs ex aequo et bono to the party paying it."

—*Chapman v. Sutton*, 68 W. 657, 661.

38. In an appeal "from the whole and every part of the judgment", where part of the judgment was for taxes which were paid and accepted, and a portion of the taxes held invalid, it is said "that the right to proceed on a judgment and enjoy its fruits, and the right to appeal therefrom, are totally inconsistent positions", and the appeal was dismissed,

39. "Upon the ground that a party cannot proceed to enforce and

have the benefit of such portions of a judgment as are in his favor, and appeal from those against him”.

40. (This case is questioned in *Fiedler v. Howard*, 99 W. post, but it is said that “perhaps this decision can be supported upon the ground that the acceptance of this money was an acceptance by defendant of the conditions of the judgment;

41. But, independent of the conditional character of the judgment, no good reason is perceived why the defendant might not have received the amount adjudged absolutely to be its due, and still have sought to secure the tax decreed to be void”).

42. (And in *Price v. Grzyll*, 133 W., 623, 627, this case is cited as authority for the following: “The authorities are conclusive that one who accepts a beneficial condition of an order or judgment waives all objection thereto”).

—*Webster-Glover L. & M. Co. v. St. Croix Co.*, 71 W. 317, 319.

43. “There was no presumption either of law or fact, that the note had been paid. The presumption was that it had not been paid.

44. Payment is an affirmative defense. It must be pleaded and proved. It cannot be proved under a general denial. *Bliss Code*, Pl. (3d. Ed.), 357, 358, and notes; *Knapp v. Runals*, 37 W., 135”.

—*Studebaker Bros. Mfg. Co. v. Langson*, 89 W., 200, 202.

45. Payment of taxes by the vendor of a land contract, which the vendee has agreed to pay, before the taxes were delinquent, “seems to have been purely voluntary”, he not being “obliged to pay them to protect himself”, nor was requested by the vendee so to do. “A man cannot make another his debtor in that way”.

—*Garbes v. Roberts*, 98 W. 173, 178.

46. “Where a party is entitled” to a sum under a judgment, he may accept the money and yet appeal from another part of the judgment not involving the sum accepted. See *APPEAL*.

—*Fiedler v. Howard*, 99 W. 388, 396.

47. An alleged “payment was an affirmative defense, and the burden of proving it was necessarily upon the defendants. *Knapp v. Runals*, 37 W. 135; *Studebaker Bros. Mfg. Co. v. Langson*, 89 W. supra.

48. Such burden of proof did not shift during the trial. *Atkinson v. Goodrich Trans. Co.*, 69 W. 5”.

—*Kuenster v. Woodhouse*, 101 W. 216, 221.

49. That a note was received as payment, must be by express agreement. Proceeding therefor. See *PROMISSORY NOTES*, ETC.

—*Willow R. L. Co. v. Luger F. Co.*, 102 W. 636, 638.

50. Where a cestui que trust assigned, by a general assignment of his stated income of a trust fund, “a sum sufficient to pay” a judgment

against him,—the trustee, “is a mere debtor, and has a right to pay the installments, as they become due, in one sum. He cannot, against his will, be compelled to split them up.”

51. Following *Skobis v. Ferge*, 102 W., 122, it is held that “the debtor has a right to pay his debt in solido”, “and no notice of the assignment of a part of the debt,” “can destroy this right of the original debtor, without his consent.” —*Dugan v. Knapp*, 105 W., 320, 322.

52. As to evidence establishing a note as payment, and express contract. See PROMISSORY NOTES, ETC.

—*McDonald v. Provident S. L. A. Soc.*, 108 W., 213, 218.

53. “The objection that the complaint (for services) does not state a cause of action because it is not alleged that the amount earned by plaintiff has not been paid is not tenable.

54. There is no presumption of payment within the period of the statute of limitations.

55. Payment is an affirmative defense, and must be set up in the answer, or evidence of the fact will be excluded”.

—*Meating v. Tigerton L. Co.*, 113 W., 379, 382.

56. In an answer for recovery for services, the answer being “merely a general denial”, a deduction for payments not admitted in the complaint, “was not justified by the pleadings”, and erroneous.

—*Gardner v. Avery Mfg. Co.*, 117 W. 487, 489.

57. “Where a person receives money pursuant to a judicial determination which is subject to review, there is an implied promise to restore it in case such determination be set aside, no superior equities intervening.”

58. And it may “be recovered back in an action of indebitatus assumpsit, for money had and received”. *Clark v. Pinney*, 6 Cow. 297, “is a leading case”. —*Harrigan v. Gilchrist*, 121 W., 127, 441.

59. “‘To pay’ means primarily to transfer or deliver money or other agreed medium from the debtor to the creditor;

60. And while the word ‘payment’ is often used merely to signify satisfaction or discharge of an obligation by any means, as by setting off some other or the like, as in *Marinette v. Oconto Co.*, 47 W. 216, that is a secondary and somewhat loose use of the term.

61. Payment, of course, works satisfaction of an obligation; but the two are not equivalents, for satisfaction and discharge may be accomplished without payment. (Many cases)”.

—*Oneida Co. v. Tibbits*, 125 W. 9, 15.

62. The defense of payment to be available, is held not required to be pleaded against a claim in the county court.

63. The value of converted personalty pleaded, held applicable to apply on such claim as part payment,

64. And the value of realty deeded, was likewise held properly applied though not pleaded, and not shown directly to have been so intended. See also SERVICES. —*Heber v. Est. of Heber*, 139 W. 472, 475.

65. "It is a general rule of law that when an instrument upon which several are liable, some primarily and some secondarily, is satisfied by him who is primarily liable, a complete discharge results. It no longer has legal existence. *Jaffray v. Crane*, 50 W., supra; (many cases.)

66. That rule of the common law is perpetuated as to negotiable instruments by sec. 1679 of the Neg. Inst. Act (L. 1899, ch. 356). People are presumed to act in the light of such rules of law.

67. Obviously, however, if the limit of the right to pledge the credit of the accommodation makers is not fixed thus, there will be no certain limit short of the statute of limitations".

—*Comstock v. Buckley*, 141 W., 228, 231.

68. Where it is alleged that "plaintiffs were compelled to pay" "\$964.15 interest, in excess of the amount legally due" on a note, "in order to secure possession" "promptly" of bonds held as collateral, it is held "that all of the money paid was voluntarily paid, with full knowledge of the facts, hence it cannot be recovered back upon well settled principles of law. (Many cases)".

—*Burgess v. Commercial Natl. Bank*, 144 W. 59, 65.

69. "The presumption of payment which by the rules of the common law arises from the circumstance of a debt being twenty years past due",

70. Is "one of fact merely, rebuttable by evidence of non-payment", and is not "one of law, in legal effect extinguishing the debt". *Delaney v. Brunette*, 62 W., supra.

—*Holway v. Sanborn*, 145 W., 151, 154.

71. Crediting items by executor as such on a note against him personally is held to be payment of such items. See also CLAIMS.

—*Est. of Morgan*, 152 W., 138, 142.

72. The application of payments as stated in *Stones v. Talbot*, 4 W., supra, restated and followed.

73. As to two notes due, there is no "presumption of law or fact that the payor intended" "to make payment on the particular note."

—*Nelson v. Davison*, 152 W., 567, 569.

74. "Where a contract for the payment of money is silent as to the place of payment, in the absence of any legitimate inferences to the contrary the law implies that payment shall be made at the residence, office, or place of business of the creditor, if within the state". *State v. Kenosha H. T. Co.*, 158 W. 371.

75. "Payment by remittance by mail is" not "such an established and generally recognized usage of trade that it is implied and becomes part of contracts".

—*State ex rel. Gurney L. Co. v. Risjord*, 161 W. 118, 120.

76. "When paid in full, a failure to demand and receive" the note and mortgage, "is deemed in law negligence on the part of payor unless excused by special circumstances. *Spence v. Pieper*, 107 W. 453.

77. But want of possession of securities does not determine the question of authority. In 2 Corp. Jur. 625, the rule is thus stated:

78. "The mere fact that the agent has not possession of the note or securities at the time of payment is not conclusive that he has no authority to collect the same, but is only a circumstance to be considered in determining the question". See also *PRINCIPAL AND AGENT*.

—*Weigell v. Gregg*, 161 W. 413, 417.

79. "The fact that (the) bonds and interest coupons were made payable at the office of the Trust Company did not make the Trust Company the agent of the bondholders to receive payment.

80. Money deposited with the Trust Company for that reason remained the property of the payor, and if lost it was the loss of the payor. *Bartel v. Brown*, 104 W. 493.

81. It is the established law of this state that payment of a negotiable instrument must be made to the party having possession of the same or to some person duly authorized by the payee to accept payment,

82. And that where the person to whom payment is made is not in possession of the negotiable instrument the burden is upon the party making the payment to show the agent's authority by clear and satisfactory evidence. (Many cases)."

—*Connell v. Kaukauna*, 164 W. 471, 496.

PERMANENT IMPROVEMENTS.

Claim for:

Improve in good faith, 1, 4.

Not when wrongfully held, 1, 3.

First with acquiescence, 4.

Completed afterward, 4.

Fraudulent realty purchase, 7.

Active participant, 7.

Part paid; contract fails, 6.

Trust funds from corpus, 8.

No authority in will, 8.

Not even with consent, 8.

Trust property purchase, 7.

Fraud, with knowledge, 7.

Void administrator's sale, 2.

Void contract; possession, 5.

1. "As a general rule a party who wrongfully retains a title which he knows he ought to convey to another, is not in a condition to claim pay for improvements. That claim belongs to those who improve in good faith believing that the title is good."

—*Thompson v. Thompson*, 16 W. 91, 94.

2. On recovery of possession by the heirs on account of a void administrator's sale of real estate, the value of the "permanent improvements" and taxes paid, was allowed the purchaser who acted in good faith. See SALE OF REALTY. —*Blodgett v. Hitt*, 29 W. 169, 193.

3. "There are cases which hold that where a party wrongfully retains the title and possession of property which he knows he ought to convey to another, he is denied pay for his improvements. *Waterman v. Dutton*, 6 W. 265; *Thompson v. Thompson*, 16 W. supra".

4. But where there was a default on the one side and the facts constituted such a waiver on the other as to justify a decree for specific performance, and the vendor in possession made permanent improvements, first with the acquiescence of the vendee, and later to complete buildings already begun for the benefit of both parties, there being reasonable doubt whether the vendee could eventually comply with the conditions of sale, all in good faith, "the actual value of such improvements as he himself made of his own funds", was allowed. See also SPECIFIC PERFORMANCE. —*Benson v. Cutler*, 53 W. 107, 114.

5. Where "plaintiff went into possession, worked the farm and made improvements under a void parol contract", "we do not see any substantial ground for distinguishing the case from one where the purchaser has paid a part of the consideration money on a contract for the sale of real estate which for some reason fails.

6. In the latter case this court has approved of the doctrine which allows the purchaser, after a demand, to maintain an action to recover back what he has paid. (Cases)".

—*Clark v. Davidson*, 53 W. 317, 322.

7. A fraudulent purchaser of trust property, with actual knowledge of fraud, cannot be credited for improvements on property recovered. See TRUSTEES. —*Hawley v. Tesch*, 88 W., 213, 241.

8. Funds of a trust estate cannot be taken from the principal, even by consent of the interested parties, there being no authority therefor in the will. See POWER. —*Mulberger v. Beurhaus*, 102 W. 1, 9.

PERPETUITIES.

See also CHARITABLE TRUSTS. EQUITABLE CONVERSION.

Absolute power somewhere, 18.

Regardless of equivalent, 18.

Aim of statute, 17.

Alienation unduly suspended, 16.

Trustees sell at any time, 16.

Sufficient for statute, 16.

Charitable, not religious, 8.
 Trust provisions construed, 7, 8.
 City, corporate purposes, 25.
 Not being a trust, 25.
 Devise valid in first taker, 10.
 When condition is void, 10.
 English doctrine of, 1.
 Equitable conversion, 31.
 Not apply in such case, 31.
 Exceeding twenty-one years, 4.
 Express sale direction, 5.
 Includes all to limit, 5.
 No equitable conversion, 6.
 Gross term; and gestation, 23.
 Existing infancy, 23.
 Life of longest liver, 28.
 All candles at once, 29.
 Confuse provisions, 27.
 Number, not of life estate, 30.
 But of lives in being, 30.

Personalty:
 Common law rule, 1, 3.
 Not in force here, 22.
 Private trust perpetual, 24.
 Alienation not suspended, 24.
 Realty to charitable use, 32.
 Not apply in such case, 32.
 Rents and profits:
 Successive devises of, 26.
 Without sale power, 26.
 Statutes, limit to realty, 2, 22.
 Suspension of ownership, 19, 20, 21.
 Differs from power supervision, 19, 20, 21.
 Terminate in any event, 9, 12, 13.
 Persons be undetermined, 13.
 Power may be in suspense, 13.
 Within the period, 9, 12.
 Trust to city sustained, 11.
 Twenty-one years from will, 15.
 Permissible under statute, 15.

1. "The English doctrine of perpetuities applied" to both real and personal estates, "but not to trusts for charitable uses."

2. Our statutes "prohibiting perpetuities, and regulating uses and trusts", "are expressly limited to realty." See also CHARITABLE TRUSTS.
 —*Dodge v. Williams*, 46 W. 70, 95.

3. "The common law rule of perpetuity as to personalty may be unaffected by our statute".

4. Where "the power of alienation is suspended for the period of twenty years", as to realty and without reference to lives, it is held that "this comes within the express prohibition of the statute, and is void". (This was before the amdt. by ch. 551, L. 1887, to sec. 2039, adding to two lives the words "and twenty-one years thereafter". "Under the present statute, however, no term not exceeding twenty-one years is prohibitive". Will of Kopmeier, 113 W. post).

5. "The express direction for the sale of the land at the expiration of twenty years excludes all authority to make any previous sale."

6. This precludes the application of "the doctrine of equitable conversion" to sustain the will. See EQUITABLE CONVERSION.

7. A trust giving the benefit of the income "to the trustees of the Baptist and Methodist societies of the village of D." for a term of years, is not "a devise of real estate to a 'literary or charitable corporation,' and for the 'sole use and benefit' of such corporation, within the meaning of that exception", under sec. 2039.

8. "We think the charitable corporation there referred to is not a religious corporation."
 —*De Wolf v. Lawson*, 61 W. 469, 474.

9. "The rule is universal that such suspension of the power of alienation must necessarily terminate, under any and all circumstances, within

the period prescribed by the statute, or the disposition will be void. *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 N. Y. 397".

—*Ford, extr. v. Ford*, 70 W. 19, 61.

10. As to a devise being valid in the first taker, where conditions attached thereto are void under the perpetuity statute. See CONSTRUCTION OF WILLS.

—*Saxton v. Webber*, 83 W., 617, 629.

11. The statute held applicable to realty (changed by ch. 511, L. 1905), and a devise in trust to a city for a charitable use, not sustained. See CHARITABLE TRUSTS.

—*Beurhaus v. Cole*, 94 W., 617, 631.

12. As to future estates, sec. 2038, "the principle is that, in order to make the future estate valid, the suspension of the power of alienation must under all circumstances terminate at or before the termination of the second life. It is not sufficient that it may so happen. It must so happen in every possible contingency". (Approvingly quoted in *Eggleston v. Swartz*, 145 W. 106, see LIFE ESTATES).

13. The power "may be in suspense", and the persons "undetermined during the two lives in being, if at the close of that period the suspension must absolutely terminate", as here, where the contingent remainder "must vest in possession, if it vests at all", "at the termination of the second life in being at the creation of the estate. *Schettler v. Smith*, 41 N. Y. 328; *Ford v. Ford*, 70 W. supra. This satisfied the statute." See also TRUSTS.

—*Tyson v. Tyson*, 96 W. 59, 68.

14. The statute, as to personalty at least, "has no application to gifts for charitable purposes". See CHARITABLE TRUSTS.

—*Harrington v. Pier*, 105 W. 485, 493.

15. Suspension of the power of alienation for twenty-one years from the date of the will, is held permissible under the statute, sec. 2039. See CONSTRUCTION OF WILLS.

—*Will of Kopmeier*, 113 W., 233, 238.

16. Where alienation of realty held by trustees was otherwise unduly suspended, but "the trustees were given the amplest power to sell the real estate or any part of it at any time they might see fit", this was held sufficient to comply with the statute. Secs. 2038, 2039;

17. The statute is "aimed, primarily," not "at the prevention of perpetuities", but "to prevent absolutely taking the title thereto (of realty) out of the field of business for a longer period than that named therein".

18. "We adopt the doctrine that the absolute power of alienation is not suspended within the meaning of the statute so long as absolute power is located somewhere to alienate, regardless of the condition in which the equivalent of the property alienated may be left;

19. That undue suspension of the absolute ownership of an estate is one thing, and unlawful suspension of the power of alienation of real estate is another;

20. That a trust term that does not involve the latter because of its being characterized by a power to convert realty into personalty is valid in any event if, when the power is exercised, such trust does not involve the former;

21. And that, if there is no law as to the former, a trust that does not involve the latter, though it may necessarily continue beyond the statutory period for which the power of alienation of realty under the trust may be suspended, is valid."

22. The decision in *Dodge v. Williams*, 46 W. supra, that "the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty," and that "the common-law rule as to perpetuities respecting personalty" is not in force in this state, is specifically upheld.

23. The twenty-one year term of the common-law "rule is a gross term and an existing period of gestation", and referable to and "limited by existing infancy". *Cadell v. Palmer*, 1 Cl. & F. 372".

—*Becker v. Chester*, 115 W. 90, 106.

24. A private trust may be perpetual, the power of alienation not being suspended. See TRUSTS.

—*Holmes v. Walter*, 118 W., 409, 421.

25. As to various phases of perpetuities, and as to the statutes not applying where a devise is made to a city for corporate purposes though coupled with a condition or limitation, it not being a trust. See CHARITABLE TRUSTS.

—*Danforth v. Oshkosh*, 119 W., 262, 267.

26. As to successive devises of rents and profits, without power of sale, being void. See TRUSTS.

—*Will of Adelman*, 138 W. 120, 123.

27. In construing a long will with "rambling, confused, and incoherent provisions", involving the perpetuity statute, it is held:

28. "A devise of real estate during the life of the longest liver of two designated persons in being is, and has always been, considered a devise for two lives in being,

29. Just as a devise of real estate during the life of the longest liver of ten designated persons in being is for ten lives in being, and this is what was referred to by the expression, 'all the candles must be alight at once'.

30. It is not the number of life estates created which we are to consider, but the number of lives in being which must expire before it can be ascertained in whom the title to the property shall vest. (N. Y. cases)". See also VESTING OF ESTATES.

—*Will of Harrington*, 142 W. 447, 458.

31. As to "the statutes respecting perpetuities", not applying where there is equitable conversion,

32. Nor to "real estate devised to a charitable use", since the amdt. of sec. 2039, by ch. 511, L. 1905. See CHARITABLE TRUSTS.

—*Will of Kavanaugh*, 143 W. 90, 102.

PERSONAL CHATTELS.

See LEGACIES. PERSONAL ESTATE.

PERSONAL ESTATE.

See also SALE OF PERSONALTY. TITLE.

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| Action for admr.'s default, 18. | Presumption of title: |
| Admr. holds as trustee, 33. | Furniture; widow's possession, 10. |
| Advance to heir: | Possession of movable, 28. |
| Admrs. may at own risk, 5. | Question of fact, 28. |
| Conversion of: | Primary, for expenses, debts, 15, 34. |
| Admr. may waive tort, 43. | Recovery of by administrator, 40. |
| Sue on implied contract, 43. | Heirs' equitable interest, 39. |
| Defaulting; executor-devisee, 35. | Lapse of time, when bar, 41. |
| Estoppel rule applies, 35. | When heir converted to use, 40. |
| Domicil: of owner; law, 1. | Sale, of decedents': |
| Executor, residuary legatee, 34. | Admr. absolute power, 4, 9. |
| Held as executor, 34. | General or specific, 4. |
| Goods and chattels; when, 26. | Without any order, 6, 7. |
| Heirs: title by admn., 23, 25. | Before administration, 2. |
| Inheritable: is not, 14. | Notes and mortgages; no order, 7. |
| Except heir-looms, 14. | No license to sell liquors, 8. |
| Jurisdiction: | Order protects; under appraisal, 6. |
| Location confers: non-resident, 31. | Specific legacy; sale of, 9. |
| Legatee or distributee, 19. | Usually sold by admr., 16. |
| Life estate in: | Specific chattels, 16. |
| Converted and invested, 11. | Settlement: |
| Specific delivery: when, 12. | Between admr. and heir, 42. |
| Executor relieved, 12. | Prior to administration, 42. |
| Moving house: personalty, 13. | Without administration, 44. |
| Realty, on either lot, 13. | Party estopped, 44. |
| "Net personal estate," 32. | Special administrator: |
| | Conversion not within sec. 3824, 37. |

1. Personal property follows "the law of the domicil of the owner as to the transfer and disposition thereof."

—*Mowry v. Crocker*, 6 W. 326, 331.

2. The sale of an intestate's property by his widow, before administration granted, confers no title.

—*Hall v. Wilson*, 6 W. 433.

3. "The legal title to the personalty is vested in the administrator".
—*Stark v. Brown*, 12 W. 572, 582.

4. "An executor or administrator has an absolute power of disposal over the whole personal estate of his testator or intestate; and" "it cannot be followed by creditors, much less by legatees, either general or specific, into the hands of a bona fide alienee".

5. An administrator "may, if he choose, but at his own risk", before the claims are adjusted or distribution ordered, assign a note and mortgage as "an advance to the heir."
—*Williams v. Ely*, 13 W. 1, 6.

6. An administrator can "dispose of the personal effects of the intestate, and give a good title, without any order of the probate court authorizing him so to do, because the title in law" vests in him. The only object for an order "would be for his protection in case the personal property did not sell for its appraised value".

—*Munteith v. Rahn*, 14 W. 210, 212.

7. "Administrator has authority to sell and dispose of notes and mortgages * without any previous order."

—*Cleveland v. Harrison*, 15 W. 670, 674.

8. Administrator does not require license to sell liquors. See LIQUORS.

—*Williams v. Troop*, 17 W. 463, 474.

9. The executor can absolutely dispose of assets. "So perfect is this right of disposition in an executor, that he may even transfer an absolute title to a specific legacy. And it is said he may even transfer the title to the property of the estate in payment of his own debt".

—*Roys v. Vilas*, 18 W. 169, 174.

10. The possession by the widow of personal property (furniture) of a deceased intestate, there having been no administration "would not be presumptive evidence of title and ownership," as against the rights thereto of minor children.

—*Resch v. Senn*, 28 W. 286, 291.

11. "The general rule" in case of bequests of the residue to remaindermen, subject to a life estate, is that "the whole property must be converted into money, and invested in permanent securities, by the executor."

12. But where the will indicates that the "legatee for life should enjoy the property in, its then condition, the bequest is specific", and of such property the executor is relieved from further liability on delivering it to such legatee. See also CONSTRUCTION OF WILLS. LIFE ESTATES.

—*Golder v. Littlejohn*, 30 W. 344, 351.

13. In case of a house removed from one lot to another, "the presumption is that it was" attached to the soil in either case, "so as to form

part of the realty. In transitu between the two lots, it was personalty, the subject of conversion". —*Northrup v. Trask*, 39 W. 515, 518.

14. While heir-looms "descend to the heir like real estate", "ordinary personalty has no heritable quality. It does not descend to the heir".

15. "The administrator takes the legal title and possession, and the next of kin has only the mere right to it; or to the proceeds of it, on distribution, after the estate is settled and debts and expenses of administration are fully paid. And for the payment of these it is the primary fund.

16. If the property consists of specific chattels, it is subject to sale or exchange by the intestate in his lifetime; and if it comes to the administrator, it is usually sold by him and converted into money, which is paid out and distributed in due course of administration."

17. "Under a will, the right to a legacy comes by the bequest; upon intestacy, the right to distribution comes by blood. But in both cases, the right is subject to the administration of the estate, and therefore defeasible".

18. "Upon the default of the executor or administrator, the right becomes a mere right of personal action against him".

19. "In any case, when title to personalty comes to legatee or distributee, it comes from the executor or administrator, not from the testator or ancestor. The title of the executor or administrator intervenes between testator and legatee, between ancestor and next of kin. Pending the administration of the estate, the legatee or next of kin has no title". —*Est. of Kirkendall; Cramer's Appeal*, 43 W. 167, 176.

20. "In the absence of any statute of limitation of the time of granting letters of administration, and of any statute making personal property, not an heirloom, inheritable, the only way the plaintiff (heirs) could acquire title to this note as the heirs of M. deceased, would be by administration and the proper order of distribution.

21. This principle has been so recently and expressly decided by this court to be the law in this state, * that an extended reference to authorities elsewhere is unnecessary. In *Estate of Kirkendall, Cramer's Appeal*, 43 W. supra".

22. (Much of the foregoing extracts in the *Kirkendall* case are quoted approvingly with the following cases cited as of like effect: *Smith v. Denny*, 37 Mo. 20; *Leamon v. McCubbin*, 82 Ill., 263; *Hollowell v. Cole*, 25 Mich., 345; *Haynes v. Harris*, 33 Iowa, 516; *Lawrence v. Wright*, 23 Pick. 128, in which cases "the same principle is recognized".)

23. The heirs must obtain title to the note of the deceased, "and avail themselves of the promise of the defendant to pay it, if at all, through the administration of the estate of their father.

24. Their recovery in this action would clearly be no bar to an action by the administrator, when appointed, who will have full title to the note, and may avail himself of this promise of the defendant to pay it."

25. (In *McKenney v. Minahan*, 119 W. post, this and the *Kirkendall* case, *supra*, are quoted with approval and it is said "the general rule in this country is in harmony with the common law, and is the rule here"). See also *NOVATION*. —*Murphy v. Hanrahan*, 50 W. 485, 490.

26. "Personal property" may be construed, under significant conditions, as including only "goods and chattels." See *CONSTRUCTION OF WILLS*. —*Wolf, Extr. v. Schaeffner*, 51 W. 53, 60.

27. In case of a will with no executor named, no administration had or administrator appointed, neither the legatee nor her assignee "could get any title to the personal property, business, and good will" of the testator. *Murphy v. Hanrahan*, 50 W. *supra*.

—*Marshall v. Pinkham*, 52 W. 572, 590.

28. "We think that possession of movable personal property," "is, as a general thing, a question of fact so far as to be testified to by a witness. It may, in a strict sense, be regarded as a conclusion from several facts. But counsel was at liberty to cross examine the witness, and force him to state just what particular facts he regarded as constituting such possession". —*Trowbridge v. Sickler*, 54 W. 306, 309.

29. "The statute (sec. 3940) manifestly intends that the order of assignment shall operate to transfer the legal title of the personal property to the persons therein named. It has in law really the same effect as an order of distribution".

30. And it is held that the assignment in specie of a note and mortgage in the final order of distribution to the heirs, vests in them the title thereof, and that they "can maintain this foreclosure action" thereon.

—*Ford v. Smith*, 60 W. 222, 225.

31. "Location of personalty of a deceased" non-resident, confers local probate jurisdiction. See *JURISDICTION*.

—*Bragg v. Gaynor*, 85 W., 468, 485.

32. "The net personal estate" under section 2172, where the widow elects, defined. See *WIDOW*.

—*Ford v. Ford*, 88 W., 122, 132.

33. "The legal title or ownership of the personal estate of the intestate, S., vested in the defendant as his administrator on his appointment and qualification, and he held this property as the trustee" of all persons interested for administration purposes. *Est. of Kirkendall*, 43 W., *supra*; *Murphy v. Hanrahan*, 50 W., *supra*. See also *CLAIMS*.

—*Miller v. Tracy*, 86 W., 330, 333.

34. Personalty where held by an executor and residuary legatee who dies, may be recovered by an administrator de bonis non. See *CONCURRENT JURISDICTION*.

—*Meyer v. Garthwaite*, 92 W., 571, 576.

35. While the personal property must primarily be first exhausted to pay debts and legacies, yet the rule of estoppel applies to a defaulting executor-devisee. See LEGACIES.

—*Hamilton v. Buckman*, 118 W., 169, 174.

36. Title to personalty of a deceased person can only pass by and through administration. See TITLE.

—*McKenney v. Minahan*, 119 W., 651, 659.

37. In an action for conversion brought by an administrator under sec. 3824, "a conversion during the time of the special administrator is not within the terms of the statute", "a special administrator" having the same "power to take and preserve the property" for the time being, "as a regularly appointed administrator".

—*Dixon v. Sheridan*, 125 W. 60, 65.

38. "Upon the death of any person possessed of personal estate the legal title thereto and the right to possession thereof vests in his personal representative and can only reach the heirs, ultimately entitled thereto, by due course of administration.

39. Therefore in the absence of some sufficient equity in favor of an heir who may have possessed himself of such personalty, the mere fact of his having an equitable interest therein as such not being one,

40. The administrator "has an absolute right to recover the value thereof from such heir in case of his having converted the same to his own use".

41. As to when the administrator is barred from recovery by lapse of time. See LIMITATIONS OF ACTIONS.

—*Palmer v. O'Rourke*, 130 W. 507, 509.

42. An administrator is held bound to a settlement made with the sole heir prior to administration. See SETTLEMENT.

—*McKeigue v. C. & N. W. R. Co.*, 130 W. 543, 546.

43. Personal representatives, in case of conversion of estate property, may "waive the tort and sue on implied contract". See also SERVICES.

—*Heber v. Est. of Heber*, 139 W. 472, 475.

44. One in possession of estate personalty, and giving his note therefor pursuant to an agreement of settlement by the heirs without administration, is held "estopped from asserting the defense of lack of consideration". See also SETTLEMENT.

—*Schoenwetter v. Schoenwetter*, 164 W. 131, 135.

PERSONAL SERVICE.

See SERVICE.

PETITIONS.

See also ADMINISTRATION. ADOPTION. AMENDMENTS. INCOMPETENTS. INFANTS. JURISDICTION. KIN. PARTIES. PLEADINGS. PROBATE OF WILLS.

Amendment after appeal, 5.

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Facts accorded legal effect, 4.

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Petition, etc.—continued

Presumed not sworn to, 1.

Statute, strict compliance, 2.

No inferences indulged, 2.

Verification:

Not signed or dated, 3.

Held sufficient, 3.

1. Where the petition for guardianship of an incompetent, and the verification were signed by the petitioner, but "the jurat not being signed by any person, the presumption of law is that it was not sworn to", and the petition was held insufficient to give jurisdiction.

2. "The rule in such case is, that the requirements of the statute must appear to have been strictly complied with upon the face of the proceedings; and no inferences are indulged in in support of the proceedings". See also INCOMPETENTS.

—*Appeal of Royston*, 53 W., 612, 619.

3. A petition for guardianship, dated, signed, and verified with the verification officially signed by the officer, but not dated, or signed by the petitioner, is held sufficient. See also VERIFICATION.

—*State ex rel. Hoffmann v. Day, Gdn.*, 57 W., 655, 660.

4. As to a petition, "at least in support of" an application to appeal under sec. 4035, "facts stated plainly according to their legal effect should be deemed to have been sufficiently stated", applying liberal pleading rules; and as to the term 'heirs-at-law' to signify necessary statutory relationship. See also APPEAL.

—*Perry v. Scaife*, 126 W. 405, 410.

5. As to amendment of petition after appeal from order thereon. See AMENDMENT.

—*Parsons v. Balson*, 129 W. 311, 319.

6. (As to applications to the court in general under the county court rules, see §§ 458-463, and as to petitions for the various proceedings in county court, see appropriate chapters,—in Zimmerman's Probate Practice).

PHYSICIANS.

See EXPERT TESTIMONY. PRIVILEGED COMMUNICATIONS.

PLEADINGS.

See also AMENDMENT. BILL OF PARTICULARS. DEMURRER. PRAYER FOR RELIEF. SET-OFF.

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 - Bar overrides abatement, 35.
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1. "In the construction of pleadings, the maxim of the common law is, that everything shall be taken most strongly against the party pleading".

2. "But the strict rule of the common law for the construction of pleadings is abrogated by the code. The rule now is, that, 'in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties'". Sec. 2668.

3. "The rule is well settled, that a greater latitude of presumption may be indulged to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by the answer, than where the same objection is taken by demurrer".

4. Where there was a "variance between the pleadings and proofs which misled neither party, and was therefore immaterial", it was proper for the court to direct a finding "in accordance with the evidence, and might have ordered an immediate amendment of the defective pleadings without costs".

—*Hazleton v. Union Bank*, 32 W. 34, 42.

5. Insanity of the defendant cannot be proved in his behalf under a general denial. See *INSANE PERSONS*.

—*Whitman v. Lake*, 32 W. 189, 194.

6. The statute of limitations may be pleaded or waived. "It is purely a personal privilege, and can only be made available by answer".

—*Dudley v. Stiles*, 32 W. 371, 376.

7. "It is in the sound discretion of the court to grant or refuse leave to interpose a supplemental pleading. Were it otherwise the statute would not require an application for leave to do so to be made to the court.

8. It being within the discretion of the court to grant such leave, it seems to follow that the court may impose equitable terms as a condition of granting the same". This rule has been followed in New York and "is believed to be just and reasonable".

9. "The plaintiff had an undoubted right to discontinue his action," and there was "no error in that portion of the order". *McLeod v. Bertschy*, 33 W. 176." But, see DISCONTINUANCE.

—*Damp v. T. of Dane*, 33 W. 430, 434.

10. An amendment to the complaint adding a count on the original consideration, in a suit on an altered note, was allowed at the trial; and the court properly exercised its discretion in refusing to compel the plaintiff to elect which cause of action he relied on. See PROMISSORY NOTE.

—*Matteson v. Ellsworth*, 33 W. 488, 493.

11. "An amendment before trial, which attempts to change the nature of the action from one in tort to one in contract", or vice versa, "is properly not an amendment, but a substitution of a cause of action different in nature and substance from that originally stated", and "the power of amendment does not go to that extent" in this state.

—*Board of Sup. v. Decker*, 34 W. 378, 380.

12. "The same strictness of pleading is not requisite in the assertion of rights in that court (county), as in the courts of general common law jurisdiction.

13. It is sufficient if the petition show a valid subsisting right in favor of the petitioner, and assert it in general terms, although not with the particularity of pleadings in courts of general jurisdiction".

14. "Beyond the petition there are no pleadings in the probate court. No formal answer on the part of the respondent was or could be required". p. 419.

15. "In any action at law or suit in equity, except where there is no answer, the plaintiff is entitled to any relief consistent with the case made by the complaint and embraced within the issue, although not the relief specifically demanded". p. 419.

16. "This statutory rule, expressly governing in all ordinary actions, we extend to proceedings of this nature also, holding the appearance of the party adversely interested tantamount to an answer in other cases". See also PRAYER FOR RELIEF.

—*Brook v. Chappell*, 34 W. 405, 410.

17. "When evidence is admitted on the trial, without objection, great liberality of amendment is exercised by the court in order to conform the pleadings to the facts proven, and give the plaintiff the relief he may seem entitled to."

—*Board of Sup. v. Decker*, 34 W. 378, 380.

18. "The defense, being an equitable one, to be available in an action of ejectment, must be set up in the answer, and be accompanied by a demand for such relief as the defendant supposes himself entitled to."

19. A mere equitable defense is not sufficient. There must be a counterclaim also.”
—*Lombard v. Cowham*, 34 W. 486, 493.

20. “The pleadings may at any time be amended to conform with the issue really tried, or the variance may be wholly disregarded”.
—*Flanders v. Cottrell*, 36 W. 564, 570.

21. As to plaintiff’s allegation “That she was the executrix and residuary legatee”, the “defendant averred that he had no knowledge or information sufficient to form a belief; and this form of traverse put that allegation in issue. To that extent, it is obvious, the affirmative of that issue was upon the plaintiff”.
—*Wittmann, Extr. v. Watry*, 37 W. 238, 241.

22. “It would be outside of the doctrine of amendment, and a violation of all principle and precedent, to permit a plaintiff to amend his complaint by setting up a new and distinct cause of action accruing puis darrein continuance”.
—*Shinners v. Brill*, 38 W. 648, 651.

23. Hereafter a counterclaim must be “so denominated and the appropriate relief prayed”. See also SET OFF.

24. “The variance between a mere legal defense of payment, and an equitable counterclaim for specific performance, is material and vital; and it cannot be disregarded, or cured by summary amendment of the answer on the trial”, in this “action at law”.
—*Stowell v. Eldred*, 39 W. 614, 630.

25. “When answers or defenses admit of lawyerlike argument, such as courts should listen to, they are not sham in the sense of the statute.

26. When it needs argument to prove that an answer or demurrer is frivolous, it is not frivolous, and should not be stricken off.

27. To warrant this summary mode of disposing of a defense, the mere reading of the pleadings should be sufficient to disclose, without deliberation and beyond doubt, that the defense is sham or irrelevant.”
—*Cottrill v. Cramer*, 40 W. 555, 559.

28. “It seems to us that when a party is pointed to the record of an instrument in the pleadings, he is not permitted to answer that he has no knowledge or information sufficient to form a belief whether there is such an instrument or not.”

29. “A party cannot plead ignorance of a public record to which he has access,” and on denial of knowledge or information of the same by the defendant, “no proof of it was necessary under the pleadings.”
—*Goodell v. Blumer*, 41 W. 436, 444.

30. The form of the count in an action for money had and received is extremely simple and “is merely stating that the defendant is

indebted to the plaintiff in a certain sum of money had and received by the defendant to and for the use of the plaintiff'. I Chit. Plead, (16th Am. Ed.) 362; *Grannis v. Hooker*, 29 W. 65." See also ACTIONS.

—*Wells v. Am. Ex. Co.*, 49 W. 224, 230.

31. It is necessary to allege absence of notice to creditors, in a complaint in an action on a claim brought in circuit court. See CLAIMS.

—*Lannon v. Hackett*, 49 W. 261, 272.

32. "At commonlaw, pleading in bar waived all pleas in abatement. Gould 31.

33. The Code, however, allows defenses in abatement and bar to be pleaded in one answer. *Suprs. v. Van Stralen*, 45 W. 675.

34. But the Code does not permit the same defense to be pleaded in abatement and in bar. *Dutcher v. Dutcher*, 39 W. 651.

35. And when the same matter is set up to abate the action and to bar it, by all analogies the plea in bar must override the plea in abatement". (Quoted and approved in 130 W. 61, 66.)

—*Hooker v. Greene*, 50 W. 271, 277.

36. In an action on an account, "the defendants pleaded payment to the plaintiff's complaint before its amendment, and although no answer was filed after the plaintiff amended his complaint, still the defendants had the right to permit their first answer to stand as the answer to the amended complaint, and it does stand as an answer to the same, unless it be withdrawn by them or they answer anew to the amended complaint. *Yates v. French*, 25 W. 661.

37. The case must be treated as though the defendants had answered the amended complaint by an answer of payment".

—*Knips v. Stefan*, 50 W. 286, 288.

38. The corporate character of a city need not be pleaded, notwithstanding the statute, sec. 3205. See JUDICIAL NOTICE.

—*Smith v. Janesville*, 52 W. 680, 681.

39. It is held that "denials and admissions" which "are general of everything between certain words and folios", are "not according to the statute (Sec. 2655), which requires 'a general or specific denial of each material allegation of the complaint'".

—*Collins v. Singer Mfg. Co.*, 53 W. 305, 306.

40. "The defendant may, if an amended complaint is interposed, stand upon his answer to the original complaint, and it will be effectual as to all averments common to both complaints.

41. It may also be sufficiently broad to reach new averments. But if it is not, such new averments will be taken as admitted, unless a

further answer thereto is made. In this case" the original answer was held to be sufficiently broad to cover both complaints.

42. "It should be remarked, however, that we do not think a general denial pleaded to a complaint can operate as a denial of new averments of fact in an amended complaint". —*Kelly v. Bliss*, 54 W. 187, 192.

43. The complaint in a guardian's action to foreclose a contract, failed to show that the agreement had been "confirmed by the court", and "for this defect in the complaint the demurrer thereto should have been sustained."

44. But the introduction of the record by the defendants "supplied the omission in the complaint. Under a familiar rule often acted upon by this court, the complaint may be amended, as well after as before judgment, to correspond with the proofs, or the omission may be disregarded. (Many cases)". —*McKinney v. Jones*, 55 W. 39, 45.

45. The facts, to make the statute of limitations applicable, must be pleaded. See LIMITATION OF ACTIONS.

—*Paine v. Comstock*, 57 W. 159, 163.

46. "Except in those special cases in which the defendant is conclusively presumed to have positive knowledge as to the existence or non-existence of a fact alleged in the complaint, we have no doubt that the defendant may interpose a denial in this form", "upon information and belief".

—*Stacy v. Bennett*, 59 W. 234, 235.

47. "The rule is well settled that a defect of parties plaintiff must be taken advantage of by answer or demurrer, or it is waived".

—*Weatherby v. Meiklejohn*, 61 W. 67, 68.

48. "The allowance or disallowance of an amendment to a pleading setting up a statute of limitations or a plea of usury, rests in the sound discretion of the trial court, under all the circumstances of the case". (Many cases).

—*Smith v. Dragert*, 61 W. 222, 223.

49. In *Denner v. C. M. & St. P. Ry. Co.*, 57 W. 218, the complaint "contained a demand for relief which it was not competent for a court of law to grant, and for that reason alone it was held that the action was in equity".

50. "It is immaterial that the question there arose upon a demurrer to the complaint, while here it rose upon an objection to a jury trial." "We think this case is ruled by the judgment in that case".

—*Fraedrich v. Flieth*, 64 W. 184, 187.

51. As to an answer to the merits, demurrer, and demurrer ore tenus, in equity actions where there is an adequate remedy at law. See EQUITY.

—*Sherry v. Smith*, 72 W., 339, 342.

52. Where the issue under "the answer was the ownership of the notes", and the "proofs showed" a gift, it was held not a "failure of proof", as "the substance of the issue" was the ownership and not the means thereof.

53. "A variance between the allegation and the proofs is not deemed material unless it be made to appear that the adverse party had been actually misled to his prejudice. Sec. 2669; (cases)".

—*McNally v. McAndrew*, 98 W. 62, 64.

54. Trial on a mixed complaint on contract and on quantum meruit, without objection, entitled recovery on either cause proven. See QUANTUM MERUIT.

—*Beers v. Kuehn*, 84 W. 33, 35.

55. On complaint to recover on an express contract, recovery cannot be had quantum meruit. See QUANTUM MERUIT.

—*Pearson v. Switzer*, 98 W. 397, 399.

56. Where the copy served, of a pleading demurred to, differs from the original, for the purposes of the demurrer the copy "is the document under consideration," and "the party serving it is estopped from contending that the original paper differs therefrom". *Knowles v. Fritz*, 58 W. 216.

—*Hunt v. Miller*, 101 W. 583, 584.

57. "The general and well-established rule in pleading is that the pleader should state the particular facts which constitute his cause of action or defense,

58. And a general allegation that the opposite party caused an injury or loss to the pleader by carelessness or negligence, or by his fraudulent acts, is not to be tolerated as a sufficient statement of facts, unless the opposite party is disposed to admit the truth of such general statements by a demurrer, or he takes issue upon them. *Young v. Lynch*, 66 W. 514".

59. "Negligence or incompetency is a mixed question of law and fact, and hence allegations of negligence or incompetency, as applied to the conduct of a party, are not mere conclusions of law, but rather statements of ultimate facts", to be so considered on demurrer, however, objectionable as being too indefinite. (Cases).

—*Doolittle v. Laycock*, 103 W. 334, 336.

60. "An oral decision amending the complaint, made by the court" "was entirely sufficient for that purpose (*Baker v. Baker*, 51 W., 538);

61. And we cannot disregard the court's declaration of what that decision was, reduced to writing and signed ten days later nunc pro tunc; certainly not, upon the conflicting recollection of counsel."

—*Findlay v. Knickerbocker Ice Co.*, 104 W., 375, 378.

62. "The infallible test, by which to determine whether a complaint states more than one cause of action, is, Does it present more than one

subject of action or primary right for adjudication? *Gager v. Marsden*, 101 W., 598.

63. If it stands that test, no matter how many incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary to the litigation for a complete settlement of the controversy as to plaintiff, or for the due protection of their rights as against him or between themselves, there is yet but one cause of action". See also CREDITORS' ACTIONS.

—*Adkins v. Loucks*, 107 W., 587, 594.

64. Payment is not required to be alleged in the complaint, but "must be set up in the answer". See PAYMENTS.

—*Meating v. Tigerton L. Co.*, 113 W., 379, 382.

65. "When a complaint is amended after an answer thereto has been filed, that answer will stand as the answer to the amended complaint, unless it be withdrawn or a new one filed. (Cases)".

—*Ellison v. Straw*, 119 W., 502, 507.

66. An answer, unverified and unsigned by the party, "filed by his authorized attorney, and adopted by the client by proceeding to and through trial thereon, was an,

67. Admission conclusive only so long as the pleading remained unamended, but still evidentiary even after substitution of another answer. (Cases)".

68. Testimony of the attorney as to "collateral circumstances" as to the making of the pleading, was held inadmissible on the ground that it "was not receivable in evidence as an admission",

69. But admissible for "deciding upon the weight to be given to the admission", when the "writing ceases to be a pleading, by reason of presence of a substitute", it being then "of course only as any other declaration of facts—as an evidentiary admission of such facts".

—*Schultz v. Culbertson*, 125 W. 169, 171.

70. As to a claim upon contract for money paid, where on appeal, on the evidence, the circuit "court ordered the claim to be amended accordingly" granting equitable relief, there being "no evidence to support" the legal action, it is said, that,—

71. "It is not permissible to entirely change the nature of a cause of action by amendment,—substituting one in equity for one at law, or one on contract for one sounding in tort. (Many cases)". (Subsequently changed by sec. 2836b, in ch. 219, L. 1915. See *Jilek v. Zahl*, 162 W. post).

—*Charmley v. Charmley*, 125 W. 297, 302.

72. As to detailed powers of amendments of pleadings in county court. See AMENDMENT.

—*Longwell v. Mierow*, 130 W. 208, 211.

73. "The allegation of the complaint on information and belief" "that no license to sell the realty was granted", the positive record information being available,—“are not sufficient to raise such question”. *Union L. Co. v. Chippewa Co.*, 47 W. 245.

—*Steinberg v. Saltzman*, 130 W. 419, 428.

74. "The general rule under the Code is that any matter of fact alleged in the complaint which the plaintiff must establish to make out his cause of action may be disproved under a general denial. (Many cases).

75. That rule manifestly includes proof that the alleged cause of action never existed. (Cases)".

—*Hilliard v. Wis. L. Ins. Co.*, 137 W. 208, 212.

76. Payment is held not required to be pleaded to a county court claim, to be available. See SERVICES.

—*Heber v. Est. of Heber*, 139 W. 472, 474.

77. "When a fact is admitted by clear and necessary implication from other facts expressly stated in the pleading the admission so made is as effective as though it were specifically made and will not be overcome by a mere general denial. (Cases)".

—*Wolf Co. v. Kutch*, 147 W., 209, 213.

78. If want of legal capacity to sue appears by the complaint, advantage thereof must be taken by special demurrer, or it is waived. See also DEMURRER.

—*Jenks v. Allen*, 151 W., 625, 628.

79. Where a "tender was not definitely pleaded in the answer, but the evidence came in without objection and the facts appear from the plaintiff's own evidence", "the pleadings may be considered as amended in the furtherance of justice".

—*Kiefert v. Maple V. M. H. F. Ins. Co.*, 158 W. 340, 342.

80. "An order requiring a complaint to be made more definite and certain is not appealable under the present appeal statute. *O'Connell v. Smith*, 101 W. 68".

—*State ex rel. Schumacher v. Markham*, 162 W. 55, 56.

81. "The ironclad rule that an amendment could not be allowed which would change the action from one at law to one in equity" (*Charmley v. Charmley*, 125 W. supra), "has been changed" "by sec. 2669a (ch. 353, L. 1911)", and "further progress along the same line has been made by sec. 2 of ch. 219, L. 1915 (sec. 2836b);"

82. And an action at law to enforce a land contract, is held "must be continued as an action in equity to reform and enforce the land contract".

—*Jilek v. Zahl*, 162 W. 157, 160.

83. Where "the complaint alleges and the answer admits that the contract was made on a secular day", this, it is said, "might not be conclusive if it appeared beyond doubt that the contract was fully completed on Sunday".

—*Zielica v. Worzalla*, 162 W. 603, 607.

PLEDGE.

See COLLATERAL SECURITY.

POLICE POWER.

See CONSTITUTION.

POLICY OF THE LAW.

Contentions not revived, 3.

Judicial tendency, 4.

Day in court, entitled, 5.

Executor:

Assume to act as, 10.

Unauthorized interference, 11.

Interest, duty, conflict, 1.

Legacy condition:

Capable of performance, 13.

Good moral character, 12.

Promotive of good morals, 14.

Useful trade or profession, 12.

Public charity, 8.

Public charity—continued

Care of destitute, 6.

Helpless from any cause, 7.

Public policy:

Constitutional; is public policy, 19.

Constitutional, not against, 17.

Decisions; when considered, 16.

Determined by constitution, 15.

Legislature settles, declares, 18.

Upheld whether invoked or not, 20.

Valid statutes passed, 15.

Uphold judicial sales, 2.

Somewhat irregular, 2.

Wills, not to avoid, 9.

1. "The policy of the law is to shut the door against temptation and prevent a man from acting in a case where interest will directly conflict with duty".

—*Puzey v. Senier*, 9 W. 370, 376.

2. "It is the policy of this state, evident from its legislation during a series of years, to uphold, to a reasonable extent, judicial sales fairly and honestly made, although the proceeding preliminary thereto, or the record thereof, may be to some extent defective or irregular." Lyon, J.

—*Blodgett v. Hitt*, 29 W. 169, 191.

3. "It is not the policy of the law to stir up the embers or to rekindle or allow to be re-kindled the fires of past strifes and controversies, the flames of which have once been extinguished or the burning quenched by reconciliation and compact between the parties. The law loves peace, and hates dissensions and turmoils and litigations, and all its policy

and maxims are against their being revived or unnecessarily prolonged”.

4. “The tendency of the judicial mind has always been, not to resuscitate contentions once fairly put to rest, nor to permit the way to be opened by which they may be renewed or further agitation succeed”. Dixon, C. J. —*Kercheval v. Doty*, 31 W. 476, 484.

5. “That every man is entitled to his day in court, and must have it, and cannot be affected in his person or his property, unheard or without the privilege secured to him of appearing or being represented in his own defense, if he so desires, is a maxim the force and importance of which every good lawyer appreciates and one which no court ever surrenders”. —*Seifert v. Brooks*, 34 W. 443, 447.

6. “The political necessity and duty of the sovereignty to make provision for the care of subjects or citizens, unable for any cause to take care of themselves, and destitute of other care, has been too long recognized in all civilized countries, too well established under the state of governments of this country, to be regarded as an open question.”

7. “All public asylums, here and elsewhere in the country, for the poor, for the insane, for orphans, for the helpless and destitute by any cause, are witnesses to the political necessity of public charity”.

8. “And we assume, as a principle underlying every consideration in this case, that it is the duty and policy of the state to provide efficient means, in its discretion, for the care of all destitute and helpless persons within it; that public charity, in such cases, is a public necessity”.

—*Milwaukee Ind. Sch. v. Suprs.*, 40 W. 328, 331.

9. “It is the policy of the law not to seek grounds to avoid” wills. See WILLS. —*Dodge v. Williams*, 46 W. 70, 91.

10. “The common law imposed severe liabilities upon one who without authority, assumed to act as executor.

11. It always has been the policy of the law to prevent any unauthorized and unnecessary interference with the estates of deceased persons, and to confine the settlement of such estates to the legally appointed and qualified executors or administrators, acting under the scrutiny and control of the proper courts”.

—*Samuel v. Est. of Thomas*, 51 W. 549, 553.

12. A legatee’s right to a legacy, at a certain time “is made dependent upon his being of good moral character and having in the meantime learned some useful trade, business, or profession, in the judgment of the executors.”

13. “We must hold that the clause in question is capable of performance by any person of ordinary intelligence, and not contrary to public policy. It is designed to put the beneficiary under wholesome restraint.

14. It is not in contravention of good morals, nor any law, nor any matter of conscience, but is promotive of good moral character. It is in no sense indefinite nor uncertain." See also CONSTRUCTION OF WILLS.

—*Webster, Extr. v. Morris*, 66 W. 366, 389.

15. "The term 'public policy' is frequently used very vaguely". "It is, however, quite a definite thing. Public policy on a given subject is determined either by the constitution itself or by statutes passed within constitutional limitations.

16. In the absence of such constitutional or statutory determinations only may the decisions of the courts determine it. (U. S. cases).

17. This court has said: 'We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy' (Julien v. Model B. L. & I. Asso., 116 W. 79), and the remark is certainly correct.

18. When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court".

19. "A constitutional statute cannot be contrary to public policy,—it is public policy."

—*Borgnis v. Falk Co.*, 147 W. 327, 351.

20. Where the situation is "one where the public policy of the state is involved", "it is the duty of the court to enforce such policy, irrespective of whether it is invoked by a litigant or not. (Case)".

—*Thronson v. Universal Mfg. Co.*, 164 W. 44, 70.

POOR HOUSES AND POOR PERSONS.

See PAUPERS.

POST-NUPTIAL CONTRACT.

See MARRIAGE CONTRACTS.

POWER.

See also CHARITABLE TRUSTS. CONSTRUCTION OF WILLS. FUTURE CONTINGENT ESTATES. DEEDS. LIFE ESTATES. MORTGAGES. SALE OF REALTY. TRUST VARIATION. VESTING OF ESTATES, ETC. WILLS.

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1. An ordinary quit-claim deed "contains no apt words indicating an intent to sell under a power. On the contrary, its language naturally and properly relates only to the interest which the grantor owned in the land."

2. "And where such is the case, the party making the conveyance actually owning an interest (life) upon which it can take effect, it is held to be only a conveyance of that interest, and not an execution of the power" of sale under a will, sale being made by quit-claim only.

—*Towle v. Ewing*, 23 W. 336, 338.

3. Under sec. 2156, as to a power to sell in a mortgage, "it is clear that the executor or administrator of the mortgage(e) may execute the power". See also FOREIGN EXTRS. & ADMRS.

—*Hayes v. Frey*, 54 W. 503, 515.

4. "The power to sell, whether expressly granted, or whether arising by implication, is an authority given by the will, and comes precisely within the definition of a power as defined by the chapter on powers, Sec. 2102".

5. "Held that the authority of the executors to dispose of the estate (realty) of the testator was a power, the execution of which required the united action of all the executors;

6. Or, in other words, that the case was within sec. 2137, which provides that where a power is vested in several persons all must unite in its execution. The executors were vested with authority under the will to 'convert all the real estate not specifically devised, into money'. 66 W. 399".

7. Where a written agreement for the sale of realty under such power in the will, "was signed by two of the executors, but the third executor did not sign it, and refuses to carry out the contract by joining in the deed of conveyance", a court of equity will not "compel a specific performance of the agreement,"

8. Unless "there are some circumstances which show that the dissenting executor, in refusing to join in the conveyance, is acting capriciously and arbitrarily and not for the best interests of the estate"; and such specific performance was refused.

9. And Subd. 3, sec. 4971, ordinarily giving a majority of public officers, the right to exercise a conferred authority, is held not to apply because of other express authority under the statute of power.

10. It is said that if the proceeds were invested in personalty, "one executor might then make a valid sale of the assets without the consent of the others," but that where the land has not actually been converted, "it is necessary for all the executors to join in the sale and conveyance to give a good title".

—*Crowley v. Hicks*, 72 W. 539, 541.

11. Life estate with power of sale and use of corpus if necessary, construed. See LIFE ESTATES.

—*Larsen v. Johnson*, 78 W., 300.

12. A will devised realty to the wife for life, and provided that after her decease it should be sold and \$200 of the proceeds paid to a son and the balance to a daughter; the will also authorized the wife to sell,

if she and the son and daughter agreed thereto, and to "pay the above sums, according to the above conditions," out of the proceeds.

13. Held, though the son "had been paid \$200" prior thereto, that a deed and mortgage by the wife and daughter without proof that an "agreement was made by the three, altogether", such instruments were "executed without authority and contrary to the express terms of the will, and hence must be regarded as a nullity."

14. "The mortgages" were, in legal effect, conveyances. *Rowell v. Williams*, 54 W., 636 (See DEEDS).

15. "The question involved being one of power, it is immaterial whether the deed was executed by the plaintiffs or either of them with knowledge of its contents or for a valuable consideration, and the same is true in respect to the respective mortgages". The plaintiffs were the wife and daughter, who brought the action to have the instruments declared void. —*Goebel v. Thieme*, 85 W., 286, 289.

16. The testator gave to H., executor, estate in trust, to "pay over to my daughter E. any portion of the principal of said trust fund, as it shall seem to him proper, for her comfort and support." This is an express trust and a mixed trust and power, or a trust power. Sec. 2123; *Perry, Trusts*, 20.

17. The power is imperative, and imposes a duty on the donee or grantee, the performance of which may be compelled by action for the benefit of the party interested, and not a power made expressly to depend on the will of the grantee whether it shall be executed or not.

18. Upon the death of the original trustee, appointed by the will, the trust vests in the court, with all the powers and duties of the original trustee, to be executed by some person appointed for that purpose under the direction of the court, Sec. 2094.

19. This power joined to the trust is imperative and must be executed, and the general trust is settled and fixed by the testator or settler of the trust. It makes no difference with such a trust power if the mode and details of its execution are left to the discretion or judgment of the trustee. *Perry, Trusts*, supra.

20. A power annexed to the trust, which may be executed or not in the judgment or discretion of the trustee, is a mere naked power, and will not devolve upon a trustee appointed by the court upon the death of the original trustee. Such a power must be executed by the original trustee and by no one else, and, if not executed by him, fails."

21. The "discretion, or 'as it shall seem to him proper'," relates to "the portion of the principal". "The beneficiary is entitled to any portion of the fund necessary or 'proper'," and fixing the 'portion' "is the duty of the trustee, in the first place. Such a discretion is by no means unlimited." And a payment of \$1000 out of the principal, by a subsequently appointed trustee, is sustained, and the circuit court reversed.

22. "The statutes of Massachusetts, Maine, Vermont and New York are like ours in this respect, and the cases cited" "are clearly in point."

23. "We cannot (so) hold, and it is not necessary", that, "a trustee can be appointed to carry out the trust and execute the power in any case of an express trust", under our statute.

—*Osborne v. Gordon*, 86 W., 92, 95

24. "A mixed trust and power," to be executed by an appointed trustee, citing *Osborne v. Gordon*, 86 W., supra. See CHARITABLE TRUSTS.

—*Sawtelle v. Witham*, 94 W., 412, 415.

25. As to a power of sale by a trustee, by implication, where no express power is given, or where the executor is forbidden to sell. See CHARITABLE TRUSTS.

—*Beurhaus v. Cole*, 94 W., 617, 630.

26. It is "the general principle that a power of sale, however peremptory in form, does not operate as a conversion in aid of a particular purpose of the testator where the testator's plan or purpose fails by reason of illegality, lapse, or other cause.

27. In such event an intention to convert realty into personalty will not be implied, and the property retains its original character, and goes to the heir or next of kin as real or personal estate, as the case may be. *Read v. Williams*, 125 N. Y. 571". (Approvingly cited and restated in *Harrington v. Pier*, 105 W. 485, 496 See CHARITABLE TRUSTS.)

—*McHugh v. McCole*, 97 W. 166, 175.

28. A will gave the widow a life estate, with "the right to sell and dispose of all" the property, and "full right and power to hold" the same and to conduct the business as the testator could, "for supporting herself and family";

29. In the circumstances of "the present case", "the intent of the testator was to give his widow power to mortgage the property as well as to sell and convey it". *Kent v. Morrison*, 153 Mass. 137, 10 L. R. A. 756.

30. "In so holding, we are not to be understood as holding that a simple power of sale will authorize a mortgage".

31. In a foreclosure and reformation suit, it is held, that ordinary mortgages without mention of the power, covered only the widow's life interest, but that reformation be had, on the facts, to include therein the power.

32. "The well-established rule at common law is that where a person has both an interest and a power, a conveyance which contains no apt words indicating an intent to exercise the power will be held to be merely a conveyance of the interest, and not an execution of the power. 4 Kent. Comm. 334, 335; (other citations).

33. This rule was recognized and adopted in this state in" *Towle v. Ewing*, 23 W. supra; and, held in New York on a similar statute, and "we are content to adopt this construction", to the effect that the statute sec. 2149, does not change the rule, being intended only to apply

“whenever a single power exists under which a grantor may convey”.
Mut. L. Ins. Co. v. Shipman, 119 N. Y. 324.

34. (But, where the power to dispose is “not accompanied by any trust”, under sec. 2108 of the statutes, a deed of sale without mention of the power, is held to convey the fee, and the instant case is distinguished as involving a trust. *Auer v. Brown*, 121 W. post).

—*Lardner v. Williams*, 98 W. 514, 519.

35. “This court has decided that all the executors must join in the execution of the power of sale under the will under which they act”.

—*Crowley v. Hicks*, 98 W. 566, 572.

36. Where a city as remainderman in a trust estate, agreed that expenses for repairs and improvements in trust property, should be paid out of the principal, it is held that such agreement “was ultra vires and totally so, and as said before, without regard to whether such expenditures were in part for permanent improvements, strictly so called”,—the will devoting “the income to the payment of all repairs on the buildings”, and there being available income.

37. “There is no special power given to do anything to the buildings except to keep them in repair. As a general rule, unless such special power be expressly given to trustees, they cannot exercise it at all. (Citations)”.

38. “There is no power in the trustees to change the plain scheme of the will, no power in the court to authorize any such change, and no power in the city of W. to vary it in any manner”.

—*Mulberger v. Beurhaus*, 102 W. 1, 9.

39. A devise to the wife of the estate “for and during her natural life”, and “the full and sole control”, and “the right to devise,” to the family members, “shares as she may see fit at the time of making her last will”,—is “intended to confer a life estate”, “accompanied by a power to apportion the real estate among the children by will”, following *Knox v. Knox*, 59 W. 172 (See PRECATORY TRUSTS);

40. It did not give “to her the additional power of disposition, during her life”, and “clearly conferred upon the widow a special power in trust, as defined by sec. 2122; for under that section a ‘class of persons other than the grantee’ was entitled to benefit from the disposition authorized by the power”.

41. And the power being “unexecuted, its execution shall be adjudged in the circuit court for the benefit equally of all” the children. Sec. 2127.

—*Derse v. Derse*, 103 W. 113, 115.

42. “It is firmly established, both at common law and by statute, that a special power, to be executed by will, cannot be executed in any other way, or released, or extinguished so as to cut off a taker not participating in the extinguishment and who is entitled to take in case the

power be not executed in the manner provided by the donor of the power."

43. "If the title be liable, upon the happening of a contingency, to go over to other persons, their interests will not be affected by the conveyance."

44. "If there is an estate with a devise over which may take effect on a contingency, such estate cannot be used for the benefit of the precedent holder without the consent of the contingent devisee or vendee. (English cases.)" See also TRUST VARIATION.

—*Ruggles v. Tyson*, 104 W., 500, 517.

45. Power of attorney to sell realty does not confer power to mortgage. See DEEDS. —*Minnesota S. Co. v. McCrossen*, 110 W., 316, 320.

46. As to power of sale in a will not conferring power to mortgage, and as to the power of court to authorize transfers of title. See SALE OF REALTY.

—*Bloor v. Smith*, 112 W., 340, 346.

47. "The principle is familiar that the appointee under a power takes under the instrument creating the power, not under that executing it.

48. His title rests upon the act creating the power and takes effect as if created by the original instrument. *Doolittle v. Lewis*, 7 Johns. Ch. 45; 18 Am. & Eng. Ency. of Law, 925". See also INSURANCE.

—*Ledebuhr v. Wis. Trust Co.*, 112 W., 657, 661.

49. Where a "trust attempted to be created" by a will, failed—in that "no duties being imposed upon the trustees such as are permitted by sec. 2081, to support the grant or devise in trust, so as to vest the legal estate in the trustees", it is held,—

50. There was "a good and valid power in trust to sell and convey" the lands, either under sec. 2082 or 2084, that being also "the primary object of the trust".

51. Where "they must sell whenever the beneficiary so elects", "the duty of the trustee to sell is clearly absolute, and not discretionary".

52. Such sale is valid, though "made to the life tenant, who had an election, as to when it should be made", the price being adequate, and there being no allegation of failure "to make every exertion to obtain the highest possible one".

53. "When power of investment of proceeds exists", "it is recognized that acceptance of mortgage on the property sold is a proper exercise of the trustee's discretion", for "a reasonable amount" of the sale price. And a low rate of interest 2%, and a mortgage of \$15,000, on an \$18,000 sale, for 25 years, while not approvable, was here sustained as injuring no one, the life tenant outliving the term.

—*McLenegan v. Yeiser*, 115 W. 304, 309.

54. "Where the sale of real estate is commanded by a will, obviously as a part of the settlement of the estate within the province of the probate court, and preliminary to the final accounting and distribution,

55. The implication, in the absence of anything to show a different intention, is that the executor selected by the deceased to administer said estate and to execute said will, is the person to perform such step, which is a part thereof. (Cases)."

56. In such case sec. 2128 does not apply, as by so "directing such sale", the testator impliedly "does designate such executor as the person to perform the act. *Meakings v. Cromwell*, 5 N. Y. 136". See also CONSTRUCTION OF WILLS. —*Lawrence v. Barber*, 116 W. 294, 301.

57. As to implied equitable conversion, power of sale by implication only. See VESTING OF ESTATES, ETC.

—*In re Albiston's Est.*, 117 W. 272, 274.

58. Where land was devised to the wife "for her life" with "full power and authority" of disposition thereof, unaccompanied by any trust, a conveyance thereof to a purchaser for a reasonable price, by warranty deed "making no specific reference to the will", "nor to the power of sale therein contained",

59. Is held to convey to the purchaser "a fee by virtue of" sec. 2108, and "that no rights remain in" the remainderman "by virtue of that statute", such sale being "an execution of the power as sec. 2108 contemplates". —*Auer v. Brown*, 121 W., 115, 122.

60. "The weight of authority seems to be that a mere power to sell, such as that of a power of attorney to sell real estate, confers no power to mortgage. (Citations).

61. But when such powers, coupled with charges upon the estate, are conferred by wills or other instruments, and the executors are intrusted with its management to carry out and discharge such obligations, no such limitation is implied.

62. Under such circumstances the extent of the power conferred by such words as 'to sell', 'convey', and their equivalents is to be ascertained from the intention of the donor of the power in the light of the purposes and objects of the trusts as expressed in the grant".

63. Such rule was adopted in *Lardner v. Williams*, 98 W. supra, and here "the language, 'generally to have, manage, and control my estate as fully as I might, if living, do myself', is," together with other circumstances, construed as including the power to mortgage and justifying the same.

64. Such "mortgage being valid", and no other "means of payment available", another mortgage to pay the same, together with delinquent taxes, was held proper,

65. Though "the law imposes the duty of paying them (taxes) on the life tenant", the payment thereof being necessary to protect the infant remainderman's estate.

66. Such subsequent mortgage, after the power under the trust had expired, was held proper, as to possible future estates, as "within the contemplation of ch. 300, L. 1899", (Secs. 3519c, et seq.), such proceeding being adopted.
—*Lueft v. Lueft*, 129 W. 534, 540.

67. On execution of a power coupled with a life estate, under sec. 2108, to change the title "into a fee simple" as to the purchaser, there must be "a valuable consideration". See also LIFE ESTATES.

—*Perkinson v. Clarke*, 135 W. 584, 592.

68. A foreign executor with power of sale may convey realty, without probate here, on filing authenticated copy of the will with the register.

69. "The statutes both in Wis. and Mich. provide that the sole surviving executor can rightfully execute the power. Sec. 2137; Mich. sec. 5628." So held, there having been three originally. See also FOREIGN WILLS.
—*Ills. S. Co. v. Konkel*, 146 W. 556, 570.

70. Devise for life 'with the right to use and consume' as 'necessary', held to give power of sale of both personalty and realty. See also LIFE ESTATES.
—*Otjen v. Frohbach*, 148 W., 301, 312.

71. As to trustees under a will having implied power to lease for a term of ninety-nine years, under court's advice. See TRUST VARIATIONS.
—*Upham v. Plankinton*, 152 W., 275, 291.

POWER OF ATTORNEY.

See DEEDS.

POWER OF SALE.

See POWER.

PRACTICE.

See RULES OF PRACTICE.

PRAYER FOR RELIEF.

See also PLEADINGS.

Amended at trial, 7.

Contract to value of, 7.

Consistent with facts, 3.

Court not limited to, 2, 3.

Demurrer not lie to, 6.

Have established trust, 4.

Not prayed for, 4.

Nature of action by, 1.

Whether legal or equitable, 5.

Not go to jurisdiction, 2.

1. "As a general rule * the nature of the action is to be determined by the prayer for relief", under the code and especially when the pleadings partake of the nature of both legal and equitable action.

—*Gillett v. Treganza*, 13 W. 472, 476.

2. "The prayer for relief does not go to the jurisdiction of the court. It may grant any relief consistent with the case made, without any prayer, or different from that prayed".

—*Amory v. Amory*, 26 W. 152, 161.

3. "The county court, sitting in probate," is not "limited to granting or refusing the precise relief asked", but, "acting within its jurisdiction, it may, especially where the parties opposed in interest are present or are represented, grant any relief consistent with the facts proved or admitted and which the justice of the case demands".

4. The county court's order establishing a nuncupative codicil, being simply reversed by the circuit court, the supreme court holds that without such relief being prayed for, the circuit court should have established a trust in the residuary legatee to pay certain sums not set forth in the will.

—*Brook v. Chappell*, 34 W. 405, 410.

5. It seems that "the nature of the relief demanded in the complaint", "determines the character of the action", whether legal or equitable.

—*Lowber v. Connit*, 36 W. 176, 182.

6. "A demurrer does not lie to a demand for judgment, and it was so held in *State ex rel. Mitchell v. Smith*, 14 W. 564".

—*Tewksbury v. Schulenberg*, 41 W. 584, 592.

7. The prayer was allowed to be amended at the trial "consistent with the facts proven", and to allow recovery for value, instead of on contract for services. See SERVICES.

—*Slater v. Est. of Cook*, 93 W., 104, 107.

PRECATORY TRUSTS.

"All the proceeds", meaning, 10.

Charitable trust:

Special, "recommend", direction, 17.

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Codicil language, precatory, 40.

Former wills considered, 37.

General rules; principles, 1.

(1) Technical language unnecessary,
2.

(2) Precatory; may create trust, 3.

(3) Mandatory or discretion, 4.

General rules—continued

(4) Person, estate, clearly defined, 5.

Approved and followed, 18, 25, 36.

Precatory words; aptly stated, 11.

Imperative if necessary, 33.

Not as far as older cases, 14.

Intention is clear, 15.

Reasonable certainty, 16.

When held imperative, 13.

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"Provision", contingent remainder, 31.

Specific instances:

- "Desire" trustee appointed, 32.
- Command or direction, 33.
- "Full confidence", "request", 6.
- Intent to create trust, 8.
- Persons and quantum clear, 7.
- "Full trust and confidence", 19.
- Devise, absolute fee, 20, 21.
- Not "limiting" ownership, 20.
- Words held advisory merely, 18, 19.
- Widow was remarriageable, 25.
- After-born children, 29.
- "Provision" undetermined, 31.
- Testator had in mind, 30.

Specific instances—continued

- Life estate, remainder, 27.
- Widow to be trustee, 28.
- "Wish that" property, 26.
- Without inheritance words, 26.
- Will so arrange affairs, 35.
- Not mandatory words, 39.
- Wife absolute estate, 36.
- Trust by intention, 34.
- Trust in first taker, 22.
- Intent appears clear, 23.
- Read from language, 24.
- Words of inheritance, 26.
- Absence, no significance, 38.

1. "The general rules or principles which the law writers upon this subject (precatory trusts) have deduced from the adjudged cases, as applicable to the proper construction of wills of the kind under consideration", taken "for our guide in construing the will before us", are thus given;

2. "First. 'It is not necessary that technical language should be used to create a trust. It is enough that the intention is apparent'.

1. Jarman on Wills, (5th ed.) 385, and note.

3. Second: 'That precatory words used in a will,—that is, words of recommendation, entreaty, request, wish, or expectation,—addressed to a devisee or legatee, may be sufficient to create a trust in favor of the person or persons in whose favor such expressions are used'. (Citations,—Jarman, Lewin, Story, Hill and Redfield).

4. Third. In order to determine whether precatory words in a will create a binding trust, 'the real question always is whether the wish, desire, or recommendation expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion'. (Citations).

5. Fourth. In determining that precatory words in a will create a trust, the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and the quantum of the estate to be given to such person or object is also clearly defined. (Citations and note to *Harrisons v. Harrison's Adm.*, 44 Am. Dec. 365, 369)". (Followed in *Conlin v. Sowards*, 129 W. post.)

6. And in a will giving "unto my wife K., her heirs and assigns forever, all my real and personal estate, * having full confidence in my said wife, and hereby request that at her death she will divide equally, share and share alike, in equal portions, as tenants in common, between my sons and daughters (naming them), all the proceeds of my said property, real and personal, goods and chattels, hereby bequeathed",—it is held:

7. That the persons "are clearly pointed out", and "that the quantum

of the estate which the testator requested should go to such parties", is "sufficiently and clearly indicated", and,—

8. "We have no hesitation in holding that it was the clear intent of the testator to create a trust in favor of the children named in the will; and that the language used by the testator was intended by him to govern and control the conduct of his wife in the disposition of his estate;" and,—

9. "It is clear that his will was that his children should take the property after the death of his wife", that the wife received but a life estate, and that his request "must be construed as directory and not simply as advisory".

10. The words "all the proceeds of my said property", are held to mean the entire body or capital of the estate.

11. The case of *Warner v. Bates*, 98 Mass. 274, is quoted at length approvingly as being "very aptly and clearly stated by Bigelow, C. J.", and in which as to precatory words, it is said:

12. "In such case the words used by Lord Loughborough are applicable: 'When a person recommends to another who is independent of him, there is nothing imperative;

13. But if he recommends that to be done by a person whom he has right to order to do it, the mode is only civility!'"

14. While "we are inclined not to go" as far as "the older cases in England and in this country, in establishing trusts upon the strength of precatory words", yet,—

15. "We are disposed to apply the doctrine only in cases where it is clear that, on the whole, it was the intention of the testator to create such trusts by the use of such words, and,—

16. Where the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the use and control of the property devised or bequeathed".

—*Knox v. Knox*, 59 W. 172, 178.

17. In a trust "in aid or encouragement of charitable purposes", generally, "held void, and an alternative "I would recommend that the same be used to establish a school, etc.," is held valid in case "we may give it (the word 'recommend') the meaning of command or direction to use such surplus to establish the school in the event indicated. *Knox v. Knox*, 59 W. supra". And it is so held. See also CHARITABLE TRUSTS.

—*Webster v. Morris*, 66 W. 366, 397.

18. Following and quoting *Knox v. Knox*, 59 W., supra, "as the tests to be applied in deciding whether a precatory trust is created," it is held that the precatory words are "merely advisory and not in any respect obligatory.

19. "After devising all his estate to his wife, 'the real estate in fee simple, and the personal estate by a like absolute ownership,' he proceeds: 'I do this in full trust and confidence that she will provide for

the distribution of the same by her last will' " to their children, naming them, " 'in such proportions as shall be just and right'.

20. Had he stopped here, the argument would be very strong that he intended these words to be obligatory upon his wife, notwithstanding the previous devise of a fee, and the case would be in this respect very like the *Knox Case*, above referred to;

21. But he proceeded to say in the same sentence: 'But this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution'." Held that the widow received "an absolute fee simple" estate. (Approvingly quoted and followed in *Conlin v. Sowards*, 129 W., post). —*Tabor v. Tabor*, 85 W., 313, 317.

22. "Precatory words in a will, following" a general disposition, expressing a desire as to ultimate disposition, "may be construed as creating a trust in such first taker for the benefit of the other person or persons named,

23. If that, under all the circumstances, appears clearly to have been the intent of the testator,

24. And such intention can be read from the language used by him by the aid of those liberal rules which obtain for the purpose of giving effect to testamentary words".

25. Following *Knox v. Knox*, 59 W. supra, and restating and applying the rules there given, where the widow was remarriageable, and there were three minor children, the two younger born after the will was made, and the income of the estate probably "would exceed the amount necessary to support the widow", and support and educate the children, it is held,—

26. "That the will",—first giving the widow the whole estate, though without "words of inheritance", and then stating, 'it is my wish that such property and estate above devised, or so much thereof as my said wife may be possessed of at her decease, shall go or be by her given to our child or children, if any there be then living', and appointing her executrix,—

27. "Should be read as intending to give the property" to the widow "for life, with remainder over to such of his children as may be living at the termination of the life estate,

28. And making respondent (widow) a trustee for the property so far as required to effect that purpose", with "proper bond to be given".

29. Such construction of "the will is absolutely essential to sustain it at all as against the two younger children", as after-born children, under sec. 2286.

30. The facts indicate that the testator "had in mind the probability of after-born children and intended to make some provision for them. In re *Donges's Est.*, 103 W. 497 (See AFTERBORN CHILDREN)."

31. But whether such "contingent remainder" to the after-born children is "a provision within the meaning of" sec. 2286, so as to insure the widow a life estate in the whole property,—seems not determined. See also *APPEAL*. —*Swarthout v. Swarthout*, 111 W. 102, 107.

32. The request in a will, 'I desire the said probate judge to appoint my said executor, H., trustee, to assume control, etc.,' a trustee being necessary, "under the circumstances created what is called a precatory trust.

33. When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction. (Cases *supra*).

34. In a will a trust may be created by intention of the testator discovered by aid of judicial construction, as well as by words taken in their literal sense". See also VESTING OF ESTATES, ETC.

—*Wolbert v. Beard*, 128 W. 391, 397.

35. Where a testator gave to the widow 'all the rest, residue, and remainder of my estate', 'to have and to hold' 'forever', and he then states: 'It is my wish that my said wife E. will so arrange her affairs that whatever property may be left at her death the same will be divided' between two daughters,—

36. Quoting from and following "the principles announced" in *Knox v. Knox*, 59 W., *Tabor v. Tabor*, 85 W., and *Swarthout v. Swarthout*, 111 W., *supra*, it is held that 'the testator gives to the wife "all the rest, residue and remainder" absolutely.

37. Former wills are considered as bearing on the testator's intention.

38. "Under our statutes the absence of words of inheritance is of no significance. Secs. 2206, 2278: *Baker v. Est. of McLeod*, 79 W. 534, 545 (See VESTING OF ESTATES, ETC.)".

39. "We are not aware of any well-considered adjudication holding that such mere 'wish' of the testator that an executor or executrix would 'arrange her affairs' or property in some prescribed way has been held to be mandatory".

—*Conlin v. Sowards*, 129 W. 320, 324.

40. Language in a codicil, not positive, construed as precatory and not modifying the will. See CODICILS.

—*Moore v. Moore*, 138 W. 602, 604.

PREFERRED CLAIMS.

See CLAIMS. FUNERAL EXPENSES.

PREJUDICE.

See COUNTY JUDGE.

PRESUMPTION.

See also EXECUTION OF WILLS. PRESUMPTION OF DEATH.

- Administrator; appointment, 11.
 - Consent of all; presumes all, 12.
 - Reason not disclosed, 11.
 - Good legal cause, 11.
- Adoption:
 - Abandonment finding, 20.
 - Record being silent, 20.
- Claims:
 - Notice for; final judgment, 30.
 - Nothing to the contrary, 30.
- Deeds:
 - Admr's.: recitals, license, etc., 7.
 - Prima facie, title, 7.
 - Will was proved, 9.
 - Record rebut, 9.
 - Delivery at its date, 23.
 - Life tenant: without knowledge, 24.
 - Deed on land contract, 24.
 - Possession under will, 25.
 - Not adverse; no notice, 25, 26.
 - Not to be whole contract, 21.
- Does not run backward, 32.
- Existence at certain date, 32.
- Error: must be shown, 19.
- Reason for order, presumed good, 18.
- Evidence of witness:
 - Favor of party calling, 5.
- Existence:
 - Beneficiary in policy, 27.
 - Person, relation, state of things, 28.
 - Until contrary shown, 29.
- Foreign laws; the same, 4.
- Intestacy, not testacy, 22.
- Jurisdiction:
 - Judgments, superior courts, 15..
 - Not when record shows, 6.
 - Probate notice; record silent, 17.
 - After fifteen years, 17.
 - When record silent, only, 6.
- Law, knowledge of, 39.
- Minor:
 - At home; father's direction, 13.
- Necessaries; not liable, 10.
- Notes:
 - Endorsement; about date, 3.
 - Not to be whole contract, 21.
 - Paid; taken up, cancelled, 8.
 - Overcome; other dealings, 8.
 - Purpose of several unlawful, 2.
 - All are presumed liable, 2.
 - Otherwise, purpose lawful, 2.
- Records:
 - Filing endorsement, correct, 14.
 - Though antedated, 14.
 - Other business intervened, 16.
 - Probate records, loosely kept, 33.
 - No guardian ad litem or letters, 34.
 - Presumed after 60 years, 35.
 - Judge know law and acted, 35.
 - Proceeded regularly, 36, 37.
 - Executor's deed valid, 38.
- Signature and writing, 31.
- No suspicious earmarks, 31.
- Twenty year payment, 1.
- Limitation statute additional, 1.

1. A party is entitled "to the protection of the common-law presumption of payment after twenty years" as to a stale demand, notwithstanding the statute of limitations, which is simply additional.
—*Sanderson v. Olmsted*, 2 Pin. 224, 226.

2. "Where the common design (of several) is unlawful, the law presumes" assent of all, "but where it is lawful, such assent is a matter of fact to be proved."
—*Richardson v. Emerson*, 3 W. 319, 321.

3. Endorsement of a note is presumed to be at about its date. See PROMISSORY NOTES, ETC.
—*Mason v. Noonan*, 7 W., 609, 618.

4. The presumption is that foreign laws are the same as in the state of the court. See FOREIGN LAWS.
—*Rape v. Heaton*, 9 W. 328, 338.

5. "Presumption is, that the testimony of a witness will be in favor of the party calling him".

—*Juneau Bank v. McSpedon*, 15 W., 629, 631.

6. The presumption of jurisdiction is only "where the record is silent in relation" to jurisdictional facts; not where the "want of jurisdiction appears affirmatively by the record". See also JURISDICTION.

—*Blodgett v. Hitt*, 29 W. 169, 178.

7. Recitals in an administrator's deed as to license, appointment, etc., make the deed "prima facie evidence that the title" passed. See DEEDS.

—*Chase v. Whiting*, 30 W. 544, 548.

8. "The presumption, when a note has been paid is, that it has been taken up by the maker, or otherwise cancelled". This is not overcome by showing mere payments of money, without showing also "that there were no other debts or dealings to which the payments could have been applied".

—*Somervail v. Gillies*, 31 W. 152, 156.

9. An administrator's deed is presumptive evidence that the will was proved and that the prior proceedings were regular; however, when the record fails to show that the will was proved, then the presumption is "that no will had been probated". See DEEDS.

—*Chase v. Ross*, 36 W. 267, 272.

10. There "can be no presumption, that the husband is liable to pay for" necessities furnished his wife. See NECESSARIES.

—*Brown v. Worden*, 39 W. 432, 434.

11. Where "the record does not disclose the reason for the appointment, it must be presumed that the appointment was for some good cause in the law." See also ADMR. DE BONIS NON.

12. Where the record discloses that an "appointment was made by the mutual consent of all parties interested", it must be presumed, that the interested objecting widow and administratrix "was present consenting to such appointment". —*Oakes v. Est. of Buckley*, 49 W. 592, 598.

13. A minor working at home is presumed to act under his father's directions. See PARENT AND CHILD.

—*Gerhardt v. Swaty*, 57 W. 24, 37.

14. With no sufficient evidence to "the contrary we must assume that the date of filing the findings is correctly stated by the clerk in his endorsement", though they were antedated some months.

—*State v. Reesa*, 57 W. 422, 424.

15. "Reasonable presumptions are always made in favor of the judgments of superior courts, and the presumption of jurisdiction is indulged until something in the record shows a want of it".

—*Reinig v. Hecht*, 58 W. 212, 213.

16. Presumption that other business prevented hearing on the day fixed. See RULES OF PRACTICE.

—*Field v. Apple River L. D. Co.*, 67 W. 569, 571.

17. Where the "record is merely silent" as to the number of weeks publication of a notice of probate, after fifteen years, the validity of the probate is presumed. See JURISDICTION.

—*Portz v. Schantz*, 70 W. 497, 505.

18. The grounds not appearing, "the presumption is that the court had good and sufficient reasons and grounds for the order" appealed from.

19. "Those who allege error in any case must show it. It will not be presumed. The presumption is the other way."

—*Marsh v. Briesen*, 84 W., 618, 619.

20. A finding of a statutory provision of abandonment, the record being silent, will not be presumed. See ADOPTION.

—*In re Est. of McCormick*, 108 W. 234, 238.

21. A simple deed of conveyance, or a promissory note, is not presumed to contain the whole contract. See CONTRACTS.

—*Brader v. Brader*, 110 W., 423, 431.

22. The "presumption of intestacy", and not of testacy prevails. See DESCENT AND DISTRIBUTION.

23. As to presumption of delivery of a deed at "its execution", and at a later date. See DELIVERY.

—*Chase v. Woodruff*, 133 W. 555, 558.

24. "In the absence of" proof that the remaindermen "had actual knowledge of the fact that their father", the life tenant, "had caused the deed" pursuant to land contract, of premises obtained under the mother's will, "to be executed to himself or that he made any claim to the premises adverse or hostile to their rights under the mother's will", "the presumption would be that the conveyance was taken in the father's name without the knowledge of the" remaindermen. *Kluender v. Fenske*, 53 W. 118 (See DEEDS).

25. "The continued possession of" the father "was therefore presumed to be under the will and as a life tenant, and not as adverse to the" remaindermen. *Allen v. Allen*, 58 W. 202.

26. Sec. 2077 "has no application" here, the alienee having taken

the "conveyance in his own name, without the knowledge or consent of the person paying the consideration". Sec. 2079.

—*Perkinson v. Clarke*, 135 W. 584, 589.

27. As to the existence of a "beneficiary named in the policy", it "falls within the rule in *State ex rel. Coffey v. Chittenden*, 112 W. 569:

28. 'When the existence of a person, a personal relation, or a state of things, is once established by proof, the law presumes that the person, relation or state of things continues to exist as before,

29. Until the contrary is shown, or until a different presumption is raised, from the nature of the subject in question'".

—*Hilliard v. Wis. L. Ins. Co.*, 137 W. 208, 211.

30. When final judgment in an estate is entered, nothing appearing "to the contrary it must be presumed that the time was limited for creditors to present their claims and notice duly given." See also CLAIMS.

—*Davis v. Davis*, 137 W. 640, 647.

31. As to time of signature and writing therewith, as to guaranty, "bearing on its face no suspicious earmarks". See HANDWRITING.

—*Ripon H. Co. v. Haas*, 141 W., 65, 68.

32. "There is no presumption that, because schools existed at a particular date, they existed a year anterior to such date. Presumptions do not run backward. (Cases)".

—*Pierce v. Stolhand*, 141 W., 286, 288.

33. As affecting an executor's deed of realty, he having power of sale under the will, and where "the records in the office of the probate judge of M. county were loosely kept at the time",

34. And "no evidence of the fact was found either in the records or the files" "that a guardian ad litem for minors was appointed," or "that letters testamentary were issued",—it is held:

35. "We think the law is and should be, under the facts disclosed by the evidence in this case, that the court after the lapse of sixty years must presume that the probate judge knew the law and in fact did appoint a guardian ad litem for the minor heirs before admitting the will to probate,

36. And required the person named as executor in the will to file a bond before entering upon the duties of his trust,

37. And duly issued letters testamentary to him after he became entitled to receive the same,

38. And that the proceedings in the probate court were regular. It therefore follows that the deed to P. conveyed good title."

—*Chandler v. Munkwitz, R. & I. Co.*, 148 W., 5, 11.

39. As to the "presumption that every person knows the law", explained and limited. See LAW.

—*State ex rel. Kleist v. Donald*, 164 W. 545, 552.

PRESUMPTION OF DEATH.

See also SURVIVORSHIP.

Absent twenty-one years, 3.

Action for dower, 4.

Prima facie dead, 3, 4.

Administration; living, 6.

Life shown afterward, 19.

In other court, 19.

No jurisdiction, 8.

Void, ab initio, 7, 19.

Administration' petition, 14.

Inconsistent statements, 16.

Judgment of decease, 19.

Life may be shown, 19.

Mixed facts stated, 14.

Prima facie case of death, 15.

Burden of proof:

Party asserting death, 1.

After seven years, 2, 3, 5.

Diligent search:

Inference, left residence, 25.

Proof of not required, 22.

Domicil:

Intention controlling, 24.

Temporary absences, 23.

After majority, 23.

Proof of births and deaths, 20.

Documentary evidence, 20.

Seven years absence:

At expiration of seven years, 17.

Federal authority, 11.

Presumed dead, 9, 21.

Time of the death, 10, 12, 17.

Question of evidence, 13, 18.

1. "The rule of law applicable" and which "is too firmly settled to be now disturbed," is as stated by Greenleaf, Vol. 1, p. 41: "Where the issue is upon the life or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death.

2. But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party." (Approved and followed; in *Miller v. Camp* W. A. W., 140 W. post.)

3. The fact that one "had been absent from his home or place of residence more than twenty-one years", with "no intelligence respecting him for about twenty years", was "prima facie evidence that he was dead, and cast the burden of proof upon the defendant to show that he was living."

4. On failure "to introduce any testimony tending to prove" the person living, "it became a verity in the case that" he "was dead, and the court properly so held", as to the husband, in an action for dower by the wife.

5. There being no "testimony tending to show P. living within the seven years next before the action was commenced", there "was nothing for the jury to pass upon".

—*Cowan v. Lindsay*, 30 W. 586, 589.

6. "The proceedings of administration, settlement and assignment of the estate of the respondent, represented to have been dead, when he was and is still alive, are absolutely null and void for all purposes whatsoever".

7. "The proceedings are void ab initio and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate, or render any judgment, and in which every conceivable act is an absolute nullity.

8. The only jurisdiction the county court has, in respect to the administration of estates, is over the estates of dead persons."

—*Melia v. Simmons*, 45 W. 334, 337.

9. Incidentally the court says that "a person who has not been heard of for seven years is presumed to be dead,

10. But there is no legal presumption that the death occurred at the end of the seven years, nor at any precise time during the seven years. *Doe v. Nepean*, 5 Barn. & Adol. 86".

—*Williams v. Williams*, 63 W. 58, 62.

11. "Mr. Justice Harlan, speaking for the supreme court of the United States, in the case cited (*Davie v. Briggs*, 97 U. S. 628), quotes from a treatise on the law of evidence, what he states to be in harmony with the law of the English courts and the preponderance of authority in this country, this sentence:

12. That, 'although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death;

13. And, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life.' " And it was so held in this case.

—*Whitley, Admr. v. Equitable L. A. Soc.*, 72 W. 170, 177.

14. Where, "the application for administration was made April 23, 1898," and the petition states that L., the intestate, "was last seen" in Colorado, April 29, 1891, being within seven years, but the petition also states facts indicating probable decease about that time, and "further stated that he had been absent from the state, 'and that nothing whatever had been heard from said L., for the space of seven years.'—in view of these circumstances there was ample to warrant the court in" granting administration on his estate.

15. "These facts, with nothing to control the inferences naturally to be drawn from them, presented at least a prima facie case of death, even within the seven years."

16. Even excluding "from consideration the facts noted" as to

probable décease, "the concluding allegations of the petition quoted (as above) would probably have been sufficient to sustain jurisdiction", "and the court was called upon to determine which of the inconsistent statements was true".

17. "The presumption of law is that at the expiration of seven years he is dead, but there is no presumption, either of life or death during that period. Such was the holding in *Whiteley v. Equitable L. A. Soc.*, 72 W. supra, and that rule is supported by the weight of authority. 1 *Jones Ev.* 58.

18. The question when such presumed death occurred is to be determined from all the facts and circumstances in the case. The county court has complete and ample jurisdiction in matters of this kind".

19. In this action by the administrator to recover estate, "notwithstanding the question of death may have been determined by the probate court, the fact that the supposed decedent is alive could have been shown. Such showing would have established the nullity of the entire proceeding. *Melia v. Simmons*, 45 W. supra; *Brown, Juris.* 124."

—*Wis. Trust Co. v. Wis. M. & F. Ins. Co. Bank*, 105 W. 464, 467.

20. As to proof of births and deaths by foreign documentary evidence under sec. 4160. See BIRTH.

—*Sandberg v. State*, 113 W., 578, 584.

21. "In *Cowan v. Lindsey*, 30 W. supra, this court adopted, without qualification, the rule as laid down in *Greenleaf*", as quoted, "and has reiterated such rule in" cases, supra.

22. "Thus it will be seen that the court is firmly committed to the general doctrine which does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years".

23. "Where a son has reached his majority, and has made it a practice to work away from home at times, he thereby" does not lose "his domicile with his parents, at least in the absence of direct evidence on his part of intention not to change his place of residence".

24. Here "there was nothing to suggest that he had acquired or intended to acquire a home or place of residence different from that of his mother. Intention is almost invariably a controlling element in determining residence". Presumption of death, sustained. See also DOMICIL.

—*Miller v. Sovereign Camp W. O. W.*, 140 W. 505, 507.

25. "The rule declared in the *Miller Case*", 140 W. supra, is adhered to and presumption of death found on evidence that "permits only of the inference that" the party "left his home and place of residence", and that no one "has had any tidings of information concerning him or of his whereabouts" "for a period of eight years".

—*Page v. Modern W. of A.*, 162 W. 259, 262.

PRINCIPAL AND AGENT.

See also AUCTION SALES. COMMISSIONS OF BROKERS, ETC. FACTOR.
HUSBAND AND WIFE. RATIFICATION.

Acts of agent:

- Fraud, misrepresentation, 21, 44.
- Ignorant of the fraud, 21.
- Knowledge and silent, 22.
- Principal bound by, 20, 49.
- Private instructions, 49.
- Scope of authority, 49.
- Agent becomes surety, 28.
- Entitled to rights of, 28.
- Recover of principal, 29.
- Authority or ratification, 30.
- Agency is not presumed, 67.
- Agency not disclosed, 73.
- Agent himself liable, 73.
- Agent substitutes another, 1.
- Authority of agent, 64.
- Business management, 87.
- Not endorse notes, 87.
- Every delegation of power, 78.
- Carries necessary incidents, 78.
- May be proved by him, 64, 82.
- When writing not required, 64, 82.
- Wife for husband also, 65, 83.
- No presumption of agency, 67.
- Apparent authority, 70.
- Express authority, 69.
- Fact of agency proved, 68.
- Fact of authority, 68.
- Principal ratifies, 71.
- Power to purchase, contract, 72.
- Not incident to superintendent, 72.
- As a matter of law, 72.
- Receive negotiable paper, 88.
- Gives power to endorse, 88.
- Secret instructions ineffective, 79.
- As to prior apparent powers, 79.
- Third persons, on inquiry, 86.
- Authority to bind:
- Failure, not personally held, 12.
- Note signed in blank, 43.
- Within scope of authority, 49.
- Authority to sell:
- Principal's debts taken, 17.
- Both parties by consent, 24.
- Contract; agent's name, 25, 57.
- Agency known by other party, 50.
- Binds principal, 50.
- Parol admissible, 51.
- Cannot relieve himself, 63.
- Disclosed or not, 63.
- Effect of under seal, 25.
- Not bind principal, 25.

Contract—continued

- Oral evidence of, 27.
- Principal, avails himself of, 26, 57.
- Shown by parol evidence, 36.
- Written not contradicted, 37.
- Declarations of agent, 15, 42.
- Of agency, does not prove, 75.
- Made out of court, 80.
- May be by agent himself, 81.
- Part of res gestae, 15, 18.
- Or authorized, 15.
- Reliance on agent's claim, 89.
- Incompetent evidence, 89.
- Deposits in own name, 44.
- Agent takes all risks, 44.
- Unless principal consents, 44.
- Distinctions:
- Agent, factor, broker, 56.
- And as to title, 56.
- Expenses of agent:
- Bound by agent's acts, 49.
- Have principal charged, 46.
- Charged in agent's name, 47.
- Credit given to principal, 47, 48.
- Though furnished money, 46.
- Express orders of principal, 4.
- Agent liable, if deviated, 4.
- Sells for check, not cash, 4.
- False representations, 21, 45.
- Unknown to principal, 45.
- Principal bound, 45.
- Fraud with other party, 58.
- Principal, not bound, 58.
- Furnished funds to buy, 52.
- Not buy on credit, 52.
- Principal not bound, 53.
- Unless has knowledge, 53.
- Unless ratified, 53.
- Husband as agent:
- Held out as agent by wife, 55.
- Sign note in her name, 55.
- Bound, though no agency, 55.
- Powers as for third party, 16, 42.
- Testify; presence or not, 23.
- Wife's separate estate, 8.
- Known principal, 74.
- Principal's credit, 74.
- Lien of agent:
- Advances and services, 5.
- Favored in the law, 5.
- Money, principal no right to, 96.
- Agent personally liable, 96.

Money, etc.—continued

- Part payment, contract fails, 94.
- Action, recover back, 95.
- Notice, to bind principal, 19.
- Brought home to agent, 19.

Partnership:

- Each agent of firm, 11.

Principal bound:

- Accepts benefits of contract, 14.
- Gives sufficient authority, 41.
- Justifies dealing with agent, 41.

Quasi-trustees:

- Purchases of principal, 38.
- Jealous scrutiny, 39.

Ratification:

- Appropriates benefit, 3.
- Equivalent to authority, 30.
- Part, confirms whole, 2.
- Sub-agent's acts, binds, 1.
- Unauthorized contract; or disaffirm, 31.

Realty:

- Parol, clearly established, 54, 76.
- Written authority unnecessary, 13.

Revocation of authority, 32.

- Death of principal, 32.
- Depends on notice to parties, 62.
- Exception; agent's name, 33.
- Estate held liable, 34.

Revocation, etc.—continued

- Notice, for the future, is, 60.
- Person of previous dealings, 61.
- Qualification of rule, 35.

Title in trust:

- Agent takes in own name, 6.

Trust companies:

- Custom of dealing with, 91.
- Not same strict rules, 91.
- Plenary authority to act, 91.
- Principal's knowledge of charge, 92.
- Exceed express authority, 93.
- Germane to subject, 93.
- Held to be agent, 92.

Unauthorized acts, 59.

- Agent professes so to be, 90.
- Himself liable, 90.

Principal becomes notified, 59, 84.

- Must affirm or deny, 59, 85.

Warranty or representation, 66.

Wife, as agent:

- Bind husband, contracts, 9.
- Husband or third party, 7.
- Presumed, household only, 10.
- Not imply other, 77.
- Prove her agency, herself, 65.
- Testify thereto, 7, 40.
- Direct questions, 40.

1. Where an agent substitutes another without authority, the principal is not bound by the acts of the latter, unless he ratifies the acts of the sub-agent.
—*Sheldon v. Sheldon*, 3 W. 699.

2. "A ratification of a part of an unauthorized transaction of an agent, is a confirmation of the whole."
—*Fargo v. Ladil*, 6 W. 106, 117.

3. Where the principal ratifies and appropriates the avails of a transaction (satisfying a judgment for one half) he cannot repudiate by denying the agent's authority.
—*Sprague v. Hibbard*, 6 W. 175.

4. "The express orders of the principal, when they are clear, possible and proper, leave no discretion with the agent" and the latter is liable for "full indemnity" if he violates his duties "by exceeding his authority, or positive misconduct, or by negligence or omission", or otherwise, as in this case selling for a check payable next day when directed to sell for cash.
—*Hall v. Storrs*, 7 W. 253, 259.

5. "Agents generally have a particular lien upon the property of their principals in their hands for the amount of their advances and services in respect to it, and this particular lien is favored in law."
—*Chappell v. Cady*, 10 W. 111, 114.

6. One who as "agent and protector of the rights of infants" or others, "and in that character obtains a conveyance in his own name, which was intended for their benefit, will be considered as holding the legal title in trust for them." —*Roller v. Spilmore*, 13 W. 26, 30.

7. Wife may act as agent for husband or third party and testify thereto. See HUSBAND AND WIFE. —*Birdsall v. Dunn*, 16 W. 235.

8. Husband may act as agent for wife as to her separate estate. See HUSBAND AND WIFE. —*Weisbrod v. C. & N. W. Ry.*, 18 W. 35, 40.

9. Wife's power to bind husband on her contracts for him, rests on agency merely. See HUSBAND AND WIFE.

10. Except perhaps in household affairs, such agency is not presumed. —*Savage v. Davis*, 18 W. 608, 613.

11. "In partnership affairs each partner is, as to the business which he transacts for the firm of which he is a member, the agent of such firm". —*Lawrence v. Vilas*, 20 W. 381, 388.

12. Agents who "had full authority to bind their principal, and did bind it," are not "personally liable". —*Charboneau v. Henni*, 24 W. 250, 255.

13. Authority in writing to the agent to make a contract for the sale of real estate is "not necessary." See SALE OF REALTY. —*Smith v. Armstrong*, 24 W. 446, 451.

14. "A principal cannot accept and enjoy the benefits of a bargain made by his agent, without at the same time adopting the instrumentalities by which the agent consummated it". —*Morse v. Ryan*, 26 W. 356, 362.

15. "It is well settled that the declarations of the agent, to bind or be admissible against the principal, must be made at the time of the act or transaction by the agent, and constitute a part of the *res gestae*; or, if not so made, that they must be authorized by the principal".

16. "The power and capacity of a husband when acting as the agent of his wife are no greater than if he were acting as the agent of any other person". —*Livesley v. Lasalette*, 28 W. 38, 41.

17. An authority to sell "confers no power to sell or transfer in payment of the debts of the principal". —*Butts v. Newton*, 29 W. 632, 640.

18. The admission of the agent against the principal in the controversy as to a transaction may be received as "a part of the *res*

gestae in the course of the agent's employment about the matter in question". See RES GESTAE. —*Hazleton v. Union Bank*, 32 W., 34, 48.

19. "Notice, to bind the principal, should be brought home to the agent while engaged in the business or negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter". —*Pringle v. Dunn*, 37 W. 449, 468.

20. The rule of law is that the principal "is responsible for all the means employed by his agent to effect the sale" of mortgage premises.

21. "If the agent effected it by means of false representations or fraud of any other description, although without authority from the plaintiff (principal) to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations or committed the fraudulent acts to the same end, in person"

22. If the principal knew that the vendee "was induced to make the purchase by the false representations of L, and failed to inform him that they were false, he is in like manner responsible for the fraud, although L was not his agent". See also FRAUD.

—*Law v. Grant*, 37 W. 548, 557.

23. The husband may testify as to the acts of agency in or out of the presence of his wife, who is a party. But he must be offered specifically. See HUSBAND AND WIFE.

—*Menk v. Steinfort*, 39 W. 370, 375.

24. An agent cannot act, without consent, for opposite parties with adverse interests. See COMMISSIONS OF BROKERS, ETC.

—*Meyer v. Hanchett*, 39 W. 419, 425.

25. In a "contract under seal executed by an agent in his own name" which ordinarily "does not bind the principal not named therein," "if the instrument would be valid without a seal, then, although executed under seal, it is to be treated as written evidence of a simple contract, and the seal adds nothing to it."

26. "Neither is it a violation of the rule which prohibits the changing of the terms of written contracts by parol evidence, to permit" the unnamed principal "to avail himself of the benefits of the agreement made for him" by his agent.

27. In such a contract the rights of the principal "are co-extensive with those which" the agent "would have were he in court seeking to compel" the performance of the agreement.

—*Stowell v. Eldred*, 39 W. 614, 626.

28. "If an agent who makes a contract for his principal, sees fit to become surety for the performance of such contract by the latter, no

good reason is perceived why he may not do so, and become thereby entitled to all the legal rights of a surety, although the consent of the principal thereto may not have been first obtained”.

29. “If the agent is compelled to pay the damages resulting from a breach of such contract, because of his suretyship; one of those rights is to recover of his principal the amount so paid for him”.

30. This is the case if the agent had authority, “or, what is equivalent thereto, if he made the contract without such authority, and the defendant (principal) subsequently ratified it”.

31. The principal may ratify by failing to disaffirm an unauthorized contract by his agent. See also **RATIFICATION**.

—*Saveland v. Green*, 40 W. 431, 438.

32. “The general rule is indisputable, that the death of the principal operates as a revocation of the authority of the agent to act”.

33. “But this general rule has its exceptions. ‘Where the act, notwithstanding the death of the principal, can and may be done in the name of the agent, there seems to be a sound reason why his death should not be deemed to be a positive revocation under all circumstances, and that a subsequent execution of it may be valid’. Story on Agency, 495”.

34. “The case before us seems to come within the exception”, and the estate is held liable for goods furnished after the death of the principal, within a contract made by the agent prior thereto.

35. “Principles of public policy, and the interests of trade and commerce, require some qualification of the rule of the common law—if it be a rule,—that the authority of the agent is extinguished by the death of the principal, when the act can and may be done in the name of the agent”.

—*Lenz v. Brown, Admr.*, 41 W. 172, 184.

36. It is “no longer an open question in this court” that where one signs a contract in his own name, but in fact for a principal, such agency may be shown by parol.”

37. But, it seems, “to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done”. *Higgins v. Senior*, 8 M. & W. 834.

—*Weston v. McMillan*, 42 W. 567, 569.

38. “Agents may be quasi trustees to bring them within the broad rule applicable to trustees generally, that they cannot become purchasers of their principals”.

39. “But whatever may be the nature of the agency, a court of equity regards every purchase by an agent from his principal with jealous scrutiny, to see that the agent takes no advantage from the confidence of his principal.” See also **TRUSTEES**.

—*Cook v. Berlin W. M. Co.*, 43 W. 433, 444.

40. A wife is a competent witness for her husband in matters of agency only, and such agency may be proved by preliminary direct questions to her. See *HUSBAND AND WIFE*.

—*Marsh v. Pugh*, 43 W. 597, 600.

41. "A principal is responsible, either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to the agent his authority". This rule, says Prof. Parsons, may be called the foundation of the law of agency. 1 Parsons on Con. 44".

—*Kasson v. Noltner*, 43 W. 646, 650.

42. "The rule laid down by this court in *Livesley v. Lasalette*, 28 W. supra," as to declarations of an agent, and of the husband's power as agent, is quoted and approved.

—*Austin v. Austin*, 45 W. 523, 531.

43. The person who delivers a signed note in blank to another, makes the latter his agent to do all necessary things "to make the note so signed accomplish the purpose" designed. See *OMISSIONS*.

—*Snyder v. Van Doren*, 46 W. 602, 606.

44. When an "agent deposits money of his principal to his own credit in a bank, or loans it to an individual, unless it be done with the consent of the principal, the agent takes all the risks which attend such deposit or loan. Story on Agency, sec. 208".

—*Sargeant v. Downey*, 49 W. 524, 528.

45. False representations to the agent, unknown to the principal, inducing purchase by the agent, have the same legal effect, seemingly, as if made to the principal buying in person.

—*Ward v. Borkenhagen*, 50 W. 459, 460.

46. An "agent (traveling salesman), having the money of his principals in his possession for the purpose of paying" expenses of livery, can "by neglecting to pay for it, charge them with the payment to the party furnishing the same, such party being ignorant at the time of furnishing the same that the agent was furnished by his principals with money and forbidden to pledge their credit for the same".

47. It was so held though the livery was charged on the books of the liveryman to the agent, the jury having found that "the credit was in fact given" to the principals.

48. "This court has held substantially in *Champion v. Doty*, 31 W. 190; that charging the service in the plaintiff's (liveryman) books to the agent is not conclusive that the credit was given to him, but might be explained."

49. "Judge Story, in his work on Agency, sec. 127, says: 'The principal is bound by all the acts of his agent within the scope of the

authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him'." —*Bentley v. Doggett*, 51 W. 224, 229.

50. An agent signing a contract in his own name for his principal, the agency being known by the other party to the contract, "binds his principal equally as though signed in the name of such principal;"

51. And "parol evidence is admissible to show the fact of his agency in order to charge the principal". See also PAROL.

—*Wiener v. Whipple*, 53 W. 298, 302.

52. "When the principal furnishes his agent to buy on his account sufficient funds to make the purchases, the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary.

53. And in such case the principal will not be bound by a purchase made on credit, unless he has knowledge of the fact, and does something in ratification thereof, or unless it be shown that it is the custom of the trade to buy upon credit".

—*Komorowski v. Krumdieck*, 56 W. 23, 27.

54. "Parol agency to charge a principal's realty ought to be express, and clearly established. *Lauer v. Bandow*, 43 W. 556".

—*Challoner v. Bouck*, 56 W. 652, 656.

55. Where a wife holds out the husband's agency to sign a note in her name, she, as such "principal may be bound by such holding out, though no agency in fact exists. (Cases)".

—*Bouck v. Enos*, 61 W. 660, 664.

56. As to distinction of authority as agent, of factor, broker, and as to title. See COMMISSIONS OF BROKERS. FACTOR. TITLE.

—*Edgerton v. Michels*, 66 W. 124, 130.

57. "The rules laid down in *Stowell v. Eldred*, 39 W. supra," where the agent contracts in his own name, are followed and applied against the principal at the instance of the other party.

—*Kirschbon v. Bonzel*, 67 W. 178, 180.

58. A principal is not "bound by the unauthorized and fraudulent acts of his agent, done and performed pursuant to a corrupt conspiracy between such agent and the person who seeks to obtain the benefit of the fraud". (Followed in *Wilhelm v. Columbian Knights*, 149 W., 585, 588).

—*Hanf v. N. W. Masonic Aid Assn.*, 76 W. 450, 454.

59. Where agents "had originally no authority to bind" a principal, "we think the law is clear that when the person for whom such agents have undertaken to act is fully notified of what they have done, it becomes the duty of the principal either to affirm or disaffirm the act of the supposed agent within a reasonable time after such notice, or he is bound by such act."

—*McWhinnie v. Martin*, 77 W. 182, 197.

60. "Notice by the principal to the person with whom the agent has done business for the principal, that he will not be allowed to do a particular thing in the future is revocation of his authority to do it. *Frederick v. Perkinson*, (Com. Pl. N. Y.) 17 N. Y. Supp. 501.

61. Notice that the principal has withdrawn his consent for the agent to do a particular thing is a sufficient revocation of his authority to do it, to the person who has had previous dealings with the agent. *Kirby v. Corning*, 54 W., 599.

62. The revocation of the agent's authority depends upon notice to the persons with whom the agent has had dealings for his principal. *Story, Agency*, Sec. 470, and note." So held.

—*Johnson v. Youngs*, 82 W., 107, 110.

63. Where a broker signed a contract in his own name, it is said: "Having made such a contract, he cannot now relieve himself from responsibility thereunder by showing that he was acting simply as agent or broker for a principal, whether such principal was disclosed or undisclosed. *Weston v. McMillan*, 42 W., supra."

—*Cream City Glass Co. v. Friedlander*, 84 W., 53, 58.

64. The rule of *O'Conner v. Hartford F. Ins. Co.*, 31 W., 160, was adhered to, "where it was distinctly held that the authority of an agent, when not in writing or required to be, may be proved by the agent himself,

65. And that this principle operates in the case where the wife acts as the agent for the husband, or the husband for the wife."

—*Roberts v. N. W. N. Ins. Co.*, 90 W. 210, 212.

66. As to agent's warranty or representation, and distinction as to same. See WARRANTY. —*Matteson v. Rice*, 116 W., 328, 331.

67. "There is no legal presumption that an agency exists, in the absence of proof,

68. Hence it was necessary for the plaintiffs to prove, not only the fact of agency, but also the fact that the agent's authority was sufficiently extensive to authorize him to bind the principal by the contract which he assumed to make.

69. This might be done by showing express authority given by the principal to the agent to make such contracts,

70. Or by showing that the principal had invested the agent with

apparent authority to make such contracts, upon the face of which apparent authority the plaintiffs acted,

71. Or by showing that the principal ratified the act of the agent with full knowledge of the facts”.

72. “The power to purchase or contract for the manufacture of important machinery to be used in a shop is” not, “as matter of law, a reasonably necessary and proper incident to the power of a mere shop superintendent”.

—*Parr v. Northern Elec. Mfg. Co.*, 117 W. 278, 285.

73. “If in a simple contract made by an agent the agent does not disclose his agency and name his principal, he will render himself liable. *Royce v. Allen*, 28 Vt. 234”.

74. “Where one deals with the agent of a known principal in the regular course of conducting the principal’s business by such agent, the presumption, in the absence of any evidence to the contrary, is that credit is extended to the former. (Citations)”.

—*Alexander & E. L. Co. v. McGeehan*, 124 W. 325, 326.

75. “The rule” is, “that the admission or claim of a person pretending to act as agent for another that he has authority to do so does not tend to prove the agency (*Davis v. Henderson*, 20 W. 520; 2 *Jones*, Ev. 359),

76. And the further rule” is, “that evidence definite and clear is required to establish agency in respect to real-estate transactions”.

—*McCune v. Badger*, 126 W. 186, 191.

77. As to married woman’s household management not implying agency. See CONTRIBUTION.

—*Payne v. Payne*, 129 W. 450, 454.

78. “In *Parr v. Northern Mfg. Co.*, 117 W. supra, the court said: ‘It is well understood that every delegation of power carries with it the authority to do all those things which are reasonably necessary and proper to carry into effect the main power conferred, and which are not forbidden,

79. And that secret instructions cannot affect such apparent powers to the detriment of third persons who have dealt with the agent on the basis of his apparent authority.’”

—*Freeman v. Dells P. & P. Co.*, 150 W. 93, 100.

80. The rule “that agency and agency authority cannot be established by proof of the declarations of the agent”, “refers to declarations made out of court and offered as evidence by the testimony of the person to whom made,—

81. Not of the agent himself, as in this case. Such is always proper”.

82. “‘The authority of an agent, when not in writing or required to be, may be proved by the agent himself’,

83. And such principle 'governs in the proof of all agencies' including 'where the wife acts as agent of the husband, or the husband as agent of the wife'. *O'Connor v. Hartford F. Ins. Co.*, 31 W., 160; (other cases)".
—*Somers v. Germania Natl. Bank*, 152 W., 210, 215.

84. "When an agent acts in excess of the authority conferred upon him, and the person for whom he has undertaken to act is fully notified of what has been done,

85. It becomes the duty of the principal to either affirm or disaffirm the act of the supposed agent within a reasonable time after such notice or he is bound by such act. (Cases)".

—*Senger v. Melloy*, 153 W., 245, 249.

86. "Third persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority. (Citations)".

87. "The authorities very generally hold that an agent with general authority to manage the business of his principal has not, by reason thereof, implied power to endorse or execute negotiable paper. (Citations).

88. The mere fact that R. (such agent) had authority to receive negotiable paper in payment for goods sold carried with it no power to endorse it. (Cases)".

—*Pluto P. Co. v. Cuba City S. B.*, 153 W., 324, 329.

89. Where, as a basis for recovery, "plaintiff relied on statements of L.", who made the contract, "to the effect that he, L. was the agent of defendants" in the transaction, it is held that "this evidence was clearly incompetent. *Aetna Ins. Co. v. N-W. I. Co.*, 21 W. 458; *Mechem, Agency* (2d Ed.) Sec. 285. Both of the defendants testified that L. never acted as agent for them".

—*Gunsten v. Gordon*, 160 W. 481, 483.

90. "One who, professing to contract as agent for another, fails to bind such other, is himself liable as principal. (Citations)".

—*Wis. Farm Co. v. Watson*, 160 W. 638, 640.

91. "The custom of dealing with trust companies on the assumption that they possess plenary authority to do the things they hold themselves out as having authority to do, is so general that incalculable hardships would ensue if their authority to act had to be established by the same strict rules that obtain in the case of an individual acting as an agent.

92. Where to the knowledge of a principal they assume full charge of a business matter he must be held to have constituted them his agent for that purpose,

93. Even though they exceed express authority, so long as their action

is fairly germane to the subject entrusted in their hands". So held as to accepting payments of principal before due. See also PAYMENTS.

—*Weigell v. Gregg*, 161 W. 413, 419.

94. Where defendant, as agent of H., contracted to sell a farm to plaintiff who paid \$100 down, and H. was unable to convey title,—an action "for money had and received" "arises from the implied agreement to return the part of the purchase price paid if conveyance is not made as agreed upon.

95. The person in possession of the money has without consideration been enriched at the expense of plaintiff, hence the latter's right to recover it back. (Case)".

96. "An agent who has money to which his principal has no right is personally liable to the party from whom it is wrongfully withheld". (Case).

—*Jensen v. Miller*, 162 W. 546, 548.

PRINCIPAL AND SURETY.

See SURETIES.

PRIVILEGED COMMUNICATIONS.

See also ATTORNEY AND CLIENT. EXPERT TESTIMONY.

Attorney:

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- Scrivener witness to will, 4, 27.
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Attorney—continued

- Not waiver of privilege, 22.
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- Attorneys, clergymen, physicians, 5.
- Not testify; waiver, 6.
- Privilege of client, patient, etc., 6.
- Protected after decease, 7.
- Husband and wife:
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- Physician:
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ysician—continued

Not general intercourse, 8.

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32.

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Physician—continued

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Will contest; competency, 28.

Information from decedent, 28.

Physician's observations, 28.

Waiver, by patient only, 29.

1. "In order to give that character to a communication it must be made to the counsel, attorney or solicitor, acting for the time being the character of legal adviser. (Cases)".

—*Brayton v. Chase*, 3 W. 456, 459.

2. On trial for perjury, on the question of knowledge of the residence of his wife as to a divorce action, letters by plaintiff in error to his wife, produced against his objections, to show "the date and place from which the letters appear to have been written, the address to his wife, and the signature" "together with the envelope and the post-marks and address thereon", with contents "not otherwise" offered, were held disclosures of confidential communications between husband and wife", and "such evidence was incompetent and inadmissible", under the statute, sec. 4072, and otherwise. (Cases).

3. This testimony, produced and sworn to by the attorney for the wife in the divorce proceedings, was also held "unlawful, as betraying the privileged confidences between" the attorney and his client, under section 4076, and otherwise. (Cases). —*Selden v. State*, 74 W. 271, 274.

4. The request to an attorney, the scrivener, to sign as a witness to a will, is "held to be a waiver of objection to his competency (under sec. 4076), so as to leave" him free to testify as to execution and as to the mental condition of the testatrix". See also *EXECUTION OF WILLS*.

—*McMaster v. Scriven*, 85 W. 162, 168.

5. As to secs. 4074 and 4076 which provide that clergymen and attorneys "shall not be allowed to disclose", and sec. 4075 which provided that physicians shall not be "compelled to disclose", certain confidential communications,—it is said:

3. "Under statutes providing that a professional witness 'shall not be allowed to disclose' information so acquired, it has been held in a great number of cases, and with entire uniformity so far as we have been able to discover, that the privilege is that of the patient, client, etc., and the information or disclosure cannot be given in evidence against him, or persons claiming under him, unless waived.

7. 'After one has gone to his grave, the living are not permitted to

impair his fame or disgrace his memory by dragging to light communications and disclosures made under the seal of the statute.' (N. Y. cases).

8. The disclosure by a physician of information acquired in his professional character, in attending on a patient, where not made in the course of his professional duty, is a plain violation of professional propriety, but the law does not prohibit such disclosure in his general intercourse.

9. The statute relates only to his giving testimony in court in relation to information thus acquired, and it should receive, we think, a liberal interpretation, in order to carry out its evident beneficial purposes".

10. The statute as to physicians, sec. 4075, being "fôr the benefit of the patient", it is expressly held that information acquired "in order to prescribe for or treat the patient", "is privileged as to the patient, and that the physician can neither be compelled nor allowed to disclose it, as a witness, against the will or without the consent of the patient".

11. (This ruling as to physicians is approved in *Cohodes v. Menomonee & M. L. & T. Co.*, 149 W. post, and the statute, sec. 4075, was amended by ch. 349, L. 1913, changing the word "compelled" to "permitted", thus making the statute in harmony with the decision, which, without such amendment, seems logically subject to the criticisms as indicated in Justice Newman's dissenting opinion).

—*Boyle v. Northwestern M. R. A.*, 95 W. 312, 321-23.

12. Where a physician testified that the facts called for were "necessary for him to know in order to enable him to treat the case intelligently"; it brings the case "within the provisions of sec. 4075, and makes it a privileged communication. This court has recently held that in such a case the privilege is that of the patient. *Boyle v. N. W. Mut. R. Asso.*, 95 W. supra".

—*Kenyon v. City of Mondovi*, 98 W. 50, 53.

13. On trial for adultery, the identity of defendant being in question, letters written to him by his wife are held to be "confidential communications between husband and wife, which are privileged and protected, and not competent to be received in evidence against the objection of either". *Selden v. State*, 74 W. supra.

—*Lanctot v. State*, 98 W. 136, 137.

14. Confidential and other communications between husband and wife, when may be testified to after decease. See HUSBAND AND WIFE.

—*Brown v. Johnson*, 101 W. 661, 662.

15. "Sec. 4075, is for the benefit and protection of the patient, and its prohibitions can be waived in her lifetime only by the patient, and not by the physician. *Boyle v. N. W. Mut. R. Asso.*, 95 W. supra."

16. "The information obtained by the physicians", "one of whom

had been the attending physician", at an examination of the deceased, "four months before the date of the will, to ascertain as to her mental capacity," to obtain a "release from guardianship", "was not obtained, for the purpose of enabling them to prescribe for the testatrix as physicians, and therefore they were not incompetent to give testimony thereof", at the probate of the will. —*Will of Bruendl*, 102 W. 45, 47.

17. "In order to entitle a client to the statutory privilege, it is not absolutely essential that a fee should be paid, or that there should be an actual retainer", it appearing here that the attorney's advice was sought "in his professional capacity", and the statute is held applicable. *Bacon v. Frisbie*, 80 N. Y. 394. —*Bruley v. Garvin*, 105 W. 625, 631.

18. A party, "after fully authorizing his attorney, as his agent, to enter into contract with a third party, and after such authority has been executed and relied on", is not privileged from testifying as to the receipt of money thereunder, nor is the attorney as to the transaction, under sec. 4076.

19. The transaction justifies the "inference of an implied authority to" the attorney "to testify with reference thereto, and waiver of any privilege of secrecy."

20. It is one of a multitude of "transactions which might as well be had by the client with one not an attorney at law are held not to be within the professional employment". Cases reviewed and discussed. —*Koeber v. Somers*, 108 W., 497, 503.

21. "The successor of a person acting in a representative capacity, such as an assignee," cannot "waive the privilege of his predecessor as to secrecy in regard to communications made by the latter to his attorney while he was in office".

22. "A person, by procuring his attorney to sign, as a subscribing witness, an instrument evidencing an agreement or transaction between such person and a third party, in the making of which and reduction thereof to writing such attorney served such person in his professional capacity", does not "waive the common-law privilege declared by sec. 4076, in respect to the transaction".

23. *McMaster v. Scriven*, 85 W. supra, distinguished, and testimony as "to the circumstance of his witnessing the execution of the paper", held proper.

24. "If an attorney acts in his professional capacity for two persons", "the circumstance that one of them waives the privilege of secrecy", does not "affect such privilege as to the other".

25. "If a person employs an attorney to act in his professional capacity", though not "as a mere agent", "in a transaction between such person and another", "such attorney" is not "privileged from disclosing the communications which passed between him and such other in regard to such employment". *Koeber v. Somers*, 108 W. supra.

26. Excusing the client "from answering on cross-examination as to whether, in the preparation of the case for trial, he was not examined by his attorney and his testimony to be given upon the stand reduced to questions and answers, upon the ground that he was privileged from answering under the rule allowing secrecy as between attorney and client", was held erroneous on the question of "credibility".

—*Herman v. Schlesinger*, 114 W. 382, 388.

27. An attorney called in as "a mere scrivener" and subscribing witness, not giving advice, does not act in a professional capacity and his testimony is held "clearly admissible" for such reason, if no other. See also EXECUTION OF WILLS.

—*In re Downing's Will*, 118 W., 581, 593.

28. After discussing cases supra, and others, differentiating as to attorneys, and considering contra decisions elsewhere, and following especially *Boyle v. N. W. M. R. Asso.*, 95 W. and *Will of Bruendl*, 102 W., supra,—as to a will contest, the "exclusion of attending physician's testimony and opinion as to mental competency based entirely upon information derived from decedent's statements or physician's observation while treating her professionally and for the purpose of such treatment",—is sustained, and such rule adhered to.

29. We "adhere to the views heretofore maintained by this court that sec. 4075 is to be enforced according to its words, with no exception, save in the presence of a clear waiver of the privilege of secrecy by the patient himself;

30. And that, after his ability to make such waiver is terminated by death, the physician's lips are forever sealed under all circumstances".

—*Will of Hunt*, 122 W. 460, 465.

31. As to testimony of wife with reference to her deceased husband. See HUSBAND AND WIFE.

—*Schultz v. Culbertson*, 125 W. 169, 172.

32. The ruling of *Boyle v. N-W. M. R. A.*, 95 W. supra, that under sec. 4075 the attending physicians information "cannot be disclosed over the plaintiff's objection", is followed.

33. "The contention that because plaintiff testified concerning her condition and the nature and extent of her injuries she thereby waived her rights under this statute is" "negatived in *Green v. Nebagamain*, 113 W. 508, which was adhered to in *In re Will of Hunt*, 122 W. supra"

—*Cohodes v. Menomonee & M. L. & T. Co.*, 149 W. 308, 313.

34. In a personal action, "the physician who treated the plaintiff after the injury" was properly not permitted on behalf of defendant to answer as to "whether he treated the plaintiff at that time for" the affliction complained of as "resulting from the accident",

35. Or as to "whether plaintiff complained to him of" suffering from such affliction.

36. "The word 'permitted' in this section (4075) was inserted by the amendment of 1913 (ch. 349) in place of the word 'compelled', "to make it absolutely certain that the information gained by a physician or surgeon for the purpose of treating a patient should not be disclosed under any circumstances".

—*Dreyfus v. Milwaukee E. R. & L. Co.*, 161 W. 524.

PROBATE COURTS.

See also JURISDICTION.

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1. "Probate courts are only, in a qualified sense, the mere creatures of the statute". They are "the offspring of the common law". They may review, revoke and correct their records to comply with the statute and such "authority must be regarded as incident to the general powers of the court".

—*Brunson v. Burnett*, 2 Pin. 185, 189, 190.

2. "Our statutes regulating the administration of the estates, the sale of the property, the payment of the debts and distribution of the assets of deceased persons, are the same substantially as those which prevail in most of the states". Dixon, C. J.

—*Williams v. Ely*, 13 W. 1, 7.

3. Probate courts "derive their powers from the statute, and can exercise none except those which the statute gives", and to acquire "jurisdiction over the subject matter, * the statute must be strictly complied with". See JURISDICTION.

—*Sitzman v. Pacquette*, 13 W. 291, 305.

4. "It is established that the records of probate courts must show jurisdiction in order to sustain their proceedings".

—*Gibbs v. Shaw*, 17 W. 197, 202.

5. They may revoke an order irregularly made. See AMENDMENT.

—*In re Fisher*, 15 W. 511, 521.

6. "The county court acting as a court of probate, is a court of record".

—*Chase v. Whiting*, 30 W. 544, 547.

7. "The powers possessed by the county court are the same as those conferred on the circuit court on appeals from its orders and judgments, which are very broad and comprehensive". See Sec. 4037.

—*Brook v. Chappell*, 34 W. 405, 410.

8. "It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants (in this case, janitor); and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it".

9. "As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments".

—*In re Janitor of Supreme Court*, 35 W. 410, 419.

10. Section 14, article VII of the constitution, provides for a 'judge of probate' for each county, "whose jurisdiction, powers and duties shall be prescribed by law;

11. Provided, however, that the legislature shall have power to abolish the office of judge of probate in any county, and to confer probate powers upon such inferior courts as may be established in said county".

12. "Under this proviso the probate courts were abolished in all the counties in this state by chapter 86 R. S. 1849; and the jurisdiction, powers and duties of such probate judges or courts were conferred upon the several county courts of the respective counties in this state (secs. 2440-2464)". See JURISDICTION. —*Lannon v. Hackett*, 49 W. 261, 267.

13. *In re Janitor of Supreme Court*, 35 W. supra, quoted and followed as to power of circuit court "to appoint necessary court attendants".

14. "The power to determine the necessity" "appropriately" rests "with the judge making the appointment", and "a broad and liberal discretion is vested in the judge respecting this power".

—*Stevenson v. Milwaukee Co.*, 140 W. 14, 19.

15. An enactment "entitled 'An act to create a superior court in the county of Fond du Lac,'" is held to be a local law and void as to the

provision abolishing the county court of such county, the fact not being mentioned in the title, and therefore void in toto. (See also *In re Woolcott*, 163 W. 34, 37, under OFFICERS.)

—*State ex rel. Richter v. Chadbourne*, 162 W. 410, 418.

PROBATE JUDGE.

See COUNTY JUDGE.

PROBATE OF WILLS.

See also EXECUTION OF WILLS. PRIVILEGED COMMUNICATIONS. TESTAMENTARY CAPACITY. UNDUE INFLUENCE. WILLS.

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1. As to the power of a court of equity to set aside the probate of a will obtained by fraud. See **EQUITY**.

—*Archer v. Meadows*, 33 W. 166, 169.

2. "It is" "the duty of courts to uphold and enforce" a testator's "will after death". See **WILLS**. —*Dodge v. Williams*, 46 W. 70, 90.

3. "At common law the probate of a will was conclusive as to the personal property, but was no evidence as to the execution or validity of the will, so far as it affected real property. (Citations.)

4. At common law, and as to real estate, the will itself, on being duly proved in an action of ejectment or other suit affecting the title to realty, became a muniment of title. *Colton v. Ross*, 2 Paige, 396; (other cases)

5. But that has been changed by statute in England, as well as several of the states. (Citations)"

6. "In this state no will is effectual to pass either real or personal estate unless it has been duly proved and allowed, etc.," "and the

probate of a will of real or personal estate, as provided in our statutes, is expressly made 'conclusive as to its due execution'. Sec. 2294."

7. When proved, with a certificate thereof annexed, "attested copy of every will devising lands, etc.," "is to be recorded in the office of the register of deeds. Sec. 2296. This indicates that the certified and attested copy of the will is to be treated as a conveyance."

8. Under Sec. 2278 "it has, in effect, been held that where there is an absolute, unconditional devise, the devisee takes at once on the death of the testator. In re Pierce, 56 W. 560; (other citations.)"

9. This may include lands acquired after making the will (Sec. 2279), and the homestead (Sec. 2280). *Ferguson v. Mason*, 60 W. 387".

10. "The conclusiveness of judgments of probate has often been declared, and cannot reasonably be questioned. *Archer v. Meadows*, 33 W. 166 (cited under EQUITV.)."

11. It is indicated that after probate the party might "be forever precluded from attacking the will collaterally on" the ground of revocation. "According to Mr. Freeman he would. Sec. 608.

12. It has been held that the probate of a will could not be collaterally voided on the ground that the will was a forgery. *Ibid.* (Cases).

13. So it has been held that it could not be collaterally avoided on the ground that the will so admitted to probate had been procured by fraud or undue influence (*Archer v. Meadows*, 33 W. 167);

14. Nor that it has been revoked by the subsequent execution of another will (*Ibid.*; *Davis v. Gaines*, 104 U. S. 386, and cases there cited); see *Waters v. Stickney*, 12 Allen, 1, and cases there cited);

15. Nor collaterally impeached on any other ground (*Vanderpool v. Van Valkenburgh*, 6 N. Y. 190);

16. Nor set aside by proceeding in chancery. *Archer v. Meadows*, 33 W. supra; (cases)". —*Newman v. Waterman*, 63 W. 612, 615.

17. As an original proposition, the court holds that a will otherwise properly admissible, where "the testator was correctly informed of the contents of the instrument", "was properly admitted to probate", "notwithstanding it was written in the English language, which she (the testatrix) could not read or understand".

—*Will of Walter*, 64 W. 487, 493.

18. "We do not pass upon the questions raised as to the validity of the provisions of the will presented for probate in this case. If the same was duly signed and witnessed, and if there was no fraud or undue influence, and the deceased was competent to make a will, then we think it should be admitted to probate."

—*Allen v. Griffin*, 69 W. 529, 537.

19. Probate of an instrument not properly executed, incorporated as a part of a subsequent similar instrument properly executed as a will. See EXECUTION OF WILLS.

—*Skinner v. Am. Bible Soc.*, 92 W., 209, 212.

20. "Legatees and heirs are all parties, in a proceeding to establish a will. See PARTIES. —*In re Valentine's Will*, 93 W., 45, 52.

21. Two wills, the second providing for its taking effect only if certain bequests in the first are avoided, were admitted together as a will and codicil, and there being no appeal, such probate was held conclusive as to "the due execution of the two instruments,—the first as a will and the second as a codicil", and the second did not revoke the first. *Newman v. Waterman*, 63 W. supra.

22. On construction, both instruments providing that certain bequests are "not to be considered as part payment of her dower interest or thirds in his estate", and that she shall also be entitled "to all under the law in such case made and provided as his widow,"—*I. W.*, named as widow, is held entitled also to dower and homestead rights, though being a niece also, she was not lawfully his wife, and "can only have such rights by virtue of the will".

—*Dicke v. Wagner*, 95 W. 260, 263.

23. A lease 'for the term of his natural life from' the day of its date, with "nothing ambiguous in the language employed", and nothing therein indicating "that it was intended as a will", is held not capable of probate.

24. "A will is an instrument by which a person makes a disposition of his property to take effect after his decease. Schouler, Wills, § 1".

—*Estate of Ogle*, 97 W. 56, 58.

25. "Unlike most written instruments, a will, in this state, must be established in court by proof, as prescribed by the statute, before it goes into effect. Sec. 3788; *Jones v. Roberts*, 96 W., 427 (See EXECUTION OF WILLS).

26. Probate of a will is essential to the passing of title to property. Sec. 2294. The measure of proof to establish a will, in case of contest, is suggested by the requisite mental capacity to make a will as adjudged by the courts".

—*In re Downing's Will*, 118 W., 581, 588.

27. Following Mass. cases that 'a will devising lands may be admitted to probate at any time after the death of the testator', it is held that probate should be granted on petition of a grantee of a devisee, twenty-seven years after the testator's decease, though a petition for probate had been filed shortly after the decease and had not been acted upon.

28. The fact that the devisee's "husband (a grantor) had obtained a tax deed on the land did not estop the defendant from claiming title under the will and the conveyance from the devisee."

29. "It has been held" "that 'whoever has a right to offer a will in evidence, or to take title under it, may insist on having it proved'. *Stebbins v. Lathrop*, 4 Pick., 33, 42".

—*Hanley v. Kraftczyk*, 119 W., 352, 356.

30. A non-heir legatee of an earlier will as contestant of a later will. See AGGRIEVED PERSONS. —*Will of Hunt*, 122 W. 460, 464.

31. Administration had before a will was found and probated, held effective until set aside. See ADMINISTRATION.

—*Perkins v. Owen*, 123 W. 238, 241.

32. Where "the will recited: 'This will is made in case I die on my journey home from California,'" and was executed at the commencement of the journey, it was found at the probate, on the facts, "she died on her journey, within the contemplation of this provision of the will.

33. However, had she died after arriving home, there is abundance of authority to the effect that such provision would not defeat the will".

—*Wells v. Chase*, 126 W. 202, 209.

34. Following Will of Walter, 64 W. supra, where a will "was in the English language which the testator did not understand", and it appears "clearly that the testator was otherwise accurately informed of the contents and meaning",—it is held properly admitted.

35. While "the proponent must show affirmatively that all the conditions required by the statute in the execution of the will were complied with", yet "the oral testimony of those present is not all the evidence."

36. On establishing the signing of the will by the testator, and that the "subscribing witnesses signed a certificate which declares that all the steps required by the statute for due execution, there arises a strong presumption that such steps were taken,

37. And such presumption need not be supported by affirmative memory of witnesses, but, to defeat the will, must be overcome by evidence to the contrary. *Gillmor's Will*, 117 W. 302 (See EXECUTION OF WILLS)". —*Will of Arneson*, 128 W. 112, 115.

38. "The probate of a will is a proceeding in rem, to which all the world are in some sense parties", and it "may affect many other rights and interests", aside from those of "specific individuals".

39. It is a proceeding "binding all the world, and in which even public welfare and policy is involved", as "evinced by various statutes in this state."

40. "Apart from the interest of the public", the "right of the testator" "is recognized to direct at least the method of management and disposal of his property after his decease,

41. Which courts cannot be compelled to disregard to accommodate the wishes of some or even all parties having pecuniary interest in the property. *Dodge v. Williams*, 46 W. supra; *Bussell v. Wright*, 133 W. 445 (See TRUST VARIATION)".

42. Held, that where all the heirs, next of kin, beneficiaries, and the executor named, proponent, under a will, stipulated that the testator

was mentally incompetent, and for a different disposition of the estate, 'and do consent and agree that said instrument may be disallowed and the probate thereof denied',—

43. And "upon the return day" "the subscribing witnesses attended and testified to the making of the will, the obvious sanity of the testator, and his apparent freedom from influence",

44. Such stipulation "could not control the duty which the probate court owed to the public, and perhaps to the testator, to adjudicate as to the legal existence of the propounded document as a will: to establish its status". Will sustained in each of the three courts.

—*Will of Dardis*, 135 W. 457, 461.

45. A will;—disposing of a large estate, the heirs represented by various sets of attorneys, and minors by general guardian and guardians ad litem,—being objected to by the adult heirs, was, after pro forma contest, admitted to probate the county court;

46. On appeal, in the circuit court, after like pro forma contest, and upon a detailed written stipulation radically changing the provisions and scheme of the will, and including large fees for all attorneys and guardians ad litem, signed by all adults, attorneys, general guardian and guardians ad litem,—the probate was affirmed and final distribution directed in accordance with the terms of the stipulation;

47. Thereupon, settlement of the estate so proceeded in county court to final judgment, and on appeal therefrom the former judgment of probate was considered res adjudicata, and after trial judgment rendered in circuit court modifying the final judgment as to allowances of fees to attorneys and guardians ad litem, and appeals taken to the supreme court by the executor, heirs, and various attorneys.

48. The will, in general provided (unambiguously) small annuities, and the bulk of the estate to be held in trust until the youngest grandchild became thirty years of age, the corpus then to be distributed as indicated.

49. The stipulation provided for considerable immediate payments to interested parties, and the use of the income, some of the estate to remain in trust for corpus distribution as the will indicated.

50. It was contended that the first circuit court judgment of probate and direction for distribution, not appealed from, was res adjudicata in the supreme court hearing. Statement and opinion of 90 pages. Held:

51. The attitude of attorneys and court in such judgment under the stipulation, now "in form res adjudicata", apparently proceeded from an entire "erroneous" "view of elementary principles" as to subverting "the wishes of the testator", and "the public policy" "respecting the inviolability of trusts". *Dodge v. Williams*, 46 W. supra; (many other cases). p. 436.

52. "The only explanation of it is probable misconception of the scope of the rule that all the beneficiaries of a trust, may, by agreement, the trustees consenting, terminate the trust and the limitation thereof

as indicated in the decisions of this court". (See TRUST VARIATION). p. 437.

53. If "the result was not merely erroneous and so, binding on all parties", and, "if the court exceeded its jurisdiction of the subject matter, then the judgment is no protection whatever. It may be ignored altogether. (Many cases)". p. 440.

54. "The circuit court" had no "judicial power over such subjects as changing the testamentary disposition of property from the plan made by the testator to one agreed upon by all the beneficiaries, especially where they were, in part, minors".

55. "The sole jurisdiction of the court is to take note of the testator's interest, so far as it can be discovered by judicial rules and does not violate the law, and give effect to it". Will of Dardis, 135 W. supra. pp. 441, 447.

56. "A contract between those interested not to offer a will to probate but to divide the property by agreement, is void where there are minors;

57. And, even as to adults, such an agreement is inter partes and does not affect the question of whether the will shall be probated as written, or not, or affect the matter as between themselves except in so far as permissible under the doctrine of estoppel. Finch v. Finch, 14 Ga. 362". p. 448.

58. "It is considered that the whole subject was outside the judicial authority and the judgment violating the terms of the will was coram non iudice.

59. So we must conclude, not only that there is a constitutional right to make a will but that such right includes a right of equal dignity to have it carried out". p. 450.

60. "The conclusion is reached that, looking at the matter from any view point, the trial court had no jurisdiction of the subject matter of displacing Mr. R.'s will. The agreement to that end should have been ignored as in the Dardis Will Case. The decree, in form, except the affirmance of the probate in county court, must be regarded as a nullity.

61. All expenditures in the contest which followed incidental to the void agreement were an unjustifiable waste of trust funds.

62. The attorneys, guardians ad litem, and others who participated in the depletion, however innocently they may have acted, received the money without right and must be held to account therefor." pp. 453-4.

63. The rule that an executor acting "in good faith in disbursing the trust fund" under "judicial directions", is "entitled to protection against any personal liability",

64. "Does not apply if there is such want of jurisdiction as to render the proceedings utterly void", and "we do not see any way for the executors to escape personal responsibilities as to that,

65. Though we confess it is a great hardship upon them, since they acted under professional advisers" of standing, and "on the judicial advice of the circuit judge.

66. However, on grounds of public policy, it seems, an executor is not protected from distributing the property of the estate he represents by a direction which is wholly void". p. 463-466.

67. However, as "to the distinctively county court matters", that court "having full jurisdiction of the subject matter of settling the estate", "all distribution" directed by its "formal order except" as to matters "referable to the circuit court judgment,

68. Must be regarded as having been, however erroneous, made, pursuant to judicial direction, within the jurisdiction of the county court, and as to the executors made within the protection of the rule before indicated". p. 467. See also ADMINISTRATION EXPENSES. COMPENSATION OF ADMR., ETC. GUARDIAN AD LITEM. INFANTS. JURISDICTION. WILLS.
—*Will of Rice*, 150 W. 401.

69. An executor named "is the representative of the testator and is charged with the duty of seeing that the will is probated and its provisions carried into effect.

70. Public policy also requires that a legally executed will be probated, and the person named as executor has a public as well as a private duty to perform.

71. If he in good faith believes that the will has been wrongfully denied probate by the county court, he should appeal from the decision". (Cases).
—*Cowan v. Beans*, 155 W., 417, 418.

72. "Where a will is made in accordance with the dictates of natural justice it will require strong evidence of lack of mental capacity or undue influence to nullify it". Will sustained as against county court's ruling, the evidence against it being "weak and unsatisfactory", and a third husband living left out, and the property having been acquired prior to his marriage with testatrix.

—*Gunderson v. Rogers*, 160 W. 468, 473.

73. Where a will is not "a natural one", weaker testimony and inference, held to set it aside. See UNDUE INFLUENCE.

—*Elliott v. Fisk*, 162 W. 249, 253.

74. Though settlement was made among the heirs and interested parties, "if there be a will in existence it should be at once probated. No one has any right to suppress or change the terms of the will. Will of Dardis, 135 W.; Will of Rice, 150 W.; supra".

—*Schoenwetter v. Schoenwetter*, 164 W. 131, 135.

75. "Delay in admitting the will to probate is immaterial". See LEGACIES.

—*Will of Brandon*, 164 W. 387, 391.

PRODUCTION OF PAPERS.

See WRITINGS.

PROFESSIONAL ETHICS.

See ATTORNEY AND CLIENT.

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1. "A promissory note is perfect without date or time of payment. *Mitchell v. Culver*, 7 Cow. 336. This note is an acknowledgment of an existing debt, payable immediately, and bears interest from its date." No time of payment is given. —*Husbrook v. Wilder*, 1 Pin. 643, 644.

2. "Any material erasure or interlineation in a note vitiates it, unless explained." A change from "order" to "bearer" apparently at the time of making the note, "explains itself." —*Williams v. Starr*, 5 W. 534, 549.

3. A note in the singular signed by A. and also by B. with the word "surety", such note is joint and several and both are liable as principals. —*Dart v. Sherwood*, 7 W. 523.

4. "Not competent to show by oral testimony this agreement or understanding, made at the time the note was given, for the purpose of varying or controlling its legal effect". —*Gregory v. Hart*, 7 W. 532, 539.

5. "The general rule is that an endorsement, in the absence of any evidence to the contrary, is always presumed to have been made at or about the date of the note". —*Mason v. Noonan*, 7 W. 609; 618.

6. Notes are payable out of mortgaged security by priority and not ratably. See PAYMENTS. —*Marine Bank v. Inter. Bank*, 9 W. 57.

7. "The transfer of the notes carries with them the interest in the mortgage" without "formal assignment". —*Rice v. Cribb*, 12 W. 179, 182.

8. Where the payee and another are endorsers, "the legal inference from the face of the note" is that the payee is the first endorser, but parol evidence is admissible to show the contrary.

—*Cady v. Shepard*, 12 W. 639, 642.

9. "In this state the doctrine is well settled, that the taking of a promissory note of the debtor 'either for a precedent liability, or a debt incurred at the time, is no payment unless expressly so agreed' by the parties".

—*Paine v. Voorhees*, 26 W. 522, 526.

10. "It is the logical result of this rule (of *Paine v. Voorhees*, 26 W. supra), that the giving of a promissory note for goods sold or money loaned is no payment or extinguishment of the debt, unless such was the agreement, and that the taking of the note only suspends the action on the contract until the note is due".

11. "But when the term of credit has expired, the creditor may bring his action and recover either upon the original consideration or on the note, as he may elect".

12. "We think the better authority is, that 'an unauthorized alteration of the note works no forfeiture of the debt, so that there can be no recovery by the party making such alteration, for the original consideration for which the obligation was given;' and that this rule necessarily results from our decisions that the taking of the note of the debtor is not a payment or extinguishment of the demand for which it was given".

13. In this case recovery was allowed; there was no fraud in making the alteration increasing the amount. Held also that the court properly allowed an amendment at the trial alleging the new cause of action on the original consideration, and that there was not "any error in refusing the defendant's motion to compel the plaintiff to elect whether he would proceed upon the claim for money loaned and interest, or upon the note. This was a matter resting in the discretion of the court"; and both claims being for the same money.

—*Matteson v. Ellsworth*, 33 W. 488, 502.

14. "The defense that the note was without consideration ought to be sustained by evidence which leaves no fair or reasonable doubt upon the subject".

—*Punch v. Williams*, 34 W. 268, 270.

15. "The rule of law applicable to this question (paying to bearer who was not the real owner) is clearly stated in *Byles on Bills*, in the following language: 'If a bill or note payable to bearer, either originally made so or become so by an endorsement in blank, be lost or stolen, we have seen that a bona fide holder may compel payment.

16. Not only is the payment to a bona fide holder protected, but payment to the thief or finder himself will discharge the maker or acceptor, provided such payment were not made with knowledge or sus-

picion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man'. Ch. 15, p. 172."

17. "In Story on Bills the doctrine is laid down in substantially the same language; and there can be no doubt of the rule upon the subject".
—*Greve v. Schweitzer*, 36 W. 554, 557.

18. Where a note not due, interest payable annually, has a year's interest "past due and unpaid, the law will construe that the note is dishonored", and that a buyer takes it subject to defenses and "could not be said to be an innocent purchaser". (Over-ruled by *Kelley v. Whitney*, 45 W. post).
—*Hart v. Stickney*, 41 W. 630, 634, 636.

19. While "there is considerable diversity of judicial opinion", "we think the sounder doctrine is laid down in those cases which put all endorsements on substantially the same footing, and which hold that the legal effect of an endorsement in blank cannot be overcome or destroyed by parol.

20. The contract by a blank endorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full".
—*Charles v. Denis*, 42 W. 56, 58.

21. "In this state the law is well settled, that the taking by the creditor of the promissory note of the debtor, either for a precedent liability or for a debt incurred at the time, does not operate as a payment unless it is expressly so agreed by the parties. *Paine v. Voorhees*, 26 W. supra, and cases cited."
—*Aultman & Co. v. Jett*, 42 W. 488, 491.

22. The stipulation in the note "No credit allowed on this note unless endorsed on the back by the payee", will not prevent "authorized payments on the note" from allowance without going "into a court of equity to compel the payee to make the proper endorsement of payments", and "the more simple and reasonable process is to allow them in a suit (at law) upon the note, even though not endorsed thereon by the payee".
—*Kasson v. Noltner*, 43 W. 646, 652.

23. "The interest is a mere incident to the debt, and although it is frequently provided that it shall be paid at stated periods before the principal falls due, we know of no authorities holding that a failure to pay it dishonors the note, so as to let in all the defenses against subsequent purchasers for value without any other notice of defects except the mere fact that such interest has not been paid. And we do not think it should have that effect.

24. The maturity of the note, within the meaning of the commercial rule upon this subject, is the time when the principal becomes due. *Boss v. Hewitt*, 15 W. 260, 262."

25. On the question of maturity and dishonor, *Hart v. Stickney*, 41

W. *supra*, is overruled, and following the previous case of *Boss v. Hewitt*, 15 W. 260, it is said,—“we deem it our duty to adhere to the rule, that a purchaser for value of unmatured commercial paper, with interest overdue, is not, from that fact alone, affected with notice of prior equities or infirmities in the title”.

26. “It is the settled law in this state that a negotiable promissory note secured by mortgage may be transferred before maturity like other negotiable paper, and the holder takes it discharged of existing equities.

27. The mortgage in such a case passes as an incident to the note, and may be enforced by the holder in spite of equities which may exist between the mortgagor and mortgagee”.

28. “And, ‘as with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser.

29. That result will only follow where there has been bad faith on his part’. *Cromwell v. County of Sac*, 96 U. S., 51.”

30. The note “was indorsed by the payee and mortgagee ‘without recourse’; but that ‘is not sufficient to charge the assignee with notice of a defense against the note, on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto’. *Stevenson v. O’Neal*, 71 Ill., 314”.

31. Nor are the words ‘secured by real estate mortgage’, “‘sufficient to inform third parties of the contents or terms of the mortgage, nor to put them upon inquiry’. *Howry v. Eppinger*, 34 Mich. 29-33”, nor do these words on the note “limit or impair its value”.

—*Kelly v. Whitney*, 45 W. 110, 115.

32. “The genuineness of the note offered could only be questioned in two ways: either by the proper denial in the answer, or by objection to its introduction in evidence when offered, on that ground”.

33. “When its alteration or want of genuineness appears upon the face of the instrument itself, the question must be raised, and the alteration explained, when it is offered and before it is received in evidence. (Cases)”.

—*Austin v. Austin*, 45 W. 523, 530.

34. The signer of a note in blank makes the holder his agent for filling out and doing all that is necessary to effect its purpose;

35. He may obtain the signature of other accommodation makers to the same. See OMISSIONS. —*Snyder v. Van Doren*, 46 W. 602, 606.

36. “‘A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein’. Story on Prom. Notes, Sec. 1.

37. The ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there ever was

a doubt that it was in law a negotiable promissory note. *O'Neill v. Bradford*, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. (Cases)".

—*Klauber v. Biggerstaff*, 47 W. 551, 555.

38. Where the creditor has knowledge, a signer may be shown to be a surety, by parol testimony.

39. An "executory usurious agreement" to extend payment does not release the surety. See also SURETIES.

—*Irvine v. Adams*, 48 W. 468, 474.

40. Where the genuineness of the signature was denied, and the attesting witness, "stated in substance, on his examination in chief, that he saw the defendant execute the note; but upon cross examination he was much less positive about having actually witnessed its execution, still, it was proper to admit the note in evidence, with the other testimony bearing on the question of its genuineness," as being sufficiently proven for consideration.

—*Holmes v. Cook*, 50 W. 172, 173.

41. Taking up and depositing as collateral a note to secure a new note for such purpose, is held to discharge the sureties of the first note, but to estop the principal from alleging payment. See SURETIES.

—*Greening v. Patten*, 51 W. 146, 151.

42. Evidence of a contemporaneous parol agreement that notes given "were not to be of any force against" the maker, "is clearly in contravention of the well-established rule of law that parol evidence of matters which take place before or at the time of making a written contract cannot be received to nullify the written contract made by the parties. This rule has been applied by this and other courts to promissory notes. (Many cases)".

—*Davy v. Kelley*, 66 W. 452, 456.

43. A certificate of deposit is held to be a promissory note, *Klauber v. Biggerstaff*, 47 W. supra, being approved.

44. The statute of limitations thereon is held to run from its date, from which it is "due and payable", and not from the date of demand.

—*Curran, Admr. v. Witter*, 68 W. 16, 22.

45. A clause in a note "to pay the expense of collection, including reasonable attorney's fees, rendered it non-negotiable, and hence no more enforceable by the defendant (subsequent holder) than the payee". "That the clause in the note agreeing to pay attorneys' fees rendered it non-negotiable was expressly held in *First Nat. Bank v. Larsen*, 60 W., 206; *Continental Nat. Bank v. McGeoch*, 73 W. 332." (But now changed; see par. 102, post).

—*Peterson v. Stoughton State Bank*, 78 W., 113, 117.

46. A receipt from a cashier, is held to have "all the characteristics of a certificate of deposit," and delivery thereof a gift of the fund. See GIFTS. —*Crook v. First Nat. Bank*, 83 W., 31, 36.

47. Where a promissory note included a stipulated attorney's fee if suit be instituted, such fee is properly receivable as in foreclosure judgments. —*Vipond v. Townsend*, 88 W., 285, 286.

48. There being no denial of the signature, where "the plaintiff introduced the note described in the complaint in evidence, and rested," it was held sufficient.

49. "The note, on its face, showed that it had been signed by the defendants (sec. 4192; *Neilson v. Schuckman*, 53 W., 638), and had become due and payable, and its production by the plaintiff was prima facie evidence that it had been delivered." See also CONSIDERATION. PAYMENT. —*Studebaker Bros. Mfg. Co. v. Langson*, 89 W. 200, 202.

50. A judgment note, with "a general power of attorney purporting to authorize the entry of judgment in any court of record", authorizes such entry in any state, and a stipulation for reasonable attorney's fees (here ten per cent) may properly be included therein.

—*Pirie v. H. Stern Jr., & Br. Co.*, 97 W. 150, 153.

51. "The alleged oral agreement by which R. (a signer) was not to be liable upon the note was no defense. A written contract cannot be varied or controlled by a contemporaneous oral agreement. *Gillmann v. Henry*, 53 W. 465; *Kulenkamp v. Groff*, 71 Mich. 675; S. C. 1 L. R. A. 594, and note.

52. Want of consideration is, however, a perfect defense between the original parties to commercial paper as it is to any other contract, and parol testimony is competent to prove the absence or failure of consideration. *Hubbard v. Galusha*, 23 W. 398".

—*Remington v. Detroit D. M. Co.*, 101 W. 307, 309.

53. Where a Tennessee intestate, died, with a deposit account in a bank, and the bank held decedent's notes, and while the estate was apparently solvent, the administrator, an heir, gave his personal note to the bank in exchange for the decedent's notes, and thereafter the administrator was allowed by the bank to check out the deposit account, which "by the law of Tennessee it was entitled to offset" against the decedent's notes, and the estate subsequently was found insolvent,—in an action by the bank on such substituted note, it was held:

54. There being no fraud, and while "it may perhaps be doubtful whether mere mistaken opinions as to the value of real estate can properly be called such mistake of fact as would justify rescission of a contract", nevertheless "the defendant is estopped from making this

defense," under the facts, the bank having paid out the deposit balance after taking the heir's note.

55. The cancelling of the decedent's notes, "constituted a sufficient consideration" for the heir's note in place thereof, and in addition, the facts "also estop him from pleading want of consideration".

—*Union & P. Bank v. Jefferson*, 101 W. 452, 455.

56. "As long ago as 1862 this court became committed to the principle that the acceptance by the creditor of the note of the debtor or of a third person for a precedent debt was no payment, unless it was expressly so agreed.

57. The acceptance merely suspended the remedy during its currency, and after the expiration of the credit an action might be maintained upon the original consideration, upon producing the note at the trial for re-delivery or cancellation. *Ford v. Mitchell*, 15 W. 304.

58. This case has been followed by many subsequent cases, so that the principle may be said to be fairly well settled. (Many cases)". "The burden of proving that the note was received as payment" is upon the defendant. So held.

59. Protest for non-payment is not required. "Timely presentation, and demand of payment, and notice to the endorser, are all that the law requires. *Sumner v. Bowen*, 2 W. 524".

—*Willow R. L. Co. v. Luger F. Co.*, 102 W. 636, 638.

60. A note and mortgage by a husband and wife, upon the latter's separate estate, for the former's debt, obtained by duress as to the wife, is held valid against her, where transferred before due, by the payee, to pay in part his liability as a former guardian, to the remaining co-guardian, as a bona fide holder. See also UNLAWFUL CONTRACTS.

—*Mack v. Prang*, 104 W., 1, 6.

61. A dated and signed instrument addressed to B.,—"Please pay to the order of W. and E. the sum of \$600, the same to be the last \$600 due me on my contract, and charge the same to my account,"—"is not negotiable, being payable out of a specified fund. *Brill v. Hoile*, 53 W., 537; *Bank of I. R. v. School D. of I. R.*, 91 W., 597."

62. Further, as "plaintiff had notice of the defenses set up," being the breach of "the performance of a contract by W. and E.," the consideration of the order,—“for both these reasons, he took it subject to all the defenses available against the original payee.

63. Failure of consideration in non-performance of their contract by W. and E. would be a good defense. *Randolph Commercial Paper*, 556; *Folger v. Dousman*, 37 W., 619; *Ward v. Perrigo*, 33 W., 143."

—*Woodward v. Smith*, 104 W., 365, 366.

64. Though the "original contract was tinctured with fraud", upon which the note was based,—the maker, while he could not read English,

the contract having been left with him after signing, "and he took no means to ascertain its contents," it being a lightning-rod contract,

65. And "he knew he was dealing with swindlers," and failing to "ascertain the nature and terms of the instrument he was about to sign,"—"he was guilty of such negligence as to estop him from obtaining relief against the note in the hands of an innocent third party."

66. Though the note was obtained by duress, "such a defense was not available against the bona fide holder of a note before due, for value. *Mack v. Prang*, 104 W., *supra*." —*Keller v. Schmidt*, 104 W., 596, 601.

67. In a note "not due until 'on or before four years after date'," "the words 'on or before' undoubtedly gave to the makers of the note the privilege of paying at any time before the end of four years, but they did not give the holder of the note the right to enforce collection before that time." *Mattison v. Marks*, 31 Mich., 423; (other cases).

—*Pagal v. Nickel*, 107 W., 471, 473.

68. A "note is only evidence of the indebtedness", "in the absence of evidence establishing an express contract making the note a payment of the debt. *Aultman & Co. v. Jett*, 42 W., *supra*.

69. There must also be kept prominently in mind the rule that an express contract is one where the parties to it state in writing or verbally the terms thereof. 1 *Parsons, Cont.* (8th Ed.) 7, note 1."

70. "The burden of proof to establish the claim that the note was received as a payment of the premium was on plaintiff (the beneficiary of the deceased maker),

71. And, while an express contract may be established in whole or in part by circumstantial evidence (*Leitgabel v. Belt*, 108 W., 107,—See SERVICES), mere circumstances that point one way as reasonably and significantly as the other are insufficient for that purpose".

—*McDonald v. Provident S. L. A. Soc.*, 108 W., 213, 218.

72. Proof of the signature of a deceased maker, is necessary for the admission of notes as evidence, though no specific objection as to signature is made. See HANDWRITING.

—*Deering H. Co. v. Johnson*, 108 W., 275, 278.

73. A promissory note is not presumed to contain the whole contract, usually. See CONTRACTS.

—*Brader v. Brader*, 110 W., 423, 431.

74. "When the plaintiff introduced" the "negotiable note" "in evidence, it had made prima facie proof that it was given for value, and that every person whose signature appeared thereon had signed for value. Negotiable instrument law (L. of 1899, Ch. 356, sec. 1675-50)".

75. "General authority to a bank officer to make discounts does not authorize him to bind the bank by discounting notes to which he is a party. (Citation)".

76. Where "the cashier turned over as cash or collateral the note in question, this is certainly prima facie proof that the cashier had advanced the bank's money upon the note".

—*Bank of Monticello v. Dooly*, 113 W., 590, 593.

77. Where a bank accepted renewal notes from time to time and stamped the old notes "Paid", "in accordance with the practice of the bank", such transaction being "intended merely as a renewal of the note", and not "as a payment and discharge of the debt," according to "the bank officials", it is held,—

78. That such effect "cannot be overcome except by evidence clearly indicating a contrary intent," under the rule of *Willow River L. Co. v. Luger F. Co.*, 102 W., supra, requiring an express agreement as to the renewal note being payment of the old note or of the debt.

—*Lourey v. Milwaukee Nat. Bak.*, 114 W., 311, 316.

79. A note reciting the corporate name followed by "and we the undersigned promise to pay", and signed with the corporate name, "by P." and others, who were its officers, but without official designation, is held to bind the corporation and the officers as individuals;

80. Being "free from ambiguity, it must be taken, without the aid of rules for judicial construction, as indicating the capacity in which appellants signed it".

81. And evidence "as to conversations had at the time they affixed their signatures to the instrument as to the capacity in which they acted in the matter" was held properly ruled out.

—*Nunnemacher v. Poss*, 116 W., 444, 447.

82. Where the plaintiff's assignor of a promissory note "purchased in good faith, and for value, before maturity, then the plaintiff, who purchased from him, is equally protected even though he may have had notice himself of defects. *Montpelier S. B. & T. Co. v. School Dist.*, 115 W. 622".

—*Prentiss v. Strand*, 116 W., 647, 653.

83. As to a non-negotiable bill of exchange, being an order by L. to C. to pay money to W., it is said:

84. "Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually twenty-four hours—to ascertain the state of accounts between himself and the drawer, and until expiration of that time the holder has no right to demand an answer, nor, without categorical answer to deem the bill either accepted or dishonored". Legal phases fully discussed.

85. "Whether such paper continued to be a bill of exchange in pursuance of our earlier decisions (cases), it certainly is not a negotiable bill within the definition of sec. 1680, as amended by Ch. 356, L. of 1899, which requires that such an instrument shall be payable to order or bearer.

86. It seems clear from the title that the codifying law of 1899 is intended to regulate only negotiable instruments. (Citation)".

—*Westberg v. Chicago L. & C. Co.*, 117 W. 589, 591, 595.

87. It is "well-established in this state", "that the giving of the promissory note or other evidence of indebtedness of a third person upon the purchase of property is presumptively in payment pro tanto of the agreed price.

88. Indorsements thereof, so as to make the purchaser liable thereon, suffices to wholly overcome that presumption, and to cast the burden upon him to establish an actual agreement that the paper is so received.

89. In the absence of such proof, it will, when so indorsed, like his own note, be presumed to have been received only as security for the purchaser's own continued indebtedness for the purchase price. (Cases)".

90. "Certificates of deposit", were indorsed "generally, and with reservation", and delivered by the vendee of the land contract to the vendor as part of the purchase price. "Presumptively, therefore, they were not received in payment, and the question of fact arose whether there was an actual agreement that they should be so received".

91. On the testimony it was "found that no such agreement was proved", and the certificates having been duly presented for payment when due, and the bank having failed, it was held that the amount thereof "with interest, was still due", from the vendee.

—*Gallagher v. Ruffing*, 118 W., 284, 285.

92. Parol evidence is inadmissible to contradict "the plain terms of an unambiguous" promissory note.

93. "If it was claimed that the note was executed by mistake, and did not express the intent of the parties, this fact could only be proven when properly alleged by an equitable counter-claim. *Casgrain v. Milwaukee Co.*, 81 W. 113." See also ADVANCEMENTS.

—*Schmidt v. Schmidt's Est.*, 123 W. 295, 296.

94. A promissory note to "pay to the order of twenty-five hundred dollars", there being in the printed form a single blank line from "order of" to "dollars", entirely filled with "twenty-five hundred", and subsequently a name interlined between "order of" and "twenty-five", there being also a "power of attorney embodied in the note",—does not, without endorsement, become "by its terms, a note payable to bearer";

95. And as an "implied authority" "for the holder" to fill in omissions "depends, however, on the very existence of a blank", and there is no right "to rewrite it or insert omitted provisions, except where the signer, by leaving a blank, obviously delivers it with such intention",—therefore "this instrument is not negotiable.

96. Whether it is absolutely void as a contract, either originally,

because containing no promise to pay any one, or subsequently, because of illegal alteration by plaintiff, for both of which contentions there is authority, we need not decide". —*Smith v. Willing*, 123 W. 377, 381.

97. A note 'payable after my demise, out of my estate', held invalid. See GIFT. —*Tyler v. Stitt*, 127 W. 379, 381.

98. In a note signed for a corporation, by the treasurer and secretary, the latter neglecting to add the word 'secretary' to his signature, under sec. 1675-20, Neg. Inst. Law, is held "ambiguous in its terms", and "even in the hands of third persons", parol evidence as to "the facts and circumstances" of the signing, is held admissible.

—*Germania Natl. Bank v. Mariner*, 129 W. 544, 549.

99. "An accepted promise to extend the time of payment of a note for a definite period for a new consideration makes a valid contract." So held, as to a collateral note secured by mortgage, given to extend payment on another note. See also MARRIED WOMAN.

—*Goll v. Fehr*, 131 W., 141, 143.

100. "A negotiable note, invalid between the original parties because given in defiance of a statutory prohibition accompanied by a penalty" can "be enforced in the hands of an innocent holder having no knowledge of the illegal fact." *Knox v. Clifford*, 38 W., 651; sec. 1676-27.

—*Arnd v. Sjoblom*, 131 W., 642, 644.

101. "Certificates of deposit" "fall within the general statutes of limitations, sec. 4222, and not within the exception mentioned in sec. 4230. (Cases)".

—*Lusk v. Stoughton S. Bank*, 135 W. 311, 319.

102. A note with a provision 'ten per cent attorney's fees if collected by an attorney, or if suit is brought upon this note', is held "negotiable under sec. 1675-2 of the Neg. Inst. Law (Ch. 356, L. 1899)", superseding prior adjudications.

103. "In all situations where the Negotiable Instrument Law passed in 1899 conflicts with our adjudications, as to instruments made subsequent to that time the former rules".

—*First Natl. Bank v. Miller*, 139 W. 126, 128.

104. As to release of accommodation makers, by payment by the maker. See PAYMENTS. —*Comstock v. Buckley*, 141 W., 228, 231.

105. "In the absence of other evidence" than possession by another person, negotiable notes "payable to the order of S." not endorsed "or transferred either by writing or by parol", "this proves ownership in S."

106. "Mere naked possession of negotiable paper payable to order

does not prove title. *Andrews v. Powers*, 35 W. 644. The same result manifestly follows from the provisions of the negotiable instrument law". Secs. 1675, 1676-21. —*Swanby v. Northern S. B.*, 150 W. 572, 574.

107. Following "the principle of the common law" and "also the rule of reason and justice", it is held that, under sub. 4a, sec. 1679-1, "the release of collateral securities released the surety pro tanto only."

108. "The purpose of the (Neg. Inst.) law was, not to make radical changes in long established and fundamental principles, but" "the idea was to secure uniformity by wiping out small differences, not to change the general principles of commercial law".

—*State Bank of L. v. Michel*, 152 W., 88, 89.

109. "A person may make a note supported by a sufficient consideration, good or valuable, conditioned upon its being extinguished by a condition subsequent specified therein". See also GIFT.

—*Miller v. Slater*, 154 W., 35, 39.

110. Where "drunkenness" is "so complete as to deprive the maker of the use of his faculties", it is void as between the maker and payee, and under sec. 1676-27, also therefore void in the hands of "a holder in due course". (Cases).

111. "Intoxication merely to the extent that he cannot give the attention to it that a reasonably prudent man would be able to give is not sufficient. (Citation)". See also INCOMPETENTS.

—*Green v. Gunsten*, 154 W., 69, 72.

112. "A party who refuses to pay a note that is presented to him does not thereby waive or lose any legitimate defense he may have to an action brought on the instrument",—

113. "The case" not being "one where the plaintiff was misled to his advantage into believing that some defense other than that finally interposed (in this case, forgery) was relied on".

114. "When a party pays a note to which his name is forged, it cannot be said that he has any intention of assuming liability for all the forgeries of his name by the same person". p. 562.

115. "Ordinarily men do not pay paper to which their names are forged. The fact of payment is at least in the nature of an admission that the signature is genuine", but "the admission may be explained away".

116. In a claim by an endorsee against the estate of the endorser, S., it was contended "that the statute",—sec. 4192, as to proof of signature,—"does not apply because of S.'s death, and that sec. 4193 does apply", as to possession being proof of endorsement. p. 564.

117. "Accepting this view as correct, then the possession of the note was presumptive evidence that the same was endorsed by S. This statute does not relieve the plaintiff of the burden of proof", but "simply permits him to make a prima facie case in" that way.

118. "It is not accurate to say that the burden of proof has been shifted because a prima facie case has been made. Where plaintiff has the burden of proof at the beginning of a trial it remains with him to the end".
—*Murphy v. Estate of Skinner*, 160 W. 554, 559.

119. A maker of a promissory note to heirs for estate personalty was held "estopped from asserting the defense of lack of consideration". See SETTLEMENT.
—*Schoenwetter v. Schoenwetter*, 164 W. 131, 135.

120. Payments made to a person other than the holder are at the risk of the payor,

121. And "the burden is upon the party making the payment to show the agent's authority". See also PAYMENTS.

—*Connell v. Kaukauna*, 164 W. 471, 496.

PROOF OF HEIRSHIP.

See BIRTH, ETC. HEIRS. PRESUMPTION OF DEATH.

PROOF OF PUBLICATION OR SERVICE.

See PUBLICATION. SERVICE.

PUBLIC ADMINISTRATOR.

Made without notice, 4.

Not collaterally questioned, 3.

Rights of next of kin, 1, 2.

Rights, etc.—continued

After appointment, 1.

Temporary situation merely, 2.

1. Where the public administrator was granted administration, the non-resident next of kin was held "absolutely entitled" to have a "suitable person resident in this state," appointed administrator, where such application was made "within thirty days after the death". See also ADMINISTRATION.
—*Welsh v. Manwaring*, 120 W., 377, 379.

2. "As held by this court, this section (3819, providing for public administrator) 'obviously provides merely for a temporary situation, and authorizes appointment of the public administrator only until those having lawful right under sec. 3807 shall make proper application'.
Welsh v. Manwaring, 120 W. supra.

3. As indicated (in sec. 3819), 'the county court having jurisdiction of such estate' may, 'upon its own motion or upon the application of the public administrator, * grant administration of such estate * to the

public administrator'. Of course, such appointment may properly be made without notice." So sustained here.

4. In *Dunn v. German Amer. Bk.*, 109 Mo. 90, "it was expressly held that 'the right of a public administrator to take charge of an estate cannot be collaterally questioned'. To the same effect; *Hoes v. N. Y., N. H. & H. R. Co.*, 73 App. Div. 363. In so far as this court has spoken on similar subjects of jurisdiction the same is in harmony with the authorities cited. (Cases)". See also ADMINISTRATION.

—*Jordan v. C. & N. W. R. Co.*, 125 W. 581, 587.

PUBLICATION.

See also JURISDICTION. NOTICE. SERVICE.

Affidavit, strictly construed, 1.

Corrected, filed, 19.

Presumptive evidence, 22.

Proprietor, foreman, 4.

Recital insufficient, 1.

Arbitration, publication, 15.

Corrected affidavit filed, 19.

English, legal language, 27.

Legal, official notices, 27.

German newspaper, 3.

Most likely to give notice, 3.

Laws, secretary's certificate, 2.

Published volumes, 2.

Legal language: public expense, 24.

Foreign language, paper, 26.

Notice in English, 26.

Silent as to language, 25.

Papers, different editions, 14.

Summons publication, 5.

Attorney as commissioner, 5.

Foreign judgment, 23.

Personal liability here, 23.

Order a judicial act, 5.

Summons, etc.—continued

Personal service supersedes, 7.

Complete when, 8.

Weeks, successively, three, 6.

Computation of time, 13.

First day or last, 13.

Five weeks successively, 17.

Mixed, insufficient, 17.

Four successive weeks, 16.

Mixed, insufficient, 16.

Full, twenty-one days, 6.

Mixed, held sufficient, 9.

Once a week for six weeks, 18, 20.

Correct publication, 20.

Six successive weeks, 21.

Mixed, sufficient, 21.

Six weeks successively, 18.

Six successive; sale, 10.

Forty-two days, sufficient, 12.

Mixed, insufficient, 11.

Three weeks successively, 22.

Mixed, insufficient, 22.

Weeks publication construed, 28.

1. The affidavit of publication of notice must be "in strict conformity" to the statute, and it is material that the printer "or foreman" should swear that he is such and not merely state it "by way of recital".

—*Hill v. Hoover*, 5 W. 354, 371.

2. The publication of the statute and the time will be taken judicial notice of on "the certificate of the secretary of state, appended to the published volumes of the laws".

—*Attorney General v. Foote*, 11 W. 14, 17.

3. "If the circuit judge", in the case of an American, "directed publication in a German instead of an English newspaper, as being

most likely to give notice to the person intended to be served, we see no legal objection to it," the publication being in the English language.

—*Wakeley v. Nicholas*, 16 W. 588, 592.

4. Affidavit made by "proprietor" instead of "foreman", is good. See SALE OF REAL ESTATE. —*Reynolds v. Schmidt*, 20 W. 374.

5. As to publication of summons it is said: "The granting of such an order is a judicial act. The commissioner or other officer granting it must hear evidence, and must be satisfied therefrom of the existence of certain facts; he must deliberate, decide, adjudge." The attorney in the action as commissioner cannot perform "these judicial functions in any matter pertaining to such action".

—*Crouch v. Crouch*, 30 W. 667, 669.

6. A publication "for three weeks successively next before such sale", "requires a publication of the notice of sale for twenty-one days. In other words, three weeks must intervene between the first publication and the day of sale".

—*McCrubb v. Bray*, 36 W. 333, 339.

7. On an order of publication and alternative personal service without the state, "it is obvious that where such personal service is made, it supersedes the necessity both of publication and of mailing".

8. The order of publication being for six weeks, such personal "service was complete, at the latest, in six weeks after it was made", the court not deciding whether the time might be less.

—*Pier v. Amory*, 40 W. 571, 574.

9. In a three weeks publication for probate of a will where the order was signed May 6th, published May 4th, for hearing May 27th, and the first publication after date was May 7th and the last May 19th, it was held to be "clearly insufficient".

—*O'Dell v. Rogers*, 44 W. 136, 167.

10. "Whatever may be the rule in the state of New York and elsewhere, it must be regarded as settled in this state, by the decision of this court, that the statute (sec. 2993) requires the publication to be for the full six successive weeks before the sale, and that six weekly publications are not sufficient unless for such full time".

11. In this case, "the first publication was on the 24th day of June, and the last on the 29th day of July, and the sale took place on the 2nd day of August, 1881. This was less than six full weeks' publication before the sale, as the statute requires", and "the sale was for that reason clearly irregular and void".

12. "In *Herrick v. Graves*, 16 W. 157, this court held, sub silentio, that the publication of notice of an execution sale, when the first publication was on the 9th day of June and the sale took place on the 21st day of July, was sufficient, because the notice was published for forty-two days, casting out the first day or the last".

13. "The rule of computation of time of the publication of notice of judicial sales of real estate ought to be harmonious if the language of the various statutes will allow it, and if this were a new question we should not hesitate to hold as above; but it is sufficient that the question has been so decided".

—*Collins v. Smith*, 57 W. 284, 286.

14. Where an order directed notice to be published in the "Milwaukee Sentinel", and it was published in the "Milwaukee Daily Sentinel", there being also a "M. Weekly Sentinel" and a "M. Tri-weekly Sentinel", as "mere adjuncts of the daily", and no specific edition known only as "Milwaukee Sentinel", it was held "that the notice was published in the newspaper directed in the order", and that there was not "any defect in the publication of the notice of hearing".

—*Melms v. Pfister*, 59 W. 186, 190.

15. In the arbitration statute (sec. 3545), 'the publication of the award', is held to be the filing in the clerk's office. See ARBITRATION.

—*Russell v. Clark*, 60 W. 284, 285.

16. Where the statute required publication "'once in each week, for four successive weeks prior to' the sale", and the printer's affidavit sworn to May 7th, "simply stated that the notice 'was published in said newspaper for the period of five weeks, commencing on the 9th day of April", which "covered a period of just twenty-eight days", it was held insufficient as not showing publication "once in each week during the time".

—*Ramsey v. Hommel*, 68 W. 12, 14.

17. Following *Ramsey v. Hommel*, 68 W. supra, under the same statute, where "the sale was advertised to take place May 13th", it was held that proof that the notice was published 'for five weeks successively commencing on the ninth of April, and ending on the seventh day of May, 1879', "fails to show a publication of the notice of sale 'once in each week' for four successive weeks prior to the sale".

—*Morris v. Carmichael*, 68 W. 133, 134.

18. "The statute (sec. 2640) requires publication to be made 'not less than once a week for six weeks.' The affidavit of publication states that the same was printed and published in such newspaper 'six weeks successively, commencing,' etc." Held not a compliance with the statute.

19. The publication being in fact correctly made, it is held that on motion "submitted at the argument for leave to file a corrected affidavit," that the same may be done to correct the record.

—*Frisk v. Reigelman*, 75 W., 499, 508.

20. Publication "once in each week for six successive weeks," under sec. 2640, is complied with where there are "six publications, each on

the first day of six successive weeks", from October 5 to November 9, the service being complete at "the expiration of the last week; that is to say, November 16."

—*Cox v. North Wis. L. Co.*, 82 W., 141, 146.

21. A publication on each of six successive Thursdays, and "only thirty-six days from the time of the first publication to the date of the last publication, inclusive," but "more than seven weeks from the time of the first publication to the time fixed for the hearing," under a statute, sec. 1702d, requiring publication 'for at least six successive weeks prior to the day of the hearing,' (without specific designation as to publication once or other number of times each week, was held "sufficient to satisfy the requirement of the statute. *Cox v. North Wis. L. Co.*, 82 W., supra."

—*Johnson v. Hill*, 90 W., 19, 22.

22. Where the statute, sec. 3787, requires publication, of the notice of hearing to prove a will, for three weeks, and the affidavit of the printer recites such publication as "once in each week for three weeks, successively", but further gives the first insertion as April 30th, and the last May 4th, it is held,—that no part can be rejected, as "the affidavit is 'presumptive evidence of such publication and the facts therein stated,' " and "was insufficient to show jurisdiction over the several heirs". See also JURISDICTION.

—*Flood v. Kerwin*, 113 W., 673, 678.

23. Effect of publication service, as to an Iowa judgment on personal liability and note here, and mortgage on land there. See FOREIGN JURISDICTION.

—*Fitch v. Huntington*, 125 W. 204, 207.

24. "Where a statute either directs or permits a publication at public expense, in the absence of language evincing a contrary intention, such publication must be made in the legal language of the country." (Cases).

25. It "has been decided", "that where a statute either authorizes or directs a publication to be made in a newspaper, and is silent as to the language in which such paper must be printed,

26. Publication may be made in a newspaper habitually printed in a foreign language, provided the publication authorized or directed is made in the English language". (Cases).

27. In *State ex rel. Goebel v. Chamberlain*, 99 W. 503, "the court said: 'The English language is the language of the country, to be used in all legal and official notifications or proceedings, in the absence of any statute authority to the contrary'".

—*Hyman v. Susemihl*, 137 W. 296, 299.

28. (See subd. 25, of sec. 4971, created by ch. 227, L. 1917, construing "weeks" publication to be one insertion in each week).

PUBLIC POLICY.

See POLICY OF THE LAW.

PUBLIC TRUSTS.

See CHARITABLE TRUSTS.

PURCHASE MONEY LIEN.

See LIEN.

QUANTUM MERUIT.

See also SERVICES.

- Contracts: failure, 1.
- Part performance, 2.
 - Contract price governs, 4.
 - Sickness intervening, 2.
- Performed and accepted, 1.
- Treated as rescinded, 8.
 - When recovery allowed, 9.
 - Without quantum meruit, 8.
- Entire contract:
 - Excusable non-performance, 7.
- Express contract shown, 29.
 - No recovery thereunder, 29.
- Infant, orphan, recovery, 3.
- Negligent, unskillful employee, 11.
 - Allowed to complete, 11.
- No meeting of minds, 21.
- Performance prevented, 10.
 - Afterward completed, 10.
 - Either remedy, 10.
- Pleading: both causes, 23.
 - Recovery on either, 23.
- Pleading express contract, 24.
 - Not recovery on merits, 24.
 - Without amendment, 24.
- No value proof; void also, 26.
 - No recovery allowed, 26.
- Son, after at age, 14.
 - Rate or time not fixed, 14.
- Special instance and request, 27.
- Testamentary promise failure, 5.
 - For part services, 28.
- Unliquidated demand, 6.
 - Carries no interest, 6.
- Void: indivisible contract, 12.
 - Contract to deed realty, 21.
 - Service recovery, 21.
- Entire contract; recovery, 25.
- Express promise, 18.
- Services contract, 15.
 - As though not express, 17.
 - Not evidence of value, 16.
 - Reputation for skill, 16.
- Services, improvements, 12.
- Special contract, 13.
 - Services, improvements, 13.
- Sunday contract, 26.
 - No value proof, 26.
- Refusal to accept agreed lot, 19.
 - Recovery for services, 20.

1. Where work, not performed in the manner nor within the time specified in a written contract, was accepted and used, the workman is entitled to recover "the reasonable value of the benefit".

—*Taylor v. Williams*, 6 W. 363, 366.

2. Recovery for part performance, sickness intervening, "is not for the contract price, but on quantum meruit." See also SICKNESS.

—*Green v. Gilbert*, 21 W. 395, 400.

3. An orphan infant where there is no agreement, and not standing in loco parentis, may recover on quantum meruit. See INFANT.

—*Mountain v. Fisher*, 22 W. 93, 97.

4. "Where there is a special contract between parties, and work done under it, the contract must govern as to the price to be paid for such work, even though the contract may have been but partially performed, and suit is brought to recover on a quantum meruit for the work done".

—*Bishop v. Price*, 24 W. 480, 482.

5. An employe may recover quantum meruit for services performed on a testamentary promise, no provision having been in fact made. See SERVICES.

—*Bayliss v. Est. of Picture*, 24 W. 651, 652.

6. "And unliquidated demand quantum meruit, for which no account had been rendered, and at which there had been no attempt at settlement", "does not carry interest".

—*Marsh v. Fraser*, 37 W. 149, 151.

7. "Recovery is allowed upon a quantum meruit", for part of a performance of an entire contract, on excusable non-performance. See ENTIRE CONTRACT.

—*Jennings v. Lyons*, 39 W. 553, 557.

8. "If the plaintiff failed to perform his contract by the time agreed upon, if any time of performance was specified therein, or, such time not being specified, if he failed to perform it within a reasonable time, it was competent for the defendant to treat the contract as rescinded, and to refuse to allow the plaintiff to complete it, without making himself liable on a quantum meruit for the work already done".

9. "But if, within the time for performance (whether that was a specific or a reasonable time), the defendant refused to allow the plaintiff to fulfill the contract on his part, the latter may recover on a quantum meruit".

—*Davis v. Hubbard*, 41 W. 408, 411.

10. "When a party was prevented from performance within the stipulated time, by the omission of the other (to make agreed payments), and subsequently performed the work agreed upon, he need not bring his action upon the contract, but may resort to the quantum meruit to obtain his indemnity". See RESCISSION OF CONTRACT.

—*School District v. Hayne*, 46 W. 511, 515.

11. Where a negligent, unskilful employe fails to fully perform his contract, he may yet recover quantum meruit for services while allowed to continue in employment. See SERVICES.

—*McCormick v. Ketchum*, 48 W. 643, 646.

12. Where under a parol agreement with an administrator, to purchase a farm if title can be given, and an agreement for specific pay for services and improvements upon the premises by the buyer, if the title fails, and the title subsequently failing, it is held, that the oral agreement for the sale of the land being void, and "the whole contract being

entire and indivisible, falls to the ground," but that recovery may be had for services and improvements, quantum meruit.

13. Judgment having been rendered on the void special contract for services and improvements, it is said: "We cannot, however, assume that the recovery would have been the same had the plaintiff proceeded on a quantum meruit," the evidence indicating to the contrary.

—*Clark v. Davidson*, 53 W. 317, 321.

14. A son working for his father after becoming of age, by agreement, but without the rate or time of payment specified, "may recover quantum meruit." See SERVICES.

—*Byrnes v. Clark*, 57 W. 13, 21.

15. On a void contract for services, the recovery may be had quantum meruit.

16. But the contract is not evidence as to the value of the services, nor is evidence of "general reputation" for skill, admissible. See SERVICES.

—*Cohen v. Stein*, 61 W. 508, 509.

17. On a void contract for services "the parties stand in the same relation to each other as though no express contract existed between them", and recovery may be had quantum meruit. See SERVICES.

—*Salb v. Campbell*, 65 W. 405, 408.

18. Claimant was held entitled to recover quantum meruit, on proof of a void "express promise or agreement to remunerate." See SERVICES.

—*Ellis v. Cary, Admr.*, 74 W., 176, 186.

19. In an action to recover for services, orally agreed to be paid for by the conveyance of a lot, the defendants offering to make such conveyance but the plaintiffs being unwilling to accept the same, the contract was held void (not voidable) under the statute of frauds, sec. 2304, and it is said:

20. "The plaintiffs having rendered valuable services to the defendants under this void contract, are entitled to recover what such services were reasonably worth. (Cases supra)". So held.

—*Koch v. Williams*, 82 W., 186, 191.

21. Recovery of attorneys for services to administrator when there had been "no meeting of the minds," as to employment. See LIABILITY.

—*Miller v. Tracy*, 86 W., 330, 335.

22. Claim for services allowed quantum meruit on the evidence, in part, of a void contract to deed realty as compensation. See SERVICES.

—*Est. of Kessler*, 87 W., 660, 667.

23. Where "the allegations are entirely sufficient to make a good complaint upon both causes of action", on contract and on quantum

meruit, while not separately stated, and poor pleading, the defendant "having gone to trial upon the complaint", without a proper "motion to make definite and certain", recovery may be had on either cause of action, i. e., on quantum meruit, the contract having failed.

—*Beers v. Kuehn*, 84 W. 33, 35.

24. On a complaint to recover for services, on an express contract, recovery cannot be had quantum meruit, nor evidence offered, "at least until by an amendment to his complaint he had laid the foundation for such a claim. This is not like the case of *Beers v. Kuehn*, 84 W. supra".

—*Pearson v. Switzer*, 98 W. 397, 399.

25. Under a void entire contract, recovery may be had quantum meruit. See ENTIRE CONTRACT. —*Draheim v. Evison*, 112 W., 27, 29.

26. In an action to recover for services upon an express contract, where "the complaint alleges no claim upon quantum meruit, nor was any proof offered of the value of the services", and the proof showed that the contract "was made on Sunday", and therefore void, though the answer "does not assert" invalidity upon that ground,—held that no recovery could be had.

—*Pearson v. Kelly*, 122 W. 660, 663.

27. As to claim for services at "special instance and request", with reasonable value stated, being on quantum meruit. See SERVICES.

—*In re Est. of Happel-Bossi*, 133 W., 119, 123.

28. On breach of agreement to compensate for past services by a definite amount by will, recovery quantum meruit only with interest can be had. See also SERVICES.

—*Murtha v. Donohoo*, 149 W. 481, 486.

29. It appearing "that there was an express contract" for services, which was not proven, it is held that this "takes away any basis" for recovery quantum meruit. See also SERVICES.

—*Est. of Simonson*, 164 W. 590, 595.

QUIA TIMET.

Legacies and annuities, 1.

Probate Court:

Legatees, by parol, 2.

Settle in advance, 1.

Remove title cloud, 3.

Tenant in common, 3.

1. "Cases of legacies and personal annuities are those in which bills quia timet have been most frequently entertained in equity", for the

protection of legatees and to prevent wrongs, "and not because an injury has already occurred".

2. "It seems to this court", "to be a most proper case for a proceeding in the probate court in the nature of a bill quia timet, to settle and determine in advance the rights of the legatees by parol, or cestui que trusts". See JURISDICTION. —*Brook v. Chappell*, 34 W. 405, 422.

3. An action to remove a cloud on the title, to declare a certificate on a foreclosure sale void by one tenant in common not in actual possession, without making the other tenant in common a party, "may be fairly treated as an action quia timet, appealing to the general equity powers of a court which will grant the relief asked upon the facts stated in the complaint. *Pier v. Fond du Lac*, 38 W., 470."

—*Herron v. Knapp, S. & Co.*, 72 W. 553, 558.

QUIT CLAIM.

See CONSTRUCTION OF DEEDS. DEEDS.

RATIFICATION.

See also WAIVER.

Accepting of avails, 5.
 Ratified unauthorized treaty, 5.
 Agents; unauthorized deal, 2.
 Assumed authority as, 4, 13.
 Principal, affirm or deny, 4.
 Conditions as to, 4.
 Knowledge of facts required, 15.
 Ratify circumstantially, 16.
 Ratifying; becomes liable, 13.
 Also, when sub-agent, 14.
 Ratify part; confirms whole, 2, 6.
 Realty; may be orally, 3.
 Authorized in advance, 17.
 Also be ratified, 17.
 With some formality, 17.

Effect of ratifying, 7.
 Retroactive efficacy, 8.
 Right of third parties, 7.
 Infant agency failure, 11.
 Oral promise to pay void, 11.
 Not ratification, 12.
 Infant ratify orally, 1.
 Plat signed and acknowledged, 18.
 Ratified, power of attorney, 18.
 Same formality necessary, 17.
 Through wrong of another, 9.
 Insistence on performance, 10.
 Operates as waiver, 10.

1. Ratification by an infant after at age may be oral, and "any act or declaration which recognizes the existence of the promise as binding is a ratification of it."
 —*Stokes v. Brown*, 3 Pin. 311, 314.

2. "Ratification of a part of an unauthorized transaction of an agent, is a confirmation of the whole". —*Fargo v. Ladd*, 6 W. 106, 117.

3. "Ratification in writing" of a contract for the sale of real estate by an agent, is not required, it not being necessary that the original authority be in writing. See *SALE OF REALTY*.

—*Smith v. Armstrong*, 24 W. 446, 451.

4. "When a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must, within a reasonable time, disaffirm such act, at least, in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act".

—*Saveland v. Green*, 40 W. 431, 438.

5. "No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of any unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself.

6. Also, a ratification of part of an unauthorized transaction of an agent is a confirmation of the whole".

—*Strasser v. Conklin*, 54 W. 102, 106.

7. "It was said by Mr. Justice Field (approvingly quoted and followed): 'The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification.

8. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification'. *Cook v. Tullis*, 18 Wall., 338".

—*Platt v. Schmitt*, 117 W., 489, 497.

9. "A party to a contract, complaining that he was induced to make it through the wrong of another, cannot assert its invalidity, and at the same time insist that it be carried out and performed.

10. Under such circumstances, insistence on performance is an affirmation and adoption of the agreement, and a waiver of any right to revoke and annul it." (Citations).

—*Burnham v. Burnham*, 119 W., 509, 516.

11. On failure to show that defendant's minor son acted as his agent in purchasing a piano, an oral promise to pay for the son's purchase "was clearly void under the statute of frauds,"

12. And there is no "question of ratification in the case", there being no agency shown.

—*Fisher v. Lutz*, 146 W. 664, 666.

13. "One may make another his agent by ratifying such other's assumption in the matter, and thereby become liable both to such other and to the third party with whom he deals, as well as by an original contract of employment.

14. Such ratification may occur as well when a person without authority in fact from the principal assumes to have it, under another falsely pretending to represent the principal and to employ a sub-agent, as where there is no intermediary in the matter.

15. True, there can be no ratification within the meaning of these rules without action on the part of the principal based on knowledge of the facts;

16. But ratification may appear circumstantially as well as expressly".

—*Garlick v. Morley*, 147 W. 397, 399.

17. "What may be authorized in advance may be subsequently ratified, provided the ratification be of the same nature and executed with like formality as that required for conferring authority in the first instance. (Citations)".

18. Held that where a plat was signed and acknowledged by a former owner as 'agent of the proprietors', a subsequent "power of attorney" from the proprietors authorizing such proceeding, was "a good ratification" making the plat effective. —*Bright v. Superior*, 163 W. 1, 14.

REAL ESTATE.

See also DEEDS. DEVISES. EQUITABLE CONVERSION. SALE OF REALTY. TITLE.

Administration rights:

Action for use and occupation, 30.

When not by admr., 30, 31.

Chargeable with rents, profits, 29.

Only while in possession, 29.

Common law rule, 15.

Absolutely to heir, 16.

Representative no right, 16.

Descends to heir immediately, 15, 46.

Executor not against devisee, 40.

Debts and legacies, 40.

During estate settlement, 40.

Possession only, under sec. 3823, 41, 47, 48.

None at common law, 41.

Extr's. estate, not intervening, 49.

Heir maintain ejection, 28.

Until possession taken, 28.

Insolvent estate; for creditors, 34.

Against assignee of heirs, 35.

Administration, etc.—continued

Possession not duty, when, 27, 47.

No debts, no right, 48.

Realty and personalty, for debts, 36.

Not barred by sec. 3873a, 36.

Representative's right now, 17.

Adopted from Michigan, 19.

Deed deprives heir of rights, 20.

Possession rights, defined, 18, 46, 47.

Possession, without sale, 20.

Sell without possession, 20.

When possession, right ceases, 25.

Ancient fence lines, 52.

Color of title, 6.

Considered as personalty, 32.

"Pay over and deliver", 32.

Contract, convey to decedent, 42.

Such lands, realty, 42.

Continuing lease contract, 43.

Binding on devisees, 43.

Continuing lease—continued
 Rents; not by admr., when, 43.
 Conveyance fraudulently obtained, 26.
 Ostensibly for third party, 26.
 Held in trust for him, 26.
 Covenant by guardian, 1.
 Estate not bound, 1.
 Disposed of at death, 22.
 In three ways, 22.
 Government description, 23.
 Prevails over acre numbers, 24.
 Whether more or less, 23.
 Income of realty, is realty, 45.
 Judicial notice; subdivisions, 9.
 Law of location governs, 50.
 Construction of deeds also, 51.
 Descent and transfer, 50.
 Lease; surrender by parol, 7.
 Assignment effect, 7.
 Lien for purchase price, 10.
 Notice:
 Public sale; jurisdictional, 14.
 Put upon inquiry, 4.
 Suspicion of defect, 3.

Option in writing, interest, 37.
 Surrendered without deed, 39.
 Accepted and acted on, 39.
 Parol:
 Fraud or mistake, 8.
 Sale of realty, void when, 13.
 Supply county and state, 9.
 Partnership in realty, 11.
 Representative's rights to, 17, 18, 20.
 When no further right, 25.
 Sale at a sacrifice, 2.
 Absence of mistake, fraud, 2.
 Statute of frauds:
 Part payment; no possession, 5.
 Surrender of interest in, 38.
 Without deed or conveyance:
 1. "Acts" of parties concerned, 38.
 2. "Operation" of law, 38.
 Tax title:
 Purchased by administrator, 33.
 Title:
 Legal vests in heirs, 12.
 Suspicion of defect in, 3.
 Will devising, passes title, 21.

1. In the sale of real estate by a guardian "he acted as a naked trustee," and he cannot covenant to remove encumbrances, and if he does and gives bond in his representative capacity so to do, his ward's estate is not bound.
 —*Person v. Merrick*, 5 W. 231, 239.

2. In the absence of mistake, surprise or fraud, a sheriff sale at a sacrifice (at \$1,138.06 of property worth \$4,000) was not set aside on application, though an offer by the mortgagor to pay the amount bid, being the amount of the mortgage debt with interest and costs, was made several days thereafter. "His property was sacrificed through his own neglect or inattention to look after it."
 —*Hill v. Hoover*, 5 W. 354, 375.

3. "Mere rumor or suspicion of a defect in the title, will not be sufficient to operate as notice".

4. "Whatever is sufficient to put a man upon inquiry is good notice" of equities. See also NOTICE.
 —*Lamont v. Stimson*, 5 W. 443, 447.

5. Part payment without delivery of possession, even by a tenant, will not take the case out of the statute of frauds. See also CONTRACTS.
 —*Blanchard v. McDougal*, 6 W. 167.

6. "Color of title" is that which is apparent but not real. See also TITLE.
 —*Edgerton v. Bird*, 6 W. 527, 536.

7. Lease with covenant to pay rent assigned, the lessee is still liable though the lessor accepts rent from the assignee. Surrender cannot be by parol. See also LANDLORD AND TENANT.

—*Bailey v. Wills*, 8 W. 141, 157.

8. Fraud or mistake may allow a prior parol agreement to vary a written contract. See PAROL.

—*Reed v. Jones*, 8 W. 392; 413.

9. Courts will take judicial notice of legal subdivisions, and supply county and state by oral evidence. See JUDICIAL NOTICE.

—*Atwater v. Schenck*, 9 W. 160, 164.

10. The vendor has a lien for the purchase price under certain circumstances. See LIEN.

—*Tobey v. McAllister*, 9 W. 463, 467.

11. An agreement by partnership in real estate transactions must be in writing. See SURVIVING PARTNER.

—*Bird v. Morrison*, 12 W. 138, 162.

12. The legal title vests in the heirs, subject to be divested on sale for debts, etc. See TITLE.

—*Stark v. Brown*, 12 W. 572, 582.

13. Verbal sale of real estate is void without a part performance. See FRAUD, STATUTE OF.

—*Brandeis v. Neustadt*, 13 W. 142.

14. The notice in the sale of real estate is jurisdictional and the record or license must show due notice. See SALE OF REALTY.

—*Gibbs v. Shaw*, 17 W. 197.

15. "By the common law the real estate descended to the heir immediately upon the death of the ancestor".

16. "The personal representative of the deceased—the executor or administrator, as such—had nothing whatever to do with the lands of which the deceased died seized, or with the rents and profits thereof. These belonged absolutely to the heir".

17. "The only changes that have been made in the common law in this respect are", (1) "that the executor or administrator shall return to the proper court an inventory;" (2) that he "may sell the real estate" for the payment of debts, etc.; and (3) that he "shall have the right to the possession" for purposes enumerated in the statute, "until the estate shall have been settled, or until delivered over by order of the county court".

18. The statute does not necessarily deprive "the heir of such right of possession", but, "it gives the personal representative the power to reduce the real estate to his actual possession should he think proper, or should the probate court direct him so to do, but it does not imperatively require him to take possession thereof, and until he does so the common law right of the heir to the possession remains unimpaired".

19. "Our statute on this subject seems to have been copied from those of Michigan, and in construing them we have adopted the reasoning and followed the decisions of the supreme court of that state. 7 Mich. 341; 12 Mich. 356".

20. The statutory powers to sell and to take possession "being separate and distinct, either may be exercised without reference to the other. The administrator may enter into possession without selling, and may sell without taking possession", in which latter case his deed "conveys the possession of the heir, and thus operates as a disseizin of the heir".

—*Jones v. Billstein*, 28 W. 221, 227.

21. A duly proved will devising real estate passes title. See TITLE.

—*Markwell v. Thorn*, 28 W. 548, 559.

22. Real estate may be disposed of at death, in three ways. See ESCROW.

—*Prutsman v. Baker*, 30 W. 644, 652.

23. A conveyance of the east half of a quarter-quarter section "containing twenty acres, according to the government survey", conveys the whole half sub-division, whether actually more or less than twenty acres.

24. "The government description and monuments established by the surveys are to be regarded, rather than the number of acres which are mentioned in the deed".

—*McEvoy v. Loyd*, 31 W. 142, 145.

25. "The provision that if the estate is settled, that is, if there are no claims against it, none in its favor, no personal property belonging to it, and the real property which once constituted a portion of it has passed into the possession of the devisees thereof and those claiming under them—the executor or administrator has no longer any right to the possession of the real estate". See also SETTLEMENT.

—*Flood, Admr. v. Pilgrim*, 32 W. 376, 380.

26. A conveyance fraudulently obtained, ostensibly for the benefit of a third party, held in equity to be held in trust for the latter. See TRUSTS.

—*Lombard v. Cowham*, 34 W. 486, 491.

27. "Whatever power the administrator (in this case, de bonis non) may have to take actual possession of the land of which his intestate died seized, it is not his duty to do so unless the rents and profits thereof are needed in the settlement of the estate;

28. And until he does take possession, the heir may maintain ejectment for the land, although the estate has not been settled and distributed by judgment of the probate court.

29. It was so held, after much deliberation, in *Jones v. Billstein*, supra. Moreover, the administrator is only chargeable with such rents and profits while the land remains in his possession".

30. It seems to follow, from *Flood v. Pilgrim*, supra, "that if the administrator has not taken possession of the land, if the rent of it is not needed in the settlement of the estate, and if there is nothing in his relations to the occupant analogous to the relation of landlord and tenant, he cannot maintain an action for use and occupation."

31. And it was so held in this case, on the authority of the two cases cited.
—*Filbey v. Carrier*, 45 W. 469, 471.

32. Real estate under a power of sale not mandatory, is considered as "personalty only", where the executors are to "pay over and deliver". See CONSTRUCTION OF WILLS.

—*Dodge v. Williams*, 46 W. 70, 97.

33. Where the administrator, "by the use of the moneys belonging to the estate", purchases an outstanding tax title on estate lands, in his own name, it inures to the benefit of the heir.

—*Watkins v. Zwietsch*, 47 W. 513, 514.

34. In an insolvent estate, "the administrator had the right to the possession of the land pending the administration, and to collect the rents of the same for the benefit of the creditors, unless he had been prevented by some proper proceeding by the petitioner, as mortgagee, to have the same applied upon his mortgage". Sec. 3823.

35. And so held, notwithstanding all the heirs had quit-claimed to the mortgagee.

—*Crow v. Day, Admr.*, 69 W. 637, 641.

36. "Chancellor Kent says the rule prevails generally in the United States that the lands descended to the heirs are liable to the debts of the ancestor equally, in all cases, with the personal estate. 4 Kent. Conn. 422. The object of the revised statutes (secs. 3274 et al) is to regulate the remedy to enforce this liability", and "the debt against such real estate is" not barred by section 3873a. See also LIEN.

—*Fisk v. Jenewein*, 75 W. 254, 256.

37. An option in writing for the purchase of land is "an interest in the land therein described, within the meaning of sec. 2302", providing for conveyance "by act or operation of law or by deed" in writing.

38. "The section provides two ways of surrendering such estate or interest without any deed or conveyance in writing. One is by the 'acts' of the parties concerned. The other is by 'operation of law.'"

39. Such option may be surrendered by act without a deed or conveyance in writing, but "such act or acts must be inconsistent with the continuance of such former estate or interest, and must, moreover, be actually accepted and acted upon by the other, and, in fact, all the parties concerned."

—*Telford v. Frost*, 76 W., 172, 174.

40. As to the right of possession of realty by the executor, under sec. 3823, not being absolute, cases supra, on the question, are cited approv-

ingly, and it is held that, following them, the executor is not entitled to possession as against the devisee "where it appears that there is enough personal property in hand to pay all debts and legacies," though the estate is not settled.

41. "All the rights which the executor has to the possession of the real estate he derives from this statute, because he has none at common law."
—*McManany v. Sheridan*, 81 W. 538, 542.

42. Lands in possession under contract to convey to decedent, is realty. See LAND CONTRACT.
—*Carpenter v. Fopper*, 94 W., 146.

43. The rents and profits not being needed for the payment of debts or the settlement of the estate,—in an action to recover realty subject to a continuing contract "somewhat in the nature of a lease", "no recovery in the action could be had by the administrator". (Cases supra).

44. Such contract not "depending on personal skill", on the part of the tenant defendant, continues in force on the landlord's decease, binding on his devisees. See also CONSTRUCTION OF CONTRACTS.

—*Volk v. Stowell*, 98 W. 385, 389.

45. "Our statutes" and "the adjudications" treat "the income of the real estate," "as real estate". See also NUNCUPATIVE WILL.

—*In re Davis's Will*, 103 W. 455, 457.

46. "Real estate descends to the heir immediately upon decease of its owner, and no intervention of court or administrator to take intermediate title, as in the case of personal property, is necessary. *Marsh v. Waupaca Co.*, 38 W. 250.

47. Our statute (sec. 3823) has given a very limited right to an administrator to take possession of the real estate, but imposed no duty on him, except when its rents and profits are necessary in the settlement of the estate.

48. It has been held that if there are no debts he has no right to take possession. *Flood v. Pilgrim*, 32 W. supra."

49. "We deem it entirely clear, both on reason and authority, that the permissive right of an administrator to take all real estate pending the settlement of the estate, certainly until exercised, does not constitute an intervening estate, so as to make that of the heir merely one in remainder or reversion". See also PARTITION.

—*Hinman v. Hinman*, 126 W. 191, 193.

50. "It is well established that the law of the state wherein land is situated controls and governs its descent, alienation, and transfer,

51. And the effect, and construction of deeds conveying it, in so far as they affect the rights of parties arising from such descent, alienation, or transfer. *McGoon v. Scales*, 9 Wall. 23; (other cases)".

—*Lyndon Lumber Co. v. Sawyer*, 135 W. 525, 531.

52. "Ancient fence lines" "maintained as they were for at least thirty and probably fifty years, should be taken as fixing the correct boundaries of the tract", as against disagreeing modern surveys. (Cases).

—*Wunnicke v. Dederich*, 160 W. 462, 467.

REAL ESTATE BROKERAGE.

See COMMISSIONS OF BROKERS, ETC.

REBUTTAL.

Excludes original, generally, 1, 6.

Admission error, when, 3.

Case, not unfairly upheld, 9.

Discretion of court, 1, 2, 4, 6.

Equity, more liberal, 4.

Good faith, not error, 5.

Material, might be error, 13.

Excludes, etc.—continued

Not abridge party's right, 7.

Original and rebuttal, 8.

No objection to it, 8.

Range, matter of discretion, 11.

No abuse, no error, 11, 12.

Surrebuttal:

Against rule of order, 10.

1. Rebuttal proof as a general rule excludes direct or original evidence, but it is a matter subject to the court's discretion. See EVIDENCE.

—*Campbell v. Moore*, 3 W. 767.

2. "It is a matter in the discretion of the trial court to permit such evidence to be given out of its proper order, and,

3. Unless the opposite party can clearly show that he has been injuriously prejudiced by the admission of such evidence out of its proper order, it is not an error for which the judgment should be reversed".

—*Duffy v. Hickey*, 68 W. 380, 383.

4. While plaintiff has no "strict legal right", to give testimony, properly a part of his original case, after the defendant's testimony is given, "trial courts, however, have a large discretion as to the order in which testimony should be admitted, especially in equity cases like this.

5. Such exercise of discretion, in good faith, and in the absence of any abuse of it, is not the subject of review".

—*Hagerty v. White*, 69 W. 317, 323.

6. The general rule that after the defense "is closed the plaintiff will be confined to rebutting evidence," "is not inflexible, and the court may, in its discretion, allow or refuse to receive original evidence. *Campbell v. Moore*, 3 W., *supra*". *Hastings v. Palmer*, 20 Wend. 225.

7. "This discretion, however, must not be exercised so as to deprive or abridge the right of the party against whom it is produced to rebut it.

8. It is no objection to the reception of such evidence that, in addition to rebutting the defense or case of the party against whom it is offered, it incidentally tends to corroborate or sustain the case made in chief. 1 *Thomp. Trials*, 346, 348: (N. Y. cases.)"

9. The admission of original evidence on rebuttal was upheld as 'not having been "unfairly withheld," though "the plaintiff and his counsel both knew of the existence of the testimony sought to be introduced as rebutting, and had the witnesses in attendance before the close of the plaintiff's case, and in fact examined one of them in support of his original case, but without any allusion to the matters thus offered."

—*McGowan v. C. & N. W. R. Co.*, 91 W., 147, 154.

10. As to the right to "surrebuttal" against "the rule of the order of proof", to comply with the statute. See *TRANSACTIONS WITH DECEASED PERSONS*.
—*Anderson v. Anderson*, 136 W. 328, 331.

11. "How wide a range evidence in rebuttal shall take is very much a matter of discretion on the part of the trial court, and unless there is a clear abuse of such discretion in excluding testimony the exclusion cannot be reversible error. *Stanhilber v. Graves*, 97 W. 515".

12. Where "the offered testimony was not strictly rebuttal to any new matter brought out by the defense", and by reason of other "uncontradicted testimony", it "does not become very material", its "exclusion cannot be held to be prejudicial error";

13. But "had it related to an issue upon which the evidence was close and conflicting it might have had to be held prejudicial error to exclude it".
—*Dixon v. Russell*, 156 W. 161, 167.

RECEIPTS.

See SETTLEMENT. WRITINGS.

RESCISSION OF CONTRACT.

See also BOND FOR MAINTENANCE. REMEDIES.

Deed with possession given, 21.
No fraud or concealment, 22.
Offer of title and possession, 23.
Estoppel from denying, 23.
Destruction of personalty, 24.
Equivalent to rescission, 25.

Efficient cause, rescinds, 5.
Other parties consent implied, 5.
Executory only, rescinded, 19.
Bankruptcy; terminate, 49.
Converse of specific performance, 20.
One repudiates; other rescinds, 48.

Failure to make payments, 9.
 Formal tender unnecessary, 30.
 Offer to return sufficient, 30.

Fraud:

Acquiescence after discovery, 32.
 Discovery of new incident, 32.
 Evidence as in reformation, 16.
 Clear and convincing, 16, 18.
 Not loose, inconclusive, 17.

Prerequisites:

(1) Restoration, original position, 40.

(2) Rescind in toto, 40.

(3) Both to be complete, 40.

Exception, part payment, 41.

Condition of, 41.

Rescind in toto, 1, 40.

Signature obtained by fraud, 42.

Absence of negligence, 42.

Victim only may rescind, 35.

General rule, consent of all, 3.

Need not be expressed, 4, 8.

Intestate, fraud on, 46.

Administrator may sue, 46.

Mistake:

Rescind on account of, 2.

Mutually rescind and vary, 26.

Without new consideration, 26.

Original imported into, 27, 28.

Non-performance of other party, 12.

Either rescind, when, 15.

Failure by vendee, 14.

Sale of land, 13.

Sale of personalty, 12.

Offer, action in equity, 33, 43.

Not action at law, 34, 43.

One of two wrong doers dies, 47.

Judgment against executor, 47.

Prevent other performing, 10.

Within stipulated time, 11.

Subsequently performs, 11.

Quantum meruit, 11.

Reasonable time to reject, 36.

Both tests applied, 39.

Consumption of article, 39.

Determined by inspection, 38.

Practical test only, 37.

Recovery of consideration, 44.

Rescission must be complete, 44.

Refusal to receive back, 31.

Is waiver of tender, 31.

Rescinded:

Done or omitted to do, 6.

Not expressly declared, 8.

Other party treat rescinded, 7.

Sale of lots by administrator, 45.

1. "When a party seeks to rescind a contract on the ground of fraud, he must do so in toto, for the purpose of restoring the party as far as possible to the condition in which he stood when the contract was made."

—*Hendricks v. Goodrich*, 15 W. 679, 682.

2. A contract may be rescinded on account of mistake. See MISTAKE.

—*Johnson v. Parker*, 34 W. 596, 601.

3. "It may be abstractly true, as a general rule, that, as a contract can be made only by the consent of all the contracting parties, it can be rescinded only by the consent of all;

4. And yet such consent need not be expressed by an agreement to rescind in any case;

5. And when a party for any efficient cause rescinds or abandons the contract, the consent of the other party will be implied or presumed, as he might have well anticipated and expected such rescission and abandonment by reason of his own default";

6. "A party may rescind the contract when the other party has done anything, or omitted to do something, which renders him unable to perform it;

7. And when one party fails or refuses to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded;

8. And the purpose of rescinding need not be expressly declared by the one party, in order to give the other party the right of consenting and so rescinding. (Citations)."

9. "The failure or refusal to make payments (as in this case) according to the terms of an executory contract, by one party, will give the other party a right to rescind the contract, or treat it as rescinded".

10. "If the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of his agreement, the contract may be considered as rescinded;

11. And when a party was prevented from performance within the stipulated time, by the omission of the other, and subsequently performed the work agreed upon, he need not bring his action upon the contract, but may resort to the quantum meruit to obtain his indemnity (Dubois v. Del. & Hudson Canal Co., 4 Wend. 285); and such prevention need not be physical or forced."

12. "A party may rescind the contract by reason of the non performance of its stipulations by the other party, as in the sale of personal property, where the property proves to be different from that contracted for (Woodle v. Whitney, 23 W. 55);

13. As in the sale of land, when the title is defective (Taft v. Kessel, 16 W. 273); or,

14. By reason of failure to perform by the vendee (Minert v. Emerick, 6 W. 355); or,

15. When the obligations of the parties to an executory contract are mutual, either party may rescind for non-performance by the other; without the consent of the other party. Bradley v. Denton, 3 W. 557".

—*School Dist. v. Hayne*, 46 W. 511, 514.

16. "The rule so often laid down by this court, that, to justify the court in reforming a written instrument on the ground that it does not correctly state the intentions of the parties, the evidence of the mistake must be clear and convincing, is applicable to a case wherein it is sought to cancel or rescind the instrument for fraud. 1 Story's Eq. Jur. 694a, and cases cited".

17. "It was said in *Howland v. Blake*, 97 U. S. (7 Otto), 624 (citing several cases in this court), that 'a judgment of the court, a deliberate deed or writing, is of too much solemnity to be brushed away by loose and inconclusive evidence.'

18. Indeed, the general rule of law, applicable to all classes of cases in which fraud in fact is asserted, is that the fraud 'must be proved by clear and satisfactory evidence.' *Fick v. Mulholland*, 48 W. 443."

—*Lavaasar v. Washburne*, 50 W. 200, 201.

19. It is "well settled that only executory contracts can be rescinded".

20. "This method of relief is the converse of specific performance, and in its very nature can have application only to executory contracts; and this court has settled the question beyond controversy."

21. "In direct application to this case, it is held in *Booth v. Ryan*, 31 W. 45, that especially a rescission cannot be made after a deed with full covenants, together with possession, have been delivered in full execution of the contract of sale.

22. It is not pretended in this case that the vendors were guilty of any fraud or concealment, or that the warrantors were insolvent, or that the appellant (vendee) did not have full knowledge of the condition of the property and title. (Cases)."

23. Where the vendee in possession "has offered to rescind the bargain", though "this offer is fruitless in such a case, yet it is sufficient" with the tender back "of the title and possession", for him to be "estopped from claiming, in this case, that he had lost or abandoned such possession, and rendered himself unable to deliver back the same to the respondents (vendors) on such rescission."

—*Smith v. Hughes*, 50 W. 620, 625.

24. The destruction of personal property "while the contract (for sale) remained executory would incapacitate the defendant (vendor) from conveying the agreed interest to the plaintiff (vendee), and there would be a total failure of consideration.

25. It would be equivalent to an unqualified rescission of the contract, and the plaintiff could recover the sums paid on account thereof."

26. "We take it to be well settled that the parties to a contract may, by mutual agreement, vary or modify its terms, or rescind it, without any new consideration therefor.

27. In case of a modification or change of a contract, the consideration for the original agreement is imported into the new agreement which is substituted for it. Per Lord Denman, in *Stead v. Dawber*, 10 Ad. & El. 57; *Brown v. Everhard*, 52 W. 205, (cited under AGREEMENT).

28. No good reason is perceived why the same principle does not apply to the rescission of a contract.

29. But if it does not, the result is the same. In the case of rescission each party is released thereby from the obligations of the rescinded contract. This would seem to furnish a sufficient new consideration, if one is essential to the validity of the agreement to rescind"

—*Kelly v. Bliss*, 54 W. 187, 190.

30. "In order to rescind a contract by a purchaser, when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser; it is sufficient to offer to make return of the same (cases);

31. And if the vendor refuses to receive the property back and return the purchase money, or do anything except to keep what he has, no formal tender of the property is necessary.

The right of the vendor to have the property formally tendered is waived by his refusal to accept it in advance"

—*Potter v. Taggart*, 54 W. 395, 401.

32. Acquiescence after discovery of the fraud, held accord and satisfaction, although "subsequently discovering a new incident in the fraud". See ACCORD AND SATISFACTION.

—*Woodford v. Marshall*, 72 W. 129, 132.

33. In a suit in equity to rescind a purchase of personalty, it is held that an offer to rescind and restore must be affirmatively shown, and for failure to do so dismissal was approved.

34. (This is practically overruled in *Ludington v. Patton*, 111 W., post, because here it is erroneously assumed that an "offer to restore must precede an action in equity as well as an action at law", and "that the omission to observe the distinction between an action for rescission and an action based on rescission was a possible mistake".)

—*Becker v. Trickel*, 80 W., 484, 486.

35. "We do not understand that it is the right of a party, by whose fraud a contract has been induced, to rescind it. The right of rescission is the right only of the victim, and not of the perpetrator, of the fraud".

—*Gunther v. Ullrich*, 82 W., 222, 230.

36. "It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material (soda ash) to exercise the right of rejection in case the goods did not conform to the contract. *Benj. Sales* (6th ed.) 703.

37. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. *Ibid*, 896. *Philadelphia W. Co. v. Detroit W. L. W.*, 58 Mich., 29.

38. But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable."

39. Here, having determined the unfitness by inspection alone, in the first instance, then rejecting and afterward using a considerable quantity for additional test, it is held, that after "rejection it became the defendant's property, if such rejection was rightful", and that plaintiffs had no right to use it further or for "providing evidence of unfitness," "if they proposed to insist upon their right to reject. *Churchill v. Proce*, 44 W., 540." (In *Peplinski v. Nichols*, 143 W., 387, 390, it is said that here "the use which was held to be an act of ownership was a consumption of the article").

—*Cream City Glass Co. v. Friedlander*, 84 W. 53, 58.

40. "The general doctrine that, as a prerequisite to rescission by one person to a contract on the ground of fraud, such person must restore the other party to his original situation; that the rescission must be in

toto, and that restoration must be complete as well,—are all familiar. *Grant v. Law*, 29 W. 99; *Hyslip v. French*, 52 W. 513; *Friend Bros. C. Co. v. Hulbert*, 98 W. 183.”

41. But “a well-recognized exception” is, “where part payment has been made on a sale contract covering various articles of merchandise, the vendor may rescind the sale for fraud as to a part of the property and reclaim it without returning the amount paid on the contract if the value of the goods reclaimed does not exceed the balance due upon the entire transaction. *Friend Bros. C. Co. v. Hulbert*, 98 W. 183”. See also REMEDIES.
—*Gay v. D. M. Osborn & Co.*, 102 W. 641, 645.

42. Where the signature to a contract is alleged to be obtained by fraud,—absence of negligence must be shown. See FRAUD.

—*Dowagiac Mfg. Co. v. Schroeder*, 108 W., 109, 110.

43. In equity, an offer to rescind, where the complaint shows “a willingness to do equity”, and to submit to a complete rescission, is not necessary as in actions at law. See TRUSTEES.

—*Ludington v. Patton*, 111 W., 208, 248.

44. “To maintain” an “action at law to recover back the consideration paid” on a contract, “it is essential that before it is commenced the rescission shall have been complete as to both parties”.

—*Phelps v. Mineral S. H. Co.*, 123 W. 253, 255.

45. Rescission of sale of lots by administrator, on false representations, without damage. See SALE OF REALTY.

—*Greiling v. Watermolen*, 128 W. 440, 446.

46. An administrator may “sue for the rescission of a contract secured through fraud” upon his intestate. See ACTIONS BY EXTR. & ADMR.

—*Borchert v. Borchert*, 132 W., 593, 598.

47. Where one of two wrongdoers dies, judgment against his executor should be separate. See BOND FOR MAINTENANCE.

—*Borchert v. Borchert*, 141 W., 142, 145.

48. “Where one party to an executory contract repudiates it, or puts it out of his power to perform it, the other party may at his option treat it as terminated at once. (Cases).”

49. In case of “involuntary bankruptcy of a party”, “such contracts may at once be treated by the other party as terminated. *Central T. Co. v. Chicago A. Asso.*, 240 U. S. 581”.

—*Kamps & S. D. Co. v. United D. Co.*, 164 W. 412, 414.

RECORDS.

Sée also NUNC PRO TUNC. OFFICERS. ORDERS.

Admissible in evidence, 18.

Amended:

Anciently during term, 1.

As to service, after order, 25.

Clerical, after the term, 1.

Filing:

Before term commencement, 17.

Same-day sufficient, 17.

Date presumed correct, 8.

Failure to endorse filing, 13.

Left with clerk, 13.

Indorsement of filing, 12.

Handed to clerk outside, 12.

Neglect until later, 19.

Effectual for proper date, 20.

Presumed properly filed, 11.

Though paper antedated, 8.

Foreign record, effect of, 5.

Import absolute verity, 10.

Not evidence by affidavits, 9, 10.

Oral decision, valid, 14.

Announcement is decision, 27.

Court's intention, 29.

Judgment, not opinion, 28.

Not preliminary, 29.

Oral decision—continued

Clerk's entry thereof, 15.

Formal order unnecessary, 16.

Nunc pro tunc entry, 14.

Presumption of good cause, 7.

Day, ends and begins term, 24.

Priority of order, 24.

Error not to be presumed, 24.

Guardian ad litem; after six years, 26.

Record fails to disclose, 7.

That hearing was had, 21.

Minutes fail to show, 21.

Not spread on record, 23.

Does not invalidate, 23.

On date noticed, 21.

Special statute, 22.

Same case considered, 2.

Subsequent petition, 2.

Stipulation in open court; 6.

Entered; a verity, 6.

Whole record in estate:

Before court; each application, 2, 3.

Continuous record, 3.

Petition for license to sell, 4.

Prior record, part thereof, 4.

1. "Anciently" the record could be amended only "during the term," but latterly "the general current of authority is to the effect that clerical errors may be corrected even at a subsequent term", "upon motion with due notice to the opposite party".

—*Hill v. Hoover*, 5 W. 386, 388.

2. The record in the same case may be considered in connection with a subsequent petition. See JURISDICTION.

—*Sitzman v. Pacquette*, 13 W. 291, 304.

3. "We regard the whole record of the probate court respecting the settlement of any estate as one continuous record, and before the court on each application".

4. "And the petition for license to sell real estate is to be considered the same as though the appointment of B. (the Admr. de bonis non) by the probate court and all the proceedings relating to it had been inserted in and made part of the petition".

—*Frederick v. Pacquette*, 19 W. 541, 552.

5. The "effect" of a record from another state, "or what it proves or does not prove, is for the court to decide", and not a jury.

—*Amory v. Amory*, 26 W. 152, 158.

6. "A stipulation of counsel in open court, and entered of record", "while it stands, it imports absolute verity." See STIPULATION.

—*Wilcox v. Bates*, 45 W. 138, 146.

7. Where "the record does not disclose the reason for the appointment" of an administrator, "it must be presumed that the appointment was for some good cause in the law." See ADMINISTRATOR DE BONIS NON.

—*Oakes v. Est. of Buckley*, 49 W. 592, 598.

8. The date of filing of a paper itself is presumed correct, though the paper is antedated. See PRESUMPTION.

—*State v. Reesa*, 57 W. 422, 424.

9. "The integrity of a judicial record cannot (thus) be overcome and destroyed by affidavits".

10. "The records and finding" "as to what issues were tried by the court import absolute verity, and cannot be impeached by affidavits, as it was attempted to do".

—*Bunn v. Valley Lbr. Co.*, 63 W. 630, 633.

11. Where a paper, being a widow's election, is "found in the office of said court duly filed therein as one of the papers or documents belonging to the records of said court, nothing else appearing in the case to cast suspicion upon the paper or its filing, the presumption of law is that it was properly filed, and the burden of proof is upon the party denying the fact of such filing. *Boyd v. Wyley*, 18 Fed. Rep., 355".

—*Beem v. Kimberly*, 72 W. 343, 362.

12. Where a petition was handed to the clerk when away from his office, and his endorsement made thereon as filed that day, it is held that "the endorsement is certainly prima facie evidence that the petition was filed in the clerk's office on" that day, there being no evidence to the contrary.

—*Minton v. Underwood Lumber Co.*, 79 W., 646, 650.

13. Where the claimant for a lien, left his claim with the clerk for filing, "he will not be prejudiced by the neglect of the clerk to perform in respect to it his duty as directed by the statute," as for "failure to put his file mark on it and to make the docket entries" required, and such failure "will not defeat the claim."

—*Goodman v. Baerlocher*, 88 W., 287, 298.

14. An oral decision, amending a complaint, held valid, as entered ten days later by a nunc pro tunc order. See PLEADINGS.

—*Findlay v. Knickerbocker Ice Co.*, 104 W., 375, 378.

15. An oral order of discontinuance, in *Juneau v. Hooker*, 67 W. 322, was held sufficient, the court "holding that: 'An entry by the clerk in

his minutes of the judicial action of the court is sufficient evidence thereof.

16. A formal order signed by the judge was not necessary. An order entered on the minutes of the clerk is sufficient for a full discontinuance of the case'."

—*State ex rel. City of Milwaukee v. Ludwig*, 106 W. 226, 232.

17. As to filing of answers, under sec. 2664, held, in effect, seasonably filed at the opening day of court, there being "nothing in the record to indicate that such answers were not filed before the opening of the court on that day, and hence 'before the commencement of the'" term.

—*Evans v. Rector*, 107 W., 286, 289.

18. "The rule is general that, when persons in public office are required by statute to make a record of their official acts, such records are admissible in evidence if relevant to the controversy. Jones Ev.; 520".

—*Schlei v. Struck*, 109 W., 598, 601.

19. Where a foreclosure judgment was signed Jan. 14, 1896, "and the papers upon which it was based, were all delivered to the clerk at or about that time", but were not "marked as filed by the clerk" until Oct. 25, 1897, it is held, that,

20. "The mere improper failure of the clerk to mark the judgment and the papers composing the judgment roll as filed did not prevent such filing from being effectual. Lang v. Menasha P. Co., 119 W., 1."

—*Hart v. Jos. Schlitz B. Co.*, 120 W., 553, 556.

21. Where the circuit "court had jurisdiction of the subject matter", and proper notice was given for a date set, and there "is the absence of any entry in the clerk's minutes of any proceedings had" on such date, "it is presumed that due proceedings were had at the time for which the proceedings were noticed, preparatory to the making of the order of" subsequent date.

22. And the fact that "this was a proceeding under a special statute," is held immaterial.

23. The fact that the final "order was not spread upon the record of the court as prescribed", being "an omission of the ministerial duty of the court's officers", does not "invalidate the order or decree". (Cases).

—*In re Marchant's Est.*, 121 W., 526, 530.

24. Presumption as to priority of order entered on day of ending and beginning of terms. Error not to be presumed. As to termination of terms. See TERMS OF COURT.

—*Cooper v. Granger*, 129 W. 50, 53.

25. Record may be amended as to service, after judgment order. See SERVICE.

—*Zahorka v. Geith*, 129 W. 498, 504.

26. As to presumption after sixty years that a guardian ad litem was appointed and letters issued, there being "no evidence of that fact" "in the records" of the probate court. See also PRESUMPTION.

—*Chandler v. Munkwitz, R. & I. Co.*, 148 W., 5, 11.

27. "We fully recognize the principle that the announcement from the bench is the judgment in fact and that the written judgment generally is merely the evidence thereof. *Wallis v. First Natl. Bank*, 155 W. 533 (See ORDERS).

28. It should be quite certain, however, that the oral pronouncement is intended to be the judgment and not merely an announcement of the opinion of the court or an indication of what the judgment is to be;

29. In other words, it should be certain that the court intends to pronounce judgment and not merely to make a preliminary order which is expected to result in a judgment at a later period".

—*Wehr v. Gimbel Bros.*, 161 W. 485, 488.

REFERENCE.

- | | |
|------------------------------------|-----------------------------------|
| Admr.; surviving partner, 16. | Long account—continued |
| Clear preponderance, 14, 21. | Twenty items sufficient, 23. |
| Not disturbed, 14. | Order confirming report, 22. |
| Compulsory: | Not appealable, 22. |
| Account, fifteen items, 13. | Other incidental matters, 15, 17. |
| Containing other matters, 15. | Refer whole case, 17. |
| Incidental to account, 15. | Outside of county, 18. |
| Equity, as law cases, 16. | Large expenses allowed, 18. |
| Without consent; account, 12. | Re-refer case: |
| Conditions of: | Failure on material facts, 19. |
| Absence of any showing, 8. | Stipulation: |
| Long account, 8. | Any issue in any court, 11. |
| Affirmative showing, 6. | Consent in open court, 11. |
| Against either's consent, 5. | Finding of court, 3. |
| Record supplies facts, 7. | Referee's fees, by parties, 10. |
| Findings: | Both liable to action, 10. |
| Dignity of court findings, 14, 20. | Signed by the judge, 3. |
| Hearing is "a trial", 9. | Waiver: |
| Long account; cases, 12, 13. | Constitutional hearing right, 1. |
| Sound discretion as to, 23. | Hearing by court or jury, 2. |

1. As to reference by "written consent of the parties" pursuant to statute, held, "it is clearly competent for parties themselves, to any litigation or controversy, not a proceeding for crime, without the assent of the legislature; to waive their constitutional rights with regard thereto."

2. "They (parties) may waive their right under the constitution to have the same heard and determined by the courts and juries of the

country. They may do so by submitting to an arbitration as at the common law.” —*Home Ins. Co. v. Security Ins. Co.*, 23 W. 171, 174.

3. On a reference by stipulation of the parties, and that the report shall be the finding of the court and be signed by the judge, held, on mandamus, that, “we cannot compel him (the judge) to sign it, since it is not an act resulting from his office.”

—*State ex rel. Orton v. McArthur*, 23 W., 427, 430.

4. To make a reference valid, compulsory or by consent, “requires the court to make and enter such an order”. On consent, there must be “written consent of parties to the reference”, or “consent given in open court, and entered upon its minutes”.

—*Stone v. Merrill*, 43 W. 72, 76.

5. In any action at law, “the right to have the issues determined by a referee and the court, against the consent of either party, is the exception; and the party who claims the right to have such issues so tried must bring the case within the exceptions pointed out in sec. 2864.

6. He must show affirmatively that the case comes within the provisions of that section, either from the record and pleadings in the case, or by proofs aliunde”.

7. Where “there are no such proofs,” and the record does not supply them, as here, “the court had no authority to make the order”.

8. “In the absence of any proof, either by the pleadings or otherwise, that an examination of a long account will become necessary on the trial of the issues, there is nothing upon which the discretion of the court can be founded.” —*Knips v. Stefan*, 50 W. 286, 290.

9. The “hearing before a referee is ‘a trial of the cause’.” See TRIAL.

—*Hill v. Durand*, 58 W. 160, 169.

10. On a stipulation by the parties for referee fees, fixed therein, both parties are liable therefor “in a common law action.”

—*Malone v. Roby*, 62 W. 459, 461.

11. “Any issue in any action may be referred if the parties consent thereto, and in this case they did so consent (in open court), and are bound thereby.”

12. In the trial of issues requiring “the examination of a long account”, of “over one hundred items in the disputed account” here, “the court had power, without such consent, to send such issues to a referee to hear and decide them. Sec. 2864”.

—*Crocker v. Currier*, 65 W. 662, 665.

13. An account current which consists “of at least fifteen different items, and some of them subdivided,” was held properly subject to

compulsory reference. "This account within the meaning of the statute, may properly be called a 'long account'. *Turner v. Nachtsheim*, 71 W. 16."

—*Sutton v. Wegner*, 74 W. 347, 348.

14. As to the "rule that the verdict of a jury will not be disturbed unless against a clear preponderance of the evidence," "the findings of a referee stand precisely like the verdict of a jury." (Many cases.) So held.

—*Briggs v. Hiles*, 87 W., 438, 447.

15. Reference involving an account with numerous debit and credit items over a long period, was held properly ordered "since the suit was on an account, and the other matters, however necessarily triable with the main issue, were merely incidental to it. *Littlejohn v. Regents of U.*, 71 W., 437."

—*Jordan v. Est. of Warner*, 107 W., 539, 550.

16. Compulsory reference under sec. 2864 is held proper in equity as well as law cases, and in the case of *Rowell v. Rowell*, 122 W. 1, (See SURVIVING PARTNER), in a partnership accounting against an administrator and surviving partner. *Druse v. Horter*, 57 W. 644, contra., overruled.

17. "Where the primary purpose of the action was accounting, and the account must obviously be a long one, this statute conferred the authority to refer the whole case, and, in the court's discretion, to submit to the referee all incidental questions of law arising therein. (Cases)".

18. A referee has "power to act outside of the county where sits the court appointing him". (Cases). Very large and varied fees, including hotel and traveling expenses, and court expenses, allowed as "within the field of discretion" of the trial court, under sec. 2930.

—*Winnebago Co. v. Dodge Co.*, 125 W. 42, 45.

19. "The court below had the right to re-refer the case because of failure to find on material facts". See also SERVICES.

—*In re Est. of Happell-Bossi*, 133 W., 119, 122.

20. "Findings of a referee have the same dignity, as regards being disturbed by the trial court on review, as the findings of that court have when challenged here as being erroneous;

21. They are not to be disturbed unless against the clear preponderance of the evidence". See also JUDICIAL DECISIONS.

—*Ott v. Boring*, 139 W. 403, 405.

22. "Under sec. 3069, no appeal lies from the order confirming the referee's report", as such "order does not present a final judgment".

—*Baker v. Bohmert*, 158 W. 337, 338.

23. "The question as to the necessary length of an account in order to justify a compulsory reference is largely a matter of judgment and

sound discretion on the part of the trial court. Twenty items have been held sufficient. (Cases)". —*Astor Co. v. Dengel*, 161 W. 1, 2.

REFORMATION.

Charitable trust deed, 33.

Conditions of:

Binding contract omitted, 10.

Original contract valid, 11.

Sufficient consideration, 12.

Not voluntary instrument, 12.

Decree performance, also, 1.

Deed after eight years, 34.

Evidence:

Beyond reasonable controversy, 29.

Reasonable doubt compared, 29.

Clear and convincing, 19, 31.

Forfeiture not inserted, 20.

Jurisdiction ancient, 32.

Laches intervening, 34.

Satisfactory explanation, 34.

Mistake and fraud, 24.

Mistake by scrivener, 26, 31.

Mistake must be mutual, 22, 23, 32.

Relief, fraud, or mistake, 25.

Statute of frauds:

Harmony, binding contract, 14.

Statute of frauds—continued

Valid executory contract, 13.

Testamentary sense, 28.

Third persons rights, 34.

Voluntary instruments, 12, 28.

Wife's defective conveyance, 15.

As to separate estate, 16.

Changed by statute, 18.

Homestead rule as to, 16, 18, 21, 27, 30.

Nor executory contract, 17.

Subsequent death of husband, 18.

Will:

Equity not reform, 2.

Making a voluntary act, 3.

No court authorized, 5.

Not to supply omissions, 9.

Probate, not attacked, 4.

Reject inserted part in, 6.

Arises before probate, 8.

Fraud; parol evidence, 7.

1. "Courts of equity * will reform a contract" to make it comply "with the real intent and meaning of the parties; and will also in the same suit" decree specific performance of the contract thus reformed.

—*Waterman v. Dutton*, 6 W. 265, 273.

2. "An extended examination of the cases and authorities bearing on the question", "has satisfied us that it is not a proper exercise of the powers of a court of equity to reform a will by adding provisions thereto to make the will accord with the real intentions of the testator".

3. "The reason why courts of equity will not interfere in such cases seems to be, that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act, there is no consideration, as in actions to reform deeds or contracts, to support the action".

4. "There is another reason why a court of equity should not reform a will by correcting a mistake therein, after the will has been admitted to probate. Such probate is the judgment of the court that the instrument, just as it is written, is the last will and testament of the testator; and on well settled principles that judgment cannot be attacked collaterally.

5. While the judgment of the proper court admitting the will to

probate remains in force, no court is authorized, in the absence of fraud, to adjudge that the instrument, or any of its provisions, is not the will of the testator. Neither can it add provisions not written in the will. It can only construe the instrument as it is written”.

6. “It is probably competent for the probate court to reject any portion of an instrument propounded as a will, on proof that such portion was inserted therein against the desire or without the knowledge of the testator, and to admit the residue to probate”.

7. “The rule is, that if the question is one of fraud, or undue influence (which is a species of fraud), or *devisavit vel non*, any relevant parol evidence is admissible.

8. But it would seem that the latter question can only arise before the will is probated, while the question of fraud may be tried at any time when rights are claimed under the will, whether the claim be made at law or in equity”.

9. “But the rule does not authorize the probate court, or any other court, to supply omissions in the will; for that would be to make a will for the testator which he has not made for himself in the form essential to its validity”. See also CONSTRUCTION OF WILLS.

—*Sherwood v. Sherwood*, 45 W. 357, 360.

10. “An essential condition upon which a court of equity will reform a written instrument is, that the parties thereto have made a binding contract, which they mutually agreed to incorporate in the instrument, but which, through fraud or mistake, they failed to do.

11. The original contract must be valid, or no reformation of the instrument will be decreed, however clearly the mistake may be established.”

12. “An instrument not founded upon sufficient consideration—that is, a mere voluntary instrument—will not be reformed; neither will an instrument be reformed to express a contract which originally was *nudum pactum*.”

13. Where the agreement was oral and within the statute of frauds, it is indicated “there is in such a case a valid and binding executory contract, which the parties intended and attempted to embody in the instrument sought to be reformed, but failed to do so.

14. Hence the cases which uphold the reformation of written instruments in proper cases, without regard to the statute of frauds, are in entire harmony with the rule above stated that there must be a valid binding contract to reform by, or reformation will not be decreed”.

15. “Because of her disability to contract, it has uniformly been held that if a wife join her husband in the execution of a defective conveyance, such conveyance cannot be reformed as to her, unless by virtue of an express statute”.

16. “Our statute only removes the disability of coverture in respect to the separate estate of the wife. This homestead not being the sep-

arate estate of the wife, it is clear that she was under the common law disabilities of coverture when she signed the defective mortgage.

17. Being so, she would only validate her husband's mortgage of the homestead by signing it. She has signed no such mortgage, and could not make a valid executory agreement to do so. Hence, there is no ground upon which a judgment to reform the mortgage can legally be rendered", the homestead having been omitted from the mortgage signed by husband and wife as drawn as alleged by mistake. p. 452.

18. It is also held that the death of the husband, the descent of the homestead to the widow, and her subsequent marriage and conveyance to her husband, do not change the situation. (As to reformation affecting the homestead and the wife the rule here stated is approved, notwithstanding the amendment by ch. 45, L. 1905 in *Gotfredson v. Dusing*, 145 W. post. But changed by ch. 222, L. 1911).

—*Petesch v. Hambach*, 48 W. 443, 446.

19. To reform or cancel, the evidence "must be clear and convincing". See RESCISSION OF CONTRACT.

—*Lavassar v. Washburne*, 50 W. 200, 201.

20. Equity will not reform a deed by inserting a forfeiture clause. See FORFEITURE.

—*Mills v. Evansville Seminary*, 52 W. 669, 671.

21. Following *Petesch v. Hambach*, 48 W., supra, it is held that a defective deed of a homestead would not be reformed as against the wife, even after the land ceased to be a homestead. (Changed by statute).

—*Conrad v. Schwamb*, 53 W. 372, 379.

22. "A reformation of a deed or other conveyance of real estate will not be adjudged on the ground of mistake unless the mistake be mutual; that is, in the absence of fraud", a mutual agreement must be shown, and that a "misdescription was inserted by mistake".

23. "Courts of equity will reform conveyances, first, where there is a mutual mistake;

24. And second, where there is a mistake by one party, and fraud in the other in taking advantage of it and thus obtaining a contract with the knowledge that the party dealing with him is in error in regard to its terms, or its sufficiency to effectuate the real contract made between the parties. *Welles v. Yates*, 44 N. Y. 525 (and other cases)".

25. On the evidence, the court was "at liberty to grant any relief asked for in the complaint, whether the plaintiff was entitled to such relief on the ground of mutual mistake or on the ground of mistake on the part of the respondent and fraud on the part of the appellant. See *Dane v. Durber*, 28 W. 216".

—*James v. Cutler*, 54 W. 172, 175.

26. Where the scrivener by mistake, omitted to insert in a lease an agreed provision as to improvements, "a court of equity will correct

such a mistake, and reform the instrument, where the evidence clearly shows what the real agreement was”.

—*Silbar v. Ryder*, 63 W. 106, 108.

27. Following *Petes v. Hambach*, 48 W., *supra*, a mortgage signed by the wife, intended to cover the homestead, but by mistake did not, cannot “be reformed to include the homestead.” See HOMESTEAD. (But, see *Gotfredson Bros. Co. v. Dusing*, 145 W. post).

—*O’Malley v. Ruddy*, 79 W., 147, 150.

28. “A purely voluntary conveyance” from father to son, “without any prior consultation or agreement with the grantee,” held to be “in a general sense, a testamentary disposition of property,” will not, after the death of the grantor as against the heirs, be reformed to include land intended to be conveyed.

—*Willey v. Hodge*, 104 W., 81, 84.

29. Requisite evidence to reform a written contract is set forth, and it is said, and so held, that “this court” “has followed the rule which generally prevails, that the facts must be established” “beyond reasonable controversy. Perhaps it may well be said that the difference between” this rule and the rule beyond reasonable doubt, “is quite shadowy and inconsequential, yet it is considered that there is a difference”.

—*Glocke v. Glocke*, 113 W., 303, 308.

30. A mortgage may now be reformed on account of mistake in description of a homestead. See HOMESTEAD.

—*Gotfredson Bros. Co. v. Dusing*, 145 W., 659, 662.

31. The rule of earlier cases that “equity will not reform a written instrument for a mistake in reducing it to writing, unless such mistake is established by the most clear and satisfactory proof,” is upheld.

—*Govier v. Brechler*, 159 W. 157, 164.

32. “The jurisdiction of a court of equity, when seasonably invoked, to reform written instruments which by mutual mistake do not express the real meaning of the parties, is very ancient and well recognized.

33. A deed establishing a charitable trust may doubtless be thus reformed in a proper case providing the necessary parties are before the court.”

34. “It is probably very rarely the case that a court would be justified in decreeing reformation of a deed after the lapse of eight years”, because usually of “inexcusable laches or rights of third persons” intervening. There being satisfactory explanation, the deed was so reformed here.

—*Van Brunt v. Ferguson*, 163 W. 540, 545.

RELATION.

See KIN.

RELEASE.

See AGREEMENTS. JOINT OBLIGATIONS. SETTLEMENT.

REMAINDERS, VESTED AND CONTINGENT.

See DEVISEES. FUTURE CONTINGENT ESTATES. POWER. TRUST VARIATION. VESTING OF ESTATES.

REMEDIES.

See also RESCISSION OF CONTRACT.

- | | |
|----------------------------------|-------------------------------------|
| Common law right, 20. | Fraud induced, etc.—continued |
| Statutory cumulative, 21. | (1) Rescind whole contract, 13. |
| Unless public policy, 21. | Act with promptness, 14. |
| Deficiency in foreclosure, 5. | (2) Recover damages for breach, 15. |
| Action on notes, 6. | And enjoy fruits, 15. |
| Election: | Promptness unnecessary, 16. |
| Binding upon election, 2. | Forfeiture clause: |
| Ignorance of material fact, 3. | Enforced, or damages, 22. |
| Opposite parties fault, 3. | Land contract loan, 8. |
| Tort and contract, 4. | Action at law; equity, 8. |
| Two inconsistent positions, 10. | Deed shown to be mortgage, 9. |
| Any unambiguous act, 11. | Limitation statute: |
| Conclusive evidence, 11. | Equity barred; legal also, 19. |
| Two inconsistent remedies, 2, 4. | New right and remedy, 7, 17. |
| Fraud induced contract, 12. | Appeal, statutory, 18. |
| | Taken away, conditions, 1. |

1. Remedies “will not be taken away without a negative expressed or clearly implied.” See REPEAL.

—*Goodrich v. Milwaukee*, 24 W. 422-438.

2. “The doctrine that an election once made between two inconsistent remedies is binding upon the elector is well understood. (Many cases).”

3. “Also the exception to that doctrine, that an election once made, without negligence, in ignorance of some material fact as to which the opposite party owed the duty of disclosure, may be rescinded within a reasonable time after the discovery of the truth and before any act is done inconsistent with the exercise of that right.”

—*Gay v. D. M. Osborn & Co.*, 102 W. 641, 645.

4. “The doctrine of election is confined to cases where the plaintiff is required to choose between two remedies which are inconsistent with each other, such as a remedy in tort and a remedy in contract. 7 Ency. of Pl. & Pr. 362; *Fuller-Warren Co. v. Harter*, 110 W. 80.”

5. "The remedy by judgment for deficiency in the foreclosure action is perfectly consistent with the remedy by judgment in an action at law upon the notes", one in equity and the other in law, but both "seek to enforce the written contract upon the same grounds".—

6. So an "unsuccessful attempt" to bind the defendant in a foreclosure action, "is no bar to" an action on the notes, "either by way of former adjudication or by way of election of remedies".

—*Carpenter v. Meachem*, 111 W., 60, 63.

7. Where "a new right has been created and a complete remedy" provided, it is exclusive. See PAUPERS.

—*Saxville v. Bartlett*, 126 W. 655, 658.

8. A complaint in equity to recover a definite sum due, where a deed was given to secure a loan and a land contract given back, and a sale with the acquiescence of both parties made to a third party,—held demurrable "on the ground that there is an adequate remedy at law" to recover the money.

9. "The fact that it (the deed) is in legal effect a mortgage may be shown in an action at law as well as in an action in equity. (Cases)".

—*Barchent v. Snyder*, 128 W. 423, 424.

10. "One having a right of choice between two inconsistent positions who exercises that choice is finally concluded and confined to the rights and remedies appropriate to the position so chosen and excluded from those consistent only with the repudiated one.

11. Since such choice is merely mental, any unambiguous act consistent with one and inconsistent with the other of the elective positions will be deemed conclusive evidence of such election. *Smeesters v. Schroeder*, 123 W., 116."

—*Fox v. Wilkinson*, 133 W., 337, 340.

12. Where one is "induced to make and execute a contract by" fraud "the defrauded purchaser has as his election either of two rights:

13. He may rescind the whole contract, and upon returning all that he has received may recover back all that he has paid, so that the parties may stand in statu quo.

14. To this right it is doubtless essential that he act with reasonable promptness, and that enjoyment of rights under the contract will be deemed a waiver.

15. He also has, however, the right to enjoy all the fruits of what he receives under the contract and to recover damages by reason of breach of warranty or deceit for whatever the property is in fact worth less than it would have been if as represented. (Many cases).

16. This latter right, when he does not rescind, is absolute and destroyed by no lapse of time less than that prescribed by the statute of limitations".

—*Jacobsen v. Whitely*, 138 W. 434, 441.

17. Where "the law creates a new remedy to meet a new situation", "the remedy is exclusive and is subject to the conditions and limitations" therein provided. (Case).

18. "The right of appeal is purely statutory, and unless given it is withheld. *Puffer v. Welch*, 141 W. 304".

—*Clancy v. Fire & P. Com.*, 150 W. 630, 633.

19. One "having two remedies, the statute of limitations barred the equitable one at the same time the legal one was barred". See also LEGACIES.

—*Nolan v. First Natl. Bank*, 161 W. 22, 26.

20. "Where a statutory remedy is provided for the enforcement of a common-law right without expressly, or by necessary inference, interfering with freedom to resort to the old remedy,

21. The new one is cumulative unless the court, on grounds of public policy, sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted. That is the logic of *State ex rel. Superior v. Duluth St. R. Co.*, 153 W. 650".

—*Field v. Milwaukee*, 161 W. 393, 395.

22. In a lease with a forfeiture clause, the lessor "has the choice" to sue for damages or to declare forfeiture. See also LANDLORD AND TENANT.

—*Mohawk Co. v. Bankers Surety Co.*, 162 W. 272, 276.

REMOVAL.

Admr. de bonis non, 13.

Without notice after removal, 13.

Failure, within six years, 12.

Implied and be valid, 3.

Non-resident executor, 1.

Not without notice, 1.

Power of, discretionary, 2, 6, 7.

Acrimonious, hostile, feeling, 8.

Executor chargeable or not, 9.

Power of, etc.—continued

Disabilities not limited, 6.

Statute from Massachusetts, 4.

Construction adopted, 5.

Without notice to others, 10.

Unless court directs, -11.

1. An executor cannot be removed for non-residence without being notified to settle his accounts, and the proceeding appointing an administrator de bonis non in such case is void.

—*Humes v. Cox*, 1 Pin. 551, 554.

2. The court's power for removal of executors, etc., is discretionary and not mandatory. See MAY.

—*Cutler v. Howard*, 9 W. 309, 315.

3. The removal of an administrator may be implied and be valid as such. See ADMR. DE BONIS NON.

—*Bailey v. Scott*, 13 W. 618.

4. The statute for removal of an executor (in effect sec. 3803), "is substantially the statute of Massachusetts of 1783, ch. 24, sec. 10, which received judicial construction in that state long before it was enacted here".

5. "Under a familiar rule, the construction given to the statute by the supreme court of Massachusetts before it was enacted in this state, ought to prevail here; and we adopt that construction the more readily because we believe it to be the true one".

6. In *Winship v. Bass*, 12 Mass., 201, it is held: "'The statute gives a very broad discretion to the judge, evidently intending not to define or limit the disabilities which should be the causes of removal, but to leave room for the application of the power to all causes which may occur to render the execution of a will, or the administration of an estate, perplexed or difficult'. This construction was approved by the same court by *Thayer v. Homer*, 11 Met. 104, decided in 1846.

7. The same construction of our statute was practically adopted by this court in *Cutler v. Howard*, 9 W. 309, *supra*".

8. The removal by the county court, sustained by the circuit court, is approved, and it is said: "If the finding that, 'at the time of the filing of the petition (for removal) there was, and still continues to be, an acrimonious and hostile feeling between the appellant and respondent, which intercepts and prevents such a management and husbanding of the state of P. deceased, as prudence, sound policy and the interests of the devisees and creditors require,' is established by the proofs, we think that of itself would make a case for the exercise of the discretion of the court.

9. Such a condition of affairs, whether chargeable to the executor or not, would inevitably render the execution of the trust perplexed or difficult, and would be likely to interfere with the proper management and disposition of the estate".

10. The petition for removal was by the widow, a principal devisee, without "making the other devisees or legatees under the will parties," and the court says:

11. "We are inclined to think that any person interested in the estate may commence and prosecute such a proceeding independently of other parties having a like interest, unless the county court in its discretion should think proper to bring in such other parties". (Subsequently in 1905, and as amended by ch. 407, L. 1913, to sec. 3803, the proceeding is set forth, but notice to other parties does not seem to be required. —*Est. of Pike: Kimball's Appeal*, 45 W. 391, 395.

12. Refusal to remove the executor because of failure to complete the administration within six years. See LIMITATION OF ACTIONS.

—*Ford v. Ford*, 88 W., 122, 134.

13. An administrator de bonis non may be appointed without notice, on the removal of an executor. See also ADMR. DE BONIS NON.

—*Jenks v. Allen*, 151 W., 625, 631.

RENTS AND PROFITS.

See also LANDLORD AND TENANT. TRUST FUNDS.

Admr. as against heir, 2.

No possession taken, 4.

Apportionment of rents, 20.

Paid in advance to decedent, 20.

Claim for accounting, 19.

Survives in trust estate, 19.

Crop raised on shares, 6.

Cropper, definition of, 12.

No estate or ownership, 14.

Facts stated of mere cropper, 11.

Landowner, legal title, 11.

Not create partnership, 18.

Stipulate as to title, 7.

Charge on share, 7, 8.

Tenant; estate and ownership, 13.

Crop raised, etc.—continued

Tenant in common; cropper, 10.

Depends upon wording, 10, 15.

Destruction by fire, 1.

Future expectant estates, 17.

Disposition not provided, 17.

Future profits, recovery, 23.

Based on past profits, 22.

Heirs barred; admr. also, 5.

Income of realty, is realty, 9.

Infant, after at age, 3.

“Rent from my farm,” 21.

Additional provision, 21.

Successive devises of, 16.

Without sale power; void, 16.

1. “At common law, the destruction of the premises by fire did not excuse the payment of rent”. If a tenant failed to protect himself in the lease “and agrees to pay rent in advance without qualification, and does so,” “the courts cannot relieve him” and he cannot recover in case of fire.

—*Cross v. Button*, 4 W. 468, 484.

2. An administrator is entitled to the rents as against the heirs.

See EXTRS. & ADMRS.

—*Edwards v. Evans*, 16 W. 181, 184.

3. Where lands are wrongfully withheld from the infant owner, he may “recover damages accruing during his minority”, after he arrives at age, as mesne profits.

—*McCrubb v. Bray*, 36 W. 333, 341.

4. The administrator cannot maintain an action for use and occupation, where he has not taken or needed the possession. See REAL ESTATE.

5. If the right of the heirs to recover rents and profits is barred, “it must necessarily bar the administrator also”.

—*Filbey v. Carrier*, 45 W. 469, 472.

6. “Undoubtedly parties making a contract to raise a crop on shares may make valid stipulations for the disposition of the crop.

7. They may stipulate what interest each shall have in it, or that the legal title to the crop shall be and remain in one of them, with a charge

upon the crop or some part of it in favor of the other, and such stipulations will be valid as between themselves.

8. This view does not conflict with the cases in this court in which it has been held that a chattel mortgage of goods not in esse, or of after-acquired goods, is inoperative". As in *Comstock v. Scales*, 7 W. 159; *Hunter v. Bosworth*, 43 W. 583; (cited under CHATTEL MORTGAGE).

—*Lanyon v. Woodward*, 55 W. 652, 656.

9. "Income of the real estate," under the statutes and adjudications, is real estate. See also NUNCUPATIVE WILL.

—*In re Davis's Will*, 103 W. 455, 457.

10. "It is sometimes difficult to determine whether a person who works the land of another on shares is a tenant in common of the crop with the owner of the land or a mere cropper. Much depends upon the wording of the contract between the parties. *Lanyon v. Woodward*, 55 W., supra; (other cases)".

11. Where the plaintiff landowner furnished the seed and defendant was to put in, care for and harvest the crop of potatoes for half, and partially neglected work which was supplied by the landowner, but harvested and divided the crop, retaining half,—on the facts he "was a mere cropper, and the plaintiff remained all the time the legal owner of the whole crop, and hence was entitled to recover in replevin." (Cases discussed).

12. In 8 Am. & Eng. Ency. of Law (2d ed.) 324, "it is (there) said that: 'The term 'cropper' is applied to a person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crop raised'".

—*Kelly v. Rummerfield*, 117 W., 620, 621.

13. "The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares,

14. While a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is. (Citations).

15. It is always a question of construction of the agreement under which the parties are acting".

—*Taylor v. Donahoe*, 125 W. 513, 517.

16. As to successive devises of rents and profits without power of sale, being void. See TRUSTS.

—*Will of Adelman*, 138 W. 120, 123.

17. As to disposition of rents and profits not provided for, of personality and realty of future expectant estates. See VESTING OF ESTATES, ETC.

—*Will of Stark*, 149 W. 631, 655.

18. "An agreement to turn over a part of the crop raised in payment of rent is not inconsistent with the relation of landlord and tenant and does not create a copartnership." Question and cases discussed.

—*Wagner v. Buttles*, 151 W., 668, 676.

19. A "claim for an accounting" for rents of realty in favor of one beneficially interested in a trust estate for the receipt of such rents, is held to survive.

20. Where a will gives to the widow a devise and bequest of the rents and profits from the farm, and the testator under a lease had for the current year received two notes "in payment of the rent and died during the year," that "did not deprive his widow of the whole year's rent", but the "year's rent should be apportioned between" his and her estates, she having subsequently died.

21. Where the will gives to the widow "the rent from my farm", and subsequently provides "that the executor may out of any money in his hands, pay to his wife" "any sum that she may need 'more than her share of the rent from the farm for her support'," it is held that she and her subsequent executor, is entitled to "all rents from said farm", though she had not needed all for her support. See also TRUSTEES.

—*Est. of Hemphill*, 157 W. 331, 335.

22. "The rule is well established in this court that past profits of an established business constitute a legitimate basis upon which to estimate the future profits of the same business conducted in the same manner,

23. And that in a proper case such future profits may be recovered when the plaintiff has been prevented from making them by the wrongful conduct of the defendant. (Cases)".

—*Huebner v. Huebner*, 163 W. 166, 170.

REPEAL.

Implication not favored, 1.

Negative, express or implied, 1.

1. "Repeals by implication are not favored in the law, especially with regard to previously existing remedies, whether by statute or common law, as to which it is held that they will not be taken away without a negative expressed or clearly implied."

—*Goodrich v. Milwaukee*, 24 W. 422, 438.

REPORTS OF GUARDIANS.

See ACCOUNTS OF GUARDIANS.

REPRESENTATIVE CAPACITY.

See also PARTIES.

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| "As" before administrator, 2. | Capacity pleaded, 4. |
| Contract obligations, 3. | Proved by certified copies, 1. |
| Not in appeal bond, 2. | Bond and letters, 1. |
| Without descriptive merely, 6. | Wife witness for co-defendant, 7. |
| Passes title personally, 5. | |

1. The representative capacity of an executor may be proved "prima facie at least", by certified copies of his bond and letters. See EXTRS. & ADMRS. —*Wittmann, Extrs. v. Watry*, 45 W. 491, 493.

2. The word 'as', need not be inserted before 'administrator' as the adverse party in an appeal bond, to give it validity;

3. Though the courts have held that in the absence of 'as' in such case in a contract, the words 'administrators, etc.', "may be treated as descriptio personae". See also EXTRS. & ADMRS.

—*Kasson v. Est. of Broker*, 47 W. 79, 86.

4. Where the complaint alleged "that the plaintiff brings this action in his capacity of administrator" and then states that he was duly appointed "by the county judge", an objection demurrer ore tenus is held "not well taken", as proper capacity is shown, and proof of the appointment by the court could be made.

—*Parish, Admr. v. T. of Eden*, 62 W. 272, 280.

5. An assignment of a judgment "'to W. F. V.', etc. 'administrators', not to them as, or in their capacity as administrators", is held to pass title personally.

6. "According to well-settled rules governing the construction of such instruments, there being no clear indication that the parties described as administrators took in their representative capacity, the word 'administrators' is to be regarded merely as descriptive of the persons. *Robbins v. Gillett*, 2 Pin. 439; *Randolph Com. Paper*, 440".

—*Vilas v. Bundy*, 106 W. 168, 181.

7. A wife is a competent witness for a co-defendant of her husband whose interest is merely nominal. See also PARTIES.

—*Robinson v. McGinnis*, 145 W., 476, 477.

RES ADJUDICATA.

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| Affirmance on other grounds, 19. | Appeal pending—continued |
| All questions determined, 16. | States, both ways, 11. |
| Appeal pending, 10. | Supersedeas, undetermined, 13. |
| Federal practice, 12. | Defendants different, 5. |
| Followed here, 13. | Demurrer decision, 8. |
| Not affect judgment, 13, 17. | In supreme court, 8. |

Demurrer decision—continued

- Not circuit court, 9.
- General affirmance, 18.
- Interest, not presented, 14.
- Ordered payment of money, 1.
- Absolute or life, open, 2.
- Part not appealed from, 15.
- Points: actually decided, 21.
- Different claim or cause, 23.
- Only actual decisions, 23.

Points—continued

- Might have been decided, 22.
- Rule of law stated, 3, 4.
- As in N. Y. case, 3.
- Parties and subject matter, 20.
- Identity of causes of action, 20.
- Supreme court errors, 6.
- Jurisdiction failure below, 7.
- Re-hearing, correction only, 6.

1. Where the county court in a final judgment, directed that a sum of money, "be paid by said administrator" to the widow, and that the administrator be discharged, this was held not an adjudication that the widow "was the absolute owner" and was "entirely consistent with the theory" that she "was entitled to the use of the money for life".

2. "That court not having determined whether she was entitled to the surplus absolutely, or only for life, the question remains open".

—*Tryon v. Farnsworth*, 30 W. 577, 582.

3. "We understand the rule of law on this subject to be as stated by Earl, C., in *Woodgate v. Fleet*, 44 N. Y. 1-13: 'A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and, although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto'."

—*Hardy v. Mills*, 35 W. 141, 149.

4. "The rule is well stated in *Hardy v. Mills* (supra) in the language of *Woodgate v. Fleet*".

—*Lathrop v. Knapp*, 37 W. 307, 314.

5. "This is the same controversy (ejectment) involved in *Kent v. Agard*, 22 W. 150. The plaintiff in that case is plaintiff here; but the defendants are different. There the defendants were tenants of the defendants here. The judgment there is, therefore, not binding here. (Cases). And the views on which the judgment rested in that case are not res adjudicata in this".

—*Kent v. Lasley*, 48 W. 257, 261.

6. "The only remedy we know of for correcting the errors of this court is by application for a rehearing in the same case".

7. "The right of the widow to an allowance in this case is res adjudicata even though the county court had no jurisdiction over the subject matter". See *Widow*.

—*Baker v. Baker, Extr.* 57 W. 382, 391.

8. "By repeated decisions it has become the settled law in this state that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved, and is res adjudicata in that case. (Cases).

9. It is true that this court has decided that an order of the circuit court upon a demurrer is not *res adjudicata*," because "such an order is reviewable by statute upon appeal from the judgment. *Hackett v. Carter*, 38 W., 394."

—*Ellis v. Northern Pacific R. Co.*, 80 W., 459, 465.

10. "In many of the states, and perhaps in most, it is held that an appeal destroys the effect of a judgment as *res adjudicata*, and, while pending, the judgment cannot be pleaded in bar to another action for the same cause between the same parties."

11. "But on the other hand, in many of the states the courts of equal credit and respectability hold otherwise, and we think with better reason."

12. "'In the federal practice a writ of error to the circuit court does not have the effect, pending the proceedings, to suspend the operation of the judgment as a bar or estoppel.' 2 Black. Judg., 510." In *N. Y.* and *Ind.*, likewise. (cases).

13. "We prefer to hold, therefore, that a mere appeal does not affect the judgment as a bar to another action, sustained as it is by reason and such respectable authorities." So held. Had there been "a super-sedeas or stay of proceedings," the effect then, is not determined.

—*Smith v. Schreiner*, 86 W., 19, 23.

14. Where a judgment was affirmed on appeal, the question of interest not being "presented, argued, or decided," it is held that on an appeal of the opposite party from the same judgment, theretofore pending, on the question of interest, the judgment as affirmed was not *res adjudicata*.

—*Taylor v. Hill*, 87 W., 669, 672.

15. A judgment having been affirmed on appeal, that part thereof "not excepted to or appealed from by either party," is held on a subsequent appeal *res adjudicata*.

—*Ford v. Ford*, 88 W., 122, 133.

16. "It must be conceded that every question determined by this court on the former appeal is *res adjudicata*, and absolutely binding, not only upon the trial court, but also on this court. (Many cases.)"

—*Keystone Lumber Co. v. Kolman*, 103 W., 300, 303.

17. "Even an appeal does not deprive a judgment of its effect as a bar to another action. It may be pleaded and relied upon pending an appeal with the same effect as if no appeal had been taken. *Smith v. Schreiner*, 86 W., supra; (other cases)".

18. And "a general affirmance of a judgment, based upon the findings of fact made by the trial court, leaves those findings intact unless they are specifically set aside in the decision or opinion".

19. "Mr. Van Fleet, in his work on Former Adjudication, at page 145, expresses the idea thus: 'If a cause is decided upon the merits,

the fact that upon appeal the judgment is affirmed upon grounds which do not touch the merits does not remove the bar of *res adjudicata*.'” (Cases). So held. See also JUDICIAL DECISIONS.

—*T. of Fulton v. Pomeroy*, 111 W., 663, 669.

20. “To furnish a basis for the rule of *res adjudicata*”, “there must be not only identity of parties and of subject matter, but also an identity of causes of action”. (Many cases).

—*Lindemann v. Rusk*, 125 W. 210, 237.

21. “A judgment is a complete bar in a subsequent action between the same parties, not only as to every point actually presented and decided in the former action,

22. But also as to every point which might have been presented and decided therein when the second action is upon the same cause of action.

23. But when the second action is upon a different claim or cause of action, the former judgment is only a bar as to matters actually presented and litigated therein. (Cases)”. So held. See also DOWER.

—*Huntzicker v. Crocker*, 135 W. 38, 41.

RESCISSION OF CONTRACT.

SEE PAGE 937.

RES GESTAE.

Agent's representations, 2.

Accompany transactions, 3.

Within his authority, 3.

Concurrent with, 1.

Contemporaneous only, 4, 10, 11, 16, 20.

Not after intervening acts, 10, 11, 13.

Not after narration, 4, 12.

Whether oral or written, 16.

Elucidate character of, 7, 17, 20.

Connected with as part, 7, 20.

Grow out of principal act, 8.

Intestate's declarations, 6.

Minor matters connected, 21.

Not competent to prove major, 22.

Possession of property, 14.

Assumption of ownership, 19.

And offer to sell, 19.

Explanatory of possession, 15.

Principle set forth, 5, 7.

Approved by Greenleaf, 17.

Rule by Greenleaf, 20.

Prior: to party leaving, 9.

Independent prior act, 18.

Not declarations after, 9.

1. “Communications between the” parties to the transaction, relating to and “before the sale of the goods” “and the negotiations at the time of sale were all calculated to explain the nature of the sale,” and were “proper and competent evidence. They were a part of the *res gestae*”.

—*Eastman v. Bennett*, 6 W. 232, 239.

2. “The admissions or representations of an agent, while engaged in any particular transaction for his principal, made in regard to such transaction, may be received as evidence against the principal in a controversy concerning such transaction.

3. But to be received they must constitute a part of the *res gestae* in the course of the agent's employment about the matter in question; they must accompany the transaction or the doing of the business, and must be within the scope of the delegated authority".

—*Hazleton v. Union Bank*, 32 W. 34, 48.

4. "Declarations are verbal parts of the *res gestae*, only when they are contemporaneous. The respondent's narrative, after the occurrence", (of "an account of the meeting which he gave to strangers, after it had ended and the parties had finally separated") "belonged no more to the *res gestae*, than his evidence on the trial".

—*Sorenson v. Dundas*, 42 W. 642, 643.

5. "The principle is elementary, that the acts and declarations of the parties, done and made at the time of the transaction which is being inquired into, and connected with it, constitute parts of the *res gestae*. There is a very exhaustive discussion of the question in *Roebke v. Andrews*, 26 W. 313, where numerous cases are examined. (Cases)".

6. Declarations of defendant's intestate, at the time of delivery of lumber the title of which is in question, "that he was satisfied the plaintiff (from whom he purchased) had no title to it, and that he had paid W. for it", were proper to be received as "part of the *res gestae*".

—*Allen v. Seyfried*, 43 W. 414, 419.

7. "When the act of a party may be given in evidence, his declarations made at the time and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence" as part of the *res gestae*. *Lund v. Tyngsborough* 9 Cush. 36.

8. "There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it".

9. "In the present case, the act of enticing—the *res gestae*—undoubtedly terminated when the two defendants left the plaintiff's daughter;" declarations prior thereto at the hotel were admissible, but those thereafter were not.

—*Felt v. Amidon*, 43 W. 467, 470.

10. A statement, by the plaintiff's minor son exonerating defendant for injuries from the latter's negligent handling of a pistol, "made after the accident occurred, and after his wound had been attended to and dressed by a physician who had been called for that purpose, and after he had taken his seat in a buggy to be carried home", the length of the intervening time not being given, is held not part of the *res gestae* and should have been rejected, in accordance with the quotation from *Sorenson v. Dundas*, 42 W. *supra*, as settling the question.

11. "The rule laid down in the case above cited was approved in *Prideaux v. Mineral Point*, 43 W. 513, 522, where it is said: 'The res gestae of this accident did not go with the team to the livery stable, but remained in the locus in quo, with the injured woman;

12. And the declarations of the driver to the livery man were a subsequent narrative of the res gestae, not admissible in chief, as offered, though admissible upon proper foundation, to contradict the driver'.

13. In the case last cited, what was said by the driver of the carriage which had been turned over and thereby injured the plaintiff, immediately on his return to the stable after the accident was rejected by the court as inadmissible as part of the res gestae".

—*Mutch v. Pierce*, 49 W. 231, 233.

14. "The testimony as to what was said by the plaintiff and her (minor) daughter I. in respect to the gift and possession of the piano, was proper in connection with and as explaining their possession of the instrument, after its purchase by the mother and its gift to the daughter," on the question of title.

15. "What is said by the person in possession of property, explanatory of such possession, is part of the res gestae. This is an elementary rule of evidence. 1 Greenl. on Ev. sec. 109. (See also *Wambold* by Gdn. v. *Vick*, 50 W. 456, cited under GIFT).

—*Kellogg v. Adams*, 51 W. 138, 145.

16. After citing the rule stated by Ryan, C. J., in *Sorenson v. Dundas*, 42 W., supra, where the statement sought to be admitted was oral, it is said: "In the application of the rule, no difference is perceived between verbal and written statements of a party. We have here written statements made too late to be regarded as of the res gestae."

—*Goff v. Stoughton State Bank*, 78 W., 106, 112.

17. The doctrine of *Lund v. Tyngsborough*, 9 Cush., 39, as per *Felt v. Amidon*, 43 W., supra, approvingly quoted, and it is said: "In 1 Greenl. Ev., 108, Note 2, this case is fully approved as containing a correct statement of the law as to what declarations are admissible as part of the res gestae.

18. As already observed, the main or principal fact or transaction in this case is the shooting of the dog. Most assuredly the declaration of the defendant's wife that the dog attempted to bite her did not grow out of such fact or transaction; neither does it derive any degree of credit therefrom, because the act of shooting had not been committed or contemplated when the declaration was made," immediately before the gun was taken down and the shooting performed.

—*Ehrlinger v. Douglas*, 81 W., 59, 62.

19. Evidence of assumption of ownership and an offer to sell, on the question of possession of the vendee in an oral contract for sale of

realty should have been admitted as acts falling "within the limits of res gestae".

20. As "guides laid down in the books", "the principal points of attention are," says Prof. Greenleaf, "whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character". 1 Greenl. Ev., 108".

—*Cuddy v. Foreman*, 107 W., 519, 524.

21. "Minor matters which constitute the res gestae of a major subject are things so closely connected therewith as to be substantially involved therein and to explain or illustrate it. *Andrews v. U. S. C. Co.*, 154 W. 82.

22. It follows" "that there must be a material major circumstance in order that there be evidentiary res gestae, and that the latter are not, primarily, competent to prove the former".

—*Andrzejewski v. N. W. Fuel Co.*, 158 W. 170, 175.

RESIDENCE.

See DOMICIL.

RESIDUARY ESTATES.

See BOND TO PAY DEBTS AND LEGACIES. CONSTRUCTION OF WILLS. LEGACIES. VESTING OF ESTATES, ETC.

RESIDUARY LEGATEE BOND.

See BOND TO PAY DEBTS AND LEGACIES.

RESIGNATION.

Equivalent to refusal of, 2.
Executor or administrator, 1.

Executor, etc.—continued
Not without statute, 1.

1. An executor or administrator cannot resign in the absence of a statute authorizing it. —*Sitzman v. Pacquette*, 13 W. 291, 306.

2. The resignation of a county judge was held to be equivalent to a refusal to qualify for a new term to begin subsequently. See COUNTY JUDGE. —*State ex rel. Finch v. Washburn*, 17 W. 658.

RESULTING TRUSTS.

See IMPLIED TRUSTS. TRUSTS.

RETROACTIVE.

Intentions unmistakable, 1.

Not from general language, 1.

1. "Statutes are never so construed unless the intention that they should so operate is unmistakable." Not so construed from "general language" "which might include past transactions as well as future".
—*Seamans v. Carter*, 15 W. 548.

REVERSION.

See DEVISES.. VESTING OF ESTATES, ETC.

REVOCATION.

See also ADOPTION. AFTER-BORN CHILD. LOST WILL. WILLS.

Administration: irregularly granted, 1.

Regularly granted; will proved, 45.

Agent's authority:

Decease of principal, 3.

Depends on notice to parties, 29.

Notice to agent; common law, 46.

Life insurance policy:

Beneficiary; revoked by death, 28.

Orders irregularly made, 1, 2.

Wills:

After admission to probate, 47.

Whether paragraph revoked, 48.

By changed conditions, 48.

Brought by divorce, 49.

Declarations inadmissible, 51, 52.

Paragraph held revoked, 50.

Republication to stand, 53.

Alteration without obliteration, 20.

Want of re-attestation, 20.

Codicil revocation effect, 42a.

Declarations inadmissible, 17.

Lost will, is different, 19.

Not part of *res gestae*, 17.

Unsworn testimony, 18.

Destroying without intent, 13.

Wills—continued

Devised specific realty, 32.

Contract, nominal sum paid, 34.

Will conveys interest in, 34.

No residuary clause, 35.

Contracted to sell before death, 32.

Common law, revoked, 32.

Changed in England, 33.

Changed in most states, 33.

Expressed a desire to change, 36.

"Implied by law," sec. 2290, 21.

As at common law, 21.

Marriage of a woman, 22.

At common law, 22.

Changed by our statute, 23, 31.

Held not to revoke, 26.

Great weight of authority, 27.

Massachusetts, contra, 27.

Removed by implication, 24.

Reason ceased to exist, 25.

Widow; remarried, husband heir, 30.

Did not revoke, 30.

Intent; without act to will, 14.

Signed, but not statutory, 15.

Wills—continued

- Lost, presumed destroyed, 43.
- Burden on proponent, 44.
- Marriage of man; issue, 37.
- At common law, revoked, 37.
- Marriage and adoption, revokes, 38.
- Obliterated signature, 54.
- Genuine to attestation clause, 54.
- Once revoked, conclusive, 42.
- Second will, revoking last, 39, 40.
- Deposited former, revoke intent, 41.
- Did not restore former, 40.

Wills—continued

- Seven ways of revoking, 7.
- All others prohibited, 8.
- Four by specific acts, 9.
- Three, signed, attested, etc., 10.
- Signed and dated, ineffective, 11.
- Failure to follow statute, 12.
- Statute of 29, Chas. II, 5.
- Substantially, sec. 2290, 6.
- Includes personality, 6.
- Subsequent will, expressly, 4, 39.
- Without express words, 4.

1. As to revocation of probate orders, and of irregular administration granted. See ADMINISTRATION.

—*Brunson v. Burnett*, 2 Pin., 185, 188.

2. The court can at any time revoke an order irregularly made. See ORDER.

—*In re Fisher*, 15 W. 511, 521.

3. The death of the principal generally revokes the authority of the agent. See PRINCIPAL AND AGENT.

—*Lenz v. Brown, Admr.*, 41 W. 172, 184.

4. "The testatrix, in the will of June 4, 1878, expressly revoked all former wills. That will would probably have operated as a revocation of any former will without words to that effect, since it made a complete disposition of the estate of the testatrix, both real and personal".

—*Farmer v. Sprague*, 57 W. 324, 326.

5. Section 6 'of the statute of 29 Chas. II, 'for the prevention of frauds and perjuries'', provides for the revocation in writing only of a will 'or any clause thereof'.

6. "Our statute relates to personal property as well as real estate, and has some words transposed, and is slightly different in some other respects; but otherwise sec. 2290, is substantially the same as that sec. 6.

7. The statute is imperative upon the court, and is to the effect that 'no will, nor any part thereof, shall be revoked unless by (1) burning, (2) tearing, (3) canceling, or (4) obliterating the same, with the intention of revoking it, by the testator, * or by some other (5) will or (6) codicil in writing, executed as prescribed in this chapter, or (7) by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will'. Sec. 2290."

8. "Here are seven ways prescribed for revoking a will, and all other ways, except such as are implied by law, are expressly prohibited.

9. Each of the first four is by doing a specified act to the will itself, with the intention of revoking it.

10. Each of the last three must not only be in writing and signed,

but also attested and subscribed in the presence of the testator by two or more competent witnesses. Sec. 2282."

11. In this case, the will occupied the first page of a four page sheet, and on the fourth there was "written in pencil, in the handwriting of the testatrix, the words: 'I revoke this will. Mary P. Ladd, October 7, 1879,'" and it was held the will was not revoked.

12. The "failure to execute in the manner prescribed by the statute manifestly prevented the words written in pencil from going into effect as a written revocation."

13. In discussing the case *White v. Casten*, 1 Jones Law, 197, the court says, "the mere act of burning, tearing, canceling, or obliterating the will itself, without the intent, is not enough. (Cases).

14. So the mere intention to revoke the will, unaccompanied by any act of burning, tearing, canceling, or obliterating, done to the will itself, is not enough. (Many cases)".

15. "Even if such intention to revoke be expressed in writing never so strongly, and signed by the testator", yet without the statutory execution, "it cannot operate as a revocation, when unaccompanied by any of the four acts, done to the will itself, specified in the statute. (Many cases)".

16. "Our statute as to the mode of revoking wills came to us with its history, and the constructions which had been put upon it by the courts." p. 199.

17. As to, statements of the testatrix showing "such intention to revoke", it is said that "such declarations are clearly inadmissible, because they do not constitute a part of the *res gestae*;

18. Besides, to allow them to have the force of evidence would be admitting testimony of one unsworn, and without the privilege of cross examination. (Cases)

19. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well-written and able opinion of Judge Dyer in *Southworth v. Adams*, 11 Biss. 256."

20. "So, where there has been an attempt to alter certain portions of the will by erasure, without obliteration, and by substituting new words in their place by way of interlineation, and the writing thus altered failed to go into effect for want of re-attestation, courts have held that there was no intent to revoke, except by way of alteration, which having failed the will remained intact as before. (Cases)".

—*Will of Ladd*, 60 W. 187, 190.

21. With reference to the statute of revocation, sec. 2290, "the revocation implied by law", thus excepted out from the operation of the prohibitory clause of the section by reason of such precaution, manifestly means such as had previously been implied at common law. (Appropriately quoted in *Will of Battis*, 143 W. post).

22. At common law the marriage of a woman was revocation of her will previously made *Forse's Case*, 2 Coke, 439; (other cases)".

23. But under the statute, since 1859, a married woman "has had the absolute power of disposing of her property" by will, regardless of her husband. Secs. 2277, 2281.

24. "The rights and powers thus secured to married women by the statutes remove every reason upon which the common-law rule of revocation by such subsequent marriage was based, and hence such rule by implication is removed by the same statutes.

25. The reason for the rule having ceased to exist, the rule itself also ceased. This is in accordance with a well-settled maxim of the law".

26. In this case, the testatrix, while the wife of S., made a will giving her property to her children of a former marriage. On the death of S. she married W., and had no children by either S. or W. It was held that her marriage to W. did not revoke such will.

27. Notwithstanding a similar statute and contrary decision in Massachusetts (*Swan v. Hammond*, 138 Mass., 45), it is said that "the conclusions we have reached are supported by the great weight of authority of our sister states under similar statutes. (Cases cited from Ill., Mich., N. J., N. H., and Vt.)." —*Will of Ward*, 70 W. 251, 255.

28. Ordinarily in a life insurance policy, "the appointment of the beneficiary is revoked by his death". See INSURANCE.

—*Given v. Wis. Odd Fellows Ins. Co.*, 71 W. 547, 551.

29. "The revocation of the agent's authority depends upon notice to the persons with whom the agent has had dealings for his principal". See PRINCIPAL AND AGENT.

—*Johnson v. Youngs*, 82 W., 107, 110.

30. Where a widow made a will, re-married, and died without issue, leaving her husband her heir, it is held, following will of *Ward*, 70 W. supra, "that the subsequent marriage of the testatrix did not revoke" her will;

31. That the statute, section 2290, as to revocation, "merely preserves the common-law rule on the subject, except as abrogated by implication" by the statute (secs. 2277-81) conferring "upon married women the absolute power of disposing of their property by last will".

—*Will of Lyon*, 96 W. 339, 340.

32. "At common law, if a man made a will devising specific real property, and before his death contracted to sell the same, this was deemed to be a revocation of his will as to this specific property".

33. "In 1837, in England," this was changed by statute. Most of the states by statute or construction, also follow this change, and the will, operates on "such portion of the estate as the testator had power to dispose of at his death."

34. Where a testator devised realty specifically to C., and subse-

quently sold it on a land contract, but a nominal sum being paid down at his decease, it is held, considering sec. 2278, that a "will shall be construed to convey all the estate of the devisor" of land, therein, there appearing no contrary intention, that,—

35. "A consideration of the circumstances, together with the fact that there was no residuary clause in his will, leads to the conclusion that it was the testator's manifest intention that C. should have this property. *Wright's Heirs v. Minshall*, 72 Ill. 584."

—*Est. of Lefebvre*, 100 W. 192, 193.

36. The fact "that some time prior to his death he (the testator) expressed a desire to change his will", is ineffective, "as the statute clearly points out the only ways in which the will may be revoked. Sec. 2290; *Ladd's Will*, 60 W. supra".

—*Deck v. Deck*, 106 W. 470, 473.

37. "There can be no doubt but that, at common law, the marriage of a man, and issue of such marriage, operated to revoke his will previously made, disposing of all his property, as here. (Many cases)".

38. Referring to *Will of Ward*, 70 W., supra, as to "revocation implied by law", under sec. 2290, it is held that under the adoption statute, sec. 4024, "that the marriage of the testator and the adoption of the child operated to revoke the will previously made".

• —*Glascott v. Bragg*, 111 W., 605, 607.

39. "Where a second will is drawn and executed with the formality required by the statute, and containing an unlimited revocatory clause, all former wills are wiped out and held for naught. The operation of the revocatory clause is immediate and absolute".

40. "The fact that the second will drawn by the testator was destroyed, or could not be found after his death, did not revive or give legal vitality to the former one,"

41. Though the testator deposited it with the county judge a second time, "with intention to revoke the same," and it was found there at his death.

42. "We believe the better and safer rule to be to require that a will once revoked, to be revived, must either be re-executed or adopted by some subsequent writing, executed as the statute requires."

—*In re Noon's Will*, 115 W. 299, 301.

42a. Mere codicil revocation would not imply a gift of such part to "other beneficiaries." See CONSTRUCTION OF WILLS.

—*Lawrence v. Barber*, 116 W. 294, 304.

43. "Where, as here, it is established that the will was last known to be in the possession of the testator, and could not be found upon his

death, it raised a prima facie presumption that he destroyed it with the intention of revoking it,

44. And that the burden of doing away with such presumption was upon the proponent", "undoubtedly is the law". See also *LOST WILL*.

—*Gavitt v. Moulton*, 119 W., 35, 48.

45. As to revocation of administration proceedings, where a will was afterwards found and probated. See *ADMINISTRATION*.

—*Perkins v. Owen*, 123 W. 238, 241.

46. Revocation of authority at common law, must "be brought to the personal notice of the agent", to be effective. See *DEEDS*.

—*Best v. Gunther*, 125 W. 518, 520.

47. After a will was duly admitted to probate, it is held that, on petition therefor pending administration, "the court thereby acquired jurisdiction to determine,

48. Whether" a "paragraph of the written paper admitted to probate as the will had been impliedly revoked and annulled under the provisions of sec. 2290, by the changed condition and circumstances of the testator subsequent to the making of the will".

49. Following cases supra, it is held, that "the change in the condition and circumstances of one who has made a will, brought about by a divorce accomplished by an adjudication making a final division and distribution of his estate", "as between him and his wife",

50. Is "of such probative force as to sustain the conclusion that the husband intended that the provision he had theretofore made in his will for his wife's benefit should be revoked thereby", and was revoked.

51. As to evidence offered "to show that after the divorce the testator entertained a friendly feeling for his former wife", and had made declarations "that he had made provision in his will for her comfort and needs for the remainder of her life",

52. We "must hold that evidence cannot be received to rebut the presumption of an implied revocation of the provision in a will,

53. Or to show that the testator meant his will to stand as written, unless such evidence amounts to a republication of it". *Wirth v. Wirth*, 149 Mich. 687.

—*Will of Battis*, 143 W. 234, 238.

54. An obliterated signature, followed by a genuine signature after the attestation clause, held not a revocation, See *EXECUTION OF WILLS*.

—*Gale v. Freeman*, 153 W., 337, 340.

REVOKING FRAUDULENT ORDERS.

See *FRAUDULENT ORDERS*.

RIGHT OF WAY.

See CONSTRUCTION OF DEEDS.

RULE IN SHELLEY'S CASE.

"Heirs of the body," 1, 3.
Not in force this state, 2.

Sec. 2052, opposite doctrine, 3.
What the rule is, 1.

1. "The famous Rule in Shelley's case, 1 Coke, 219", "is that the words 'heirs of her body' are words of limitation, and not of purchase, and the ancestor—the widow of the testator—takes the whole estate.

2. But the rule in Shelley's case is not in force in this state.

3. The opposite doctrine prevails here, and is contained in sec. 2052, which provides that in such a case the heirs of the body of a tenant for life shall take as purchasers by virtue of the remainder limited to them. This saves the remainder, and effectuates the expressed intention of the testator." See LIFE ESTATES.

—*Jones, Extr. v. Jones*, 66 W. 310, 318.

RULES OF PRACTICE.

See also JUDICIAL DECISIONS. POLICY OF THE LAW. TRIAL.

Account items objected to, 24.
Based on general conditions, 3.
County court:
 Detailed practice points, 31.
 Formal rules; commentary, 32.
Extra compensation, 18.
 Better to itemize, 18.
 Allowed against rule, 19.
Findings of trial court, 29.
 Some evidence, uncontroverted, 30.
Hearing after noticed day, 14.
 Presumed other business, 15.
 Or postponed regularly, 16.
Record, valid probate, 17.
Infirmity of rules, 2.
Law of the land, 1.
 Judgments, decisions, rules, 1.
Obiter dictum:
 Bouvier's philosophic rule, 8, 21.
 All points to be argued, 8.
 Judicial dictum, 9.
 Bouvier's rigid rule, 6.
 Few opinions without, 7.

Obiter dictum—continued
 Definition of, 9, 22.
 Different views, same conclusion, 5.
 Few judges do not offend, 10.
 Great English judges, 11.
 Judges, lawyers, differ, 4.
 Not always reprehensible, 12.
 Origin by mere dicta, 12.
 Points necessarily considered, 21.
 Not only result arrived at, 21.
Order of proof directed, 13.
 Discretion of court, 13.
Prescribed by supreme court, 1.
 Law of the land, 1.
Prior will, in will contest, 23.
Recital in probate certificate, 20.
 Sustaining jurisdiction, 20.
 Trustee appointment, 20.
Tried in open court, 26.
 Proceedings in open, 25.
Violations, when material, 27.
 Immaterial errors, 28.

1. "The rules prescribed by this court for the regulation of its own practice, as well as for that of the circuit court, are the law of the land, and are binding upon all courts, officers and parties, until altered by the court or the legislature. * So are the judgments and decisions."

—*Atty. Gen. v. Lum*, 2 W. 507, 510.

2. "It is, perhaps, not altogether an uncommon infirmity of judicial rules, that they are made in view of exceptional conditions of things presently existing.

3. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it." Ryan, C. J.

—*Klauber v. Biggerstaff*, 47 W. 551, 555.

4. "It would seem that judges, as well as lawyers, sometimes differ as to what may properly be regarded as obiter dictum.

5. It is not unfrequent, in courts of last resort composed of several judges, for all to come to the same conclusion, but from different views of the law, and hence it may at times be difficult to determine the precise principle upon which the case was decided, or what may properly be deemed mere obiter.

6. 'According to the more rigid rule', says Bouvier, 'an expression of opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum'."

7. "Under this 'more rigid rule', it is believed that, comparatively, there are but few opinions in the books which contain no obiter dictum; that is, nothing which was not absolutely essential to the disposition made of the case. Under that rule what is here being written is nothing but obiter dictum.

8. But Bouvier adds that 'it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point'.

9. Such dictum, if dictum it is, should, it would seem, be regarded as 'judicial dictum', in contradistinction to mere obiter dictum,—that is, an expression originating with the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question.

10. But even in that sense, we apprehend, there have been but few judges, occupying the bench for any considerable length of time who have always been so precise and concise in their opinions as not to be subject to that criticism.

11. As illustrations, we call to mind such expression of obiter by no

less distinguished judges than Sir Matthew Hale, Lord Chief Justice Kenyon, and Lord Chief Justice Denman, as will appear by reference to the following cases; *Steel v. Houghton*, 1 H. Bl. 53; *Parton v. Williams*, 3 Barn. & Ald. 341; *Bast v. Byrne*, 51 W. 536.

12. Besides, mere obiter is not always reprehensible. On the contrary, some of the most sacred canons of the common law had their origin in the mere dicta of some wise judges. To be valuable, however, they must of course be right." —*Buchner v. C. M. & N. W. Ry. Co.*, 60 W. 264, 267.

13. "Error cannot, in general, be assigned upon a ruling directing the order of proof. That is a matter resting in the sound discretion of the trial judge." See also AFFIRMATIVE.

—*Cunningham v. Gallagher*, 61 W. 170, 173.

14. Where "the published notice fixed Monday, the 24th of July, as the time for the hearing of the application to admit the will to probate, and the record shows that the matter was in fact heard on the 7th of August", there is "no merit in the objection that the will" was not duly "admitted to probate."

15. "We must presume, in the absence of proof to the contrary, that other business prevented the hearing on the day named in the notice,

16. Or that the hearing was postponed to the subsequent day to suit the convenience of the parties in interest.

17. The record shows that it was established as a valid will, effectual to pass the title to real estate".

—*Field v. Apple River L. D. Co.*, 67 W. 569, 571.

18. It "would be the better practice" to itemize claims for extra compensation to an executor. See COMPENSATION OF ADMR., ETC.

—*Ford v. Ford*, 88 W., 122, 130.

19. Extra compensation allowed, not in accordance with the court rule. See ACCOUNTS OF EXTRS., ETC. —*Schinz v. Schinz*, 90 W., 236, 248.

20. Where certain papers of the county court records were submitted as authority to appoint a trustee, not including "the petition for probate, order of notice, or proof of notice thereon", the jurisdiction was technically sustained by reason of a recitation in the certificate of probate, "although the better practice would have been to have introduced the whole record of the proceedings in county court". See also JURISDICTION.

—*Richter v. Est. of Leidy*, 101 W. 434, 438.

21. "It is a mistaken opinion that nothing is decided in a case except the result arrived at".

22. The case of *Buchner v. C. M. & N. W. R. Co.*, 60 W. supra, is approvingly quoted and discussed, and obiter is said to be mere observations as "to some collateral matter by way of illustration." See JUDICIAL DECISIONS.

—*Brown v. C. & N. W. R. Co.*, 102 W. 137, 154.

23. As to considering a prior will in a contest on a later will, made by a legatee of the first. See AGGRIEVED PERSONS.

—*Will of Hunt*, 122 W. 460, 464.

24. Evidence as to items of an account specifically objected to, must be affirmatively submitted, to enable allowance. See ACCOUNTS OF EXTRS. & ADMRS.

—*Fitch v. Huntington*, 125 W. 204, 209.

25. "All court proceedings should be in the open; there should be no opportunity for doing things in a corner."

26. A party "is entitled to have his case tried in open court from start to finish. There is safety in no other rule." See also JURY.

—*Hurst v. Webster Mfg. Co.*, 128 W. 342, 347.

27. "Violations of established rules or methods of procedure become material on appeal only when it is evident that they have impaired a party's right to a fair and impartial trial on the merits.

28. The Code and the court alike require a brushing aside of all errors that do not affect substantial rights". See also CLAIMS.

—*C. W. Beggs S. & Co. v. Est. of Behrend*, 156 W. 34, 36.

29. "The rule that findings of fact made by a trial court will not be disturbed unless contrary to the clear preponderance of the evidence", "is a very important one in the administration of justice";

30. But "the logic of the rule contemplates that a finding is not, necessarily, to be sustained merely because there is some evidence which, if not controverted, would support it".

—*Krahn v. Goodrich*, 164 W. 600.

31. (As to detailed points of practice in the various proceedings in county court,

32. And as to the formal County Court Rules with detailed commentary and discussion thereof, (ch. 34),—see Zimmerman's Probate Practice.)

SALE OF PERSONALTY.

See also AUCTION SALES. PERSONAL ESTATE. WARRANTY.

Administrator; absolute power, 1.

Acts in personal capacity, 20.

Assumes all liabilities, 21.

Lien on estate, 21.

Creditors and distributees, 3.

Holds title as owner, 19.

Represents no principal, 21.

To himself, is voidable, 22.

Without order of court, 2.

Agreement to bid jointly, 25.

Agreement to buy jointly, 23.

Not nudum pactum, 24.

Authority to sell, 7.

Not for debt payment, 7.

Contract: actual sale, 4.

Executory only, 5.

May be in form of receipt, 10.

Disclaim purchase: keep goods, 9.

Evidence:

- Parties to the contract, 12.
- Proof of no contract, 13, 14.
- Fraudulent as to creditors, 16.
- Valid as between parties, 16.
- Implied title warranty, 15.

Parol:

- Agreement to buy jointly, 23.
- Not within statute, 23.
- In form of receipt, 10.
- Not to vary contract, 10.

Parol—continued

- Plain and unquestionable, 11.
- Not as agreed on, 11.
- Sale on approval, 17.
- Sale or return, 18.
- Standing timber interest, 8.
- Stolen property sale, 15.
- Surviving partner to himself, 22.
- Without credit stipulation, 6.
- Reclaim upon delivery, 6.
- If payment refused, 6.

1. The sale of personalty is in the absolute power of the administrator, to be set aside only for fraud. See PERSONAL ESTATE.

—*Williams v. Ely*, 13 W. 1, 6.

2. Sale of personalty may be without any order of court. See PERSONAL ESTATE.

—*Munteith v. Rahn*, 14 W. 210, 212.

3. On a wrongful sale or pledge by the administrator, he and the vendee or obligee are responsible to the creditors and distributees, who must bring action. See EXTRS. & ADMRS.

—*Stronach v. Stronach*, 20 W. 129, 133.

4. "The rule laid down in the books is, that the contract amounts to an actual sale, if the specific thing is agreed on, and is ready for immediate delivery";

5. "But that the contract is only executory when the goods have not been specified, or if, when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. Benj. on Sales."

—*Godfrey v. Germain*, 24 W. 410, 415.

6. When goods are sold without any stipulation as to credit, the vendor may demand payment immediately upon delivery, and, payment being refused, he may reclaim the goods, not being considered to have parted with the title thereto. This right to reclaim must ordinarily be exercised promptly after refusal of payment.

—*Goldsmith v. Bryant*, 26 W. 34.

7. It is a plain and well-settled principle that "an authority to sell, strictly, and nothing more", "confers no power to sell or transfer in payment of the debts of the principal".

—*Butts v. Newton*, 29 W. 632, 640.

8. A sale of an "interest in standing timber" is a sale of an interest in land. See SALE OF REALTY.

—*Daniels v. Bailey*, 43 W. 566, 569.

9. "The defendant having received the goods from the plaintiffs, upon their claim that he had purchased from them, cannot, in the absence of

mistake or fraud, appropriate them to his own use, and then disclaim the purchase. (Cases)”. —*Wellauer v. Fellows*, 48 W. 105, 109.

10. “The contract of sale may be in the form of a receipt, and, if it is complete as such, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol. 1 Greenl. on Ev. 305; *Terry v. Wheeler*, 25 N. Y. 520; *Dunn v. Hewitt*, 2 Denio, 637”.

11. “Where the meaning of the instrument, as in this case, is plain and unquestionable, and the meaning is not that which the parties have agreed upon, or where there is no uncertainty in its legal effect, it cannot be contradicted by parol evidence. 2 Pars. on Con. 563.”

—*Schultz v. Coon*, 51 W. 416, 418.

12. In an action for the purchase price of lumber where the defendant claimed the purchase was made by a contractor, the testimony of the latter “tending to show that he purchased the lumber of the plaintiff on his own account, and that the plaintiff sold the lumber to him and not to the defendant,” was held admissible.

13. “It is not an attempt to prove what the contract between the plaintiff and defendant was by proving what were the terms of a contract between the plaintiff and the witness, as it was in the case of *Posey v. Rice*, 29 W. 93”.

14. “It was an attempt to prove that there was no contract between the plaintiff and defendant by showing that the witness was the party to the contract instead of the defendant. The evidence was clearly admissible”.

—*Dickinson v. Buskie*, 59 W. 136, 137.

15. In sale, there is “an implied warranty of title”; but in sale of stolen property, no title passes. See TITLE. FACTOR.

—*Edgerton v. Michels*, 66 W. 124, 131.

16. A fraudulent sale as to creditors is “valid as between the parties”. See FRAUD.

—*Davy v. Kelley*, 66 W. 452, 457.

17. In a “sale on approval”, “there is no sale until approval is given”, and “notice to the seller within a reasonable time after the goods are disapproved is sufficient”, without returning.

18. “But in a sale or return the sale becomes absolute after a reasonable time has elapsed without a return of the goods”. (Many cases).

—*Exhaust Ventilator Co., v. C. M. & St. P. Ry. Co.*, 69 W. 454, 458.

19. “As to personalty, he (the administrator) was the owner and held the title for the beneficial interest of the creditors and heirs.

20. In dealing with it he acts voluntarily and as owner, and solely in his personal capacity.

21. In such transactions he represents no principal, and upon well-established rules he assumes all liabilities as personal in character,

relying upon his lien for indemnity out of the estate for expenses and liabilities incurred in a proper administration of his trust". See also SALE OF REALTY. —*Wis. Trust Co. v. Chapman*, 121 W., 479, 486.

22. A sale as administrator and surviving partner, to himself, is voidable, and the trustee must respond with the property, or its value, and with profits made thereon, at the instance of the beneficiaries, though made without wrongful purpose. See SURVIVING PARTNER.

—*Rowell v. Rowell*, 122 W. 1, 13.

23. "An oral agreement to buy jointly", "irrespective of whether the joint property so bought was to be sold and the proceeds divided or the property itself divided in specie", is held "not within the statute of frauds, sec. 2308, nor within the Uniform Sales Act, sec. 1684t-4",—the statute being "applicable only to contracts between seller and buyer", and "the parties do not stand in" such relation.

24. "The agreement was not nudum pactum. The consideration was a promise for a promise", each party agreeing "to furnish one-half the purchase price".

25. "Agreements to bid jointly at a public sale, if not made for the purpose of chilling or suppressing bidding, are valid. (Citations)".

—*Stack v. Roth Bros. Co.*, 162 W. 281, 287.

SALE OF REALTY.

See also AUCTION SALES. COMMISSIONS OF BROKERS, ETC. DEEDS. INCOMPETENTS' SALE OF REALTY. INFANTS' SALE OF REALTY. LAND CONTRACT. POWER. REAL ESTATE. TRUSTEES.

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1. A guardian cannot covenant for his ward "in his representative character." See also REAL ESTATE.

—*Person v. Merrick*, 5 W. 231, 239.

2. "At sheriff's sales, property is almost always, in this country, sold at a sacrifice". "And it is highly important, in order to secure reasonable competition, that there should be confidence in the stability of these sales, otherwise the great inducement for bidding will be taken away".

3. A sale of real estate at a sacrifice is not set aside in the absence of surprise, mistake or fraud." See also REAL ESTATE.

—*Hill v. Hoover*, 5 W. 354, 375.

4. The party selling knows or is presumed to know of representations as true or false, and is liable for fraud in either case. See FRAUD.

—*Miner v. Medbury*, 6 W. 295, 309.

5. "An administrator's sale under a license from the probate court" cannot in a collateral proceeding "be sustained, where the record fails to show notice to the heirs at law as required by the statute," such notice being jurisdictional.

6. "A recital, in the order granting the license, to the effect that it appeared to the judge that the notice had been 'published in the Wisconsin Enquirer,' but leaving blanks at all the places where the facts should have been specified showing such publication to have been according to statute", is held insufficient "in the absence of any other proof of notice in the record failing to show or even recite the necessary facts".

—*Gibbs v. Shaw*, 17 W. 197, 201.

7. The sale of infant's real estate is valid though the bond was "not formally approved." See BONDS.

8. "The lands were not sold in the order of the license. This defect, if such it was, was cured by the order of confirmation", the court having "power to modify" in this particular.

9. "A fair construction of the order" of sale, authorized the raising of "expenses of the sale" in addition to the sum named.

—*Emery v. Vroman*, 19 W. 689, 700.

10. "The defect in the petition, of omitting to state the value of the personal property in the hands of the administrator, is not such an irregularity as avoids the sale", in a collateral proceeding.

11. "By 'the probate court having jurisdiction' is obviously meant the probate court of the county where the deceased resided at the time of his death, and which had jurisdiction of the estate."

12. Proof of publication of the notice "made by the proprietor of the newspaper" instead of by the printer or foreman of such printer is held valid.

—*Reynolds v. Schmidt*, 20 W. 374, 379.

13. The circuit court can make no valid order of sale for payment of debts, on transfer from the county judge because the latter had been counsel for interested parties. See CIRCUIT COURT.

—*Morgan v. Hammett*, 23 W. 30, 41.

14. As to guardian's sale of real estate: "In this case it does not appear that any oath (prescribed by the statute) at all was taken by the guardian; and the consequence is, that no title whatever passed by virtue of his deed".

15. In an action of ejectment brought after the wards became of age, it was held they were not "estopped by the unlawful acts of the guardian" though they received the benefit, and that "the remedy of the purchaser must be upon the covenants in the guardian's deed".

—*Wilkinson v. Filby*, 24 W. 441, 444.

16. "Authority in writing from S. to her husband, assuming her to have been the real owner, was not necessary in order to authorize him

to enter into the contract for the sale of the land (*Dodge v. Hopkins*, 14 W. 630); and hence a ratification in writing by her of the contract was not required". —*Smith v. Armstrong*, 24 W. 446, 451.

17. A sale of the homestead at an administrator's sale was held void, collaterally, for the reason, "that the record of the probate court fails to show any allegation or finding that the land was not the homestead." —*Howe v. McGivern*, 25 W. 525, 532.

18. An administrator's sale cannot be set aside for errors, "where the statute of limitation (5 years) has run so as to give good title." See VACATING JUDGMENT. —*Betts v. Shotton*, 27 W. 667, 670.

19. Where, on a sale of realty for the payment of debts, by reason of irregularities, "the deeds executed by the administrators to S. (the grantee) were invalid", the right of action by the heir "accrued when the administrators sold and conveyed the premises in controversy", and not when the administrators were discharged, though "it does not appear that the estate has ever been fully settled".

20. "This action is barred by either of the statutes of limitation", to-wit: that of "an adverse possession of lands of ten years under claim of title", and that barring such an action "unless it be commenced within five years next after the sale", there having been in this case a lapse of eleven years. —*Jones v. Billstein*, 28 W. 221, 224.

21. "In a court of general jurisdiction, it is well settled that we should be authorized to presume that due notice of the petition of the administrator for license to sell the real estate, was given to the parties interested, and also to presume the existence of any other jurisdictional fact concerning which the record is silent".

22. "It is only in cases where the record is silent in relation thereto, that the existence of facts is presumed in favor of jurisdiction". See JURISDICTION.

23. "A notice of the time and place of sale must be given, in the manner required by the statute, or the sale will be void."

24. "The omission of the place of sale therefrom entirely destroys the value of the notice".

25. "Were the records silent on the subject, we might, perhaps, presume a legal notice" by virtue of the statute (sec. 3906) placing the matter on a par with a court of general jurisdiction.

26. On such failure of title "the whole purchase money paid by the defendant (purchaser) for the land in controversy, and the interest thereon, less the mesne profits of the land (exclusive of the improvements placed thereon by him), during his occupancy thereof" for the six years prior to the commencement of the action, "is a lien and charge upon the land", and the heirs "cannot have restitution of the land claimed by them, until the amount of such lien and charge is paid". p. 192. See EQUITY.

27. "The defendant (purchaser) will also, upon proper claim, be entitled to recover for permanent improvements, and for the taxes paid by him upon the land."

28. In this case, as a moving cause for the interference of equity apparently, "the whole of the purchase money was applied to the payment of the mortgage (on the premises), of other debts against the estate, and of the expenses of administration".

29. "It is the policy of this state" to uphold judicial sales though the record be somewhat defective. See POLICY OF THE LAW.

—*Blodgett v. Hitt*, 29 W. 169, 178.

30. The records of probate court sale proceedings, "regular on their face, create a presumption of jurisdiction in all respects sufficient to sustain the sale until the contrary was shown," especially under the statute (ch. 127, L. 1861; sec. 3906), "which creates the same presumption in favor of the jurisdiction of the county court", in sale of realty therein, "as prevails in favor of the jurisdiction of courts of general jurisdiction and of the validity of their proceedings".

—*Farrington v. Wilson*, 29 W. 383, 398.

31. "The proceeds of the sale of real estate is realty; and no good reason is perceived why the rent of mines"; "is not also realty".

32. But where such proceeds are to "be treated as money for all purposes", a disposition thereof is "a bequest of money" and not a devise. See also CONSTRUCTION OF WILLS.

—*Chandler's Appeal: Est. of McCoy*, 34 W. 505, 510.

33. The interest of a life beneficiary "in the lot in controversy is liable to be sold by virtue of an execution issued on a judgment against him", though the testator restricted him "from selling the same", but failed to provide "that the estate so devised should terminate in the event of an alienation thereof. Failing so to provide, the rule is stated by "Judge Redfield", to be, "that property cannot be given either for life, or absolutely, without the power of alienation being incident to the gift".

—*Bridge v. Ward*, 35 W. 687, 690.

34. A sale of standing timber "is an interest in the land".

—*Warner v. Trow*, 36 W. 195, 200.

35. "If the court had no power to appoint an administrator de bonis non, or to grant letters of administration with the will annexed", then "it could not grant a valid license of sale. Before a step can be taken towards granting such license, there must be a lawful executor or administrator."

36. "The order of the county court confirming the sale" cannot "be held conclusive of the jurisdiction of the court and of the regularity of

all proceedings in the matter prior to such confirmation", where the conditions of the statute (sec. 3919) are not complied with.

—*Chase v. Ross*, 36 W. 267, 276.

37. In *Chase v. Ross*, supra, "We held that if any of the conditions specified in" sec. 3919, "are wanting, or do not appear by direct proof or legal inference, a sale of land made by an executor, administrator or guardian under that chapter, is void. Applied to this case, one of those conditions is, that the administrator 'gave notice of the time and place of sale as in this chapter prescribed'".

38. "It must be held that the statute", "requires a publication of the notice of sale for twenty-one days. In other words, three weeks must intervene between the first publication and the day of sale."

39. Where the account of the administrator allowed was \$1,500.00, and, "the land was bid off" by a third party for that sum and immediately conveyed to the administrator, held he was not "one who purchased in good faith", and that such sale was invalid. (See also par. 72, post.)

—*McCrubb v. Bray*, 36 W. 333, 339.

40. On a void sale by guardian of an insane person, the ward is not estopped from action by reason of a settlement with his guardian after his sanity is established. See INCOMPETENTS' SALE OF REALTY.

—*Mohr v. Tulip*, 40 W. 66, 80.

41. A parol contract by the husband is held valid as to his interest. See HOMESTEAD.

—*Goodell v. Blumer*, 41 W. 436, 442.

42. The sale of an "interest in the standing timber upon certain land", or of an "interest in a contract of sale of the standing timber" where "the sale proved was by parol, wholly unexecuted, was equally the sale of an interest in land, and void under the statute of frauds. (Cases)".

—*Daniels v. Bailey*, 43 W. 566, 569.

43. The statute, sec. 3914, "in terms, prohibits executors and administrators making sale of real property to pay debts, from purchasing, directly or indirectly, or being interested in the purchase of, any part of the real estate so sold, and makes all such prohibited sales void.

44. This statute, in terms, may not be broad enough to include sales by executors by direction of the will; but the reason and necessity of the prohibition are greater in the latter case than in the former, and it is held that, without such a statute, where the executors are made trustees by the will, with power of sale, they cannot become the purchasers, unless the will expressly authorizes it. 3 Redfield's Law of Wills, 551".

—*O'Dell v. Rogers*, 44 W., 136, 177.

45. The recovery and sale of realty conveyed by deceased "in fraud of creditors", may be had in an action in circuit court. See CREDITORS' ACTIONS.

—*German Bank v. Leyser*, 50 W., 258, 264.

46. While want of notice to the incompetent, where a guardian is licensed to sell realty, is not fatal to the proceedings, yet notice to adverse parties in executor's and administrator's sale is vital, to bind such parties. See INCOMPETENTS' SALE OF REALTY.

—*Mohr v. Porter*, 51 W. 487, 498

47. Under the statutes, subds. 2 and 3, sec. 4971, "we have no difficulty in holding that the heirs cannot avoid the executors' sale merely because the license was obtained on the petition of only two of them, and gave to them authority to make the sale, especially as the executrix (the third executor) had refused to take under the will, and joined in making the report of sale, and in giving the deed thereon".

48. The sale was held valid, though minor heirs were not represented (being unharmed), at the probate, the widow a sole devisee having elected to take under the law. See JURISDICTION.

—*Melms v. Pfister*, 59 W. 186, 198

49. "It is the clear duty of the executors to exercise their best judgment,—use their most intelligent efforts to sell the real estate for the best possible price which can be obtained therefor", under the power in a will, and all must join in the sale. See also POWER.

—*Crowley v. Hicks*, 72 W., 539, 548

55. A reversion or remainder may "be sold to enable an administrator to pay legacies which are a charge upon such interest". See LEGACIES.

—*Will of Root*, 81 W., 263, 267

56. The statutory provisions of sec. 3919, cannot "be waived by the guardian so as to bind the ward". See INFANTS' SALE OF REALTY.

—*Weld v. Johnson Mfg. Co.*, 84 W., 537, 548

57. A deed and mortgages of realty, executed by the interested parties but not in accordance with the express power of sale in the will, were on suit of such parties, declared a nullity. See POWER.

—*Goebel v. Thieme*, 85 W., 286, 288

58. In an executor's public sale of mortgaged realty, to one F., who purchased in fact for the use and benefit of Mrs. M., the widow and one of the executors, in an insolvent estate, and the realty including a homestead was some months thereafter sold to a third party P. & S.—on suit some twenty years thereafter, and several years after the youngest heir had become of age, of the heirs to recover, it is held:

59. As to "the words void and voidable", in the statutes, "the word void is often construed as meaning only voidable. (Cases)."

60. As to the purchase of estate realty by an executor being "void under section 3914, "we think that the word void was used in the statute in the sense of voidable, and that the legal title to the premises

passed to F. by the executor's deed, subject to be questioned or impeached" for fraud as to creditors and heirs.

61. That the subsequent grantees did not have "notice, in fact, of the fraud and illegality";

62. That the attorney for the widow, in the first transaction under the license, who acted later as attorney for both parties, could not without "a breach of professional confidence," disclose to or bind such purchasers by his knowledge so obtained;

63. That, therefore, "P. & S. were bona fide purchaser for value without notice of any fraud or illegality in the executor's sale, and that the claim of title of the plaintiffs cannot prevail."

64. And that "under the fact and circumstances disclosed, the relief sought by the plaintiffs was properly denied for the reason that they had been guilty of laches in failing to investigate and bring forward their claims within a reasonable time." (See also as to sale of the home-
stead, *Melms v. Pabst Brewing Co.*, 93 W., 140, 146, under WIDOW.)
See also ATTORNEY AND CLIENT. LACHES.

—*Melms v. Pabst Brewing Co.*, 93 W., 153, 164-170.

65. Fraudulent sale by guardian to a nominal third party, set aside twelve years later. See INCOMPETENTS' SALE OF REALTY.

—*Heyl v. Goelz*, 97 W., 327, 331.

66. "Mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale. *Schroeder v. Young*, 161 U. S. 334; (other cases)!"

67. Where the land was sold on execution sale at \$90, and said to have been worth \$600, there being nothing "to impugn the good faith of the plaintiffs, their title, if otherwise good, cannot be attacked on the ground alone that the grantor bid an inadequate price at the sale under which he took title".

68. "The validity of the sale is in no way made dependent upon the proper indexing of the papers filed" in the register of deeds office.

—*Phillips v. Hyland*, 102 W. 253, 255.

69. On the facts, where the son of the administrator bid off the premises at a fair valuation, at an administrator's sale, but subsequently received some of the money to pay therefor from the father, and the administrator also "came into possession of nearly one-half" thereof, and mortgaged some of his own land to pay therefor, it is held that his explanations are not satisfactory, and that he was "directly or indirectly interested in the sale", though no "actual or intentional fraud" was proven.

70. Held, following *Melms v. Pabst B. Co.*, 93 W. supra, that the sale "is not absolutely void, but voidable only at the election of the persons entitled to avoid it".

71. Such sale cannot, however, be set aside in an action of ejectment, but "must be avoided, if at all, in an action in equity".

72. The "point was nowhere raised in" *McGrubb v. Bray*, 36 V supra, and "the statute had not then been construed to mean that such a sale was voidable only, so we do not consider the question as settled in that case".
—*Gibson v. Gibson*, 102 W. 501, 50

73. As to a questioned administrator's sale of realty (see *Gibson v. Gibson*, 102 W., supra), a minor being interested and having within five years and over one year subsequent to his becoming of age, and more than ten years after the occurrence, brought this action to set aside the sale, being "not the recovery of real property" under section 4218, "but the cancellation of the administrator's deed" under sec. 4221, the ten years statute, the latter applied together with the one year limitation after majority under sec. 4233, and the action is held barred.

74. And "the suspension of the statute of limitations" because of trusteeship as administrator, by subsequent notorious adverse possession, terminated upon his discharge as administrator. See also LIMITATION OF ACTIONS.
—*Gibson v. Gibson*, 108 W. 102, 10

75. A will giving an executor power to sell realty, it is held, "confers no power to effectively mortgage this property. Authority to sell does not confer power to mortgage. *Minnesota S. Co. v. McCrossen*, 110 V 316. (See DEEDS)".

76. While "in an extreme case a court of general equity jurisdiction may transfer title in order to preserve an estate from destruction" (*Ruggles v. Tyson*, 104 W. 500; See TRUST VARIATION),

77. And "when the holder of title ought to convey and will not, a court of equity can" pass the title, yet,

78. "Apart from a few such instances as these, however, it is believed that the power of the courts, and especially county courts, to make conveyances not authorized by owners must be found in the statutes",

79. And "in settlement of estates, title may be passed to raise money to pay debts, but only by virtue of ch. 167, stats., and in strict compliance therewith".

80. Under the statutory proceedings, "the court has not jurisdiction over the parties in interest for the special proceeding merely because jurisdiction over them has been acquired for the general one.

81. Notwithstanding parties are before the county court for the purpose of the settlement of the estate, jurisdiction must be again acquired over them by due notice, or the proceedings under ch. 167 will be void as to such as not notified and do not appear. *McGrubb v. Bray*, 36 V supra; (other cases)".

82. And by analogy, "we cannot doubt that the power of the county court over real-estate titles in the hands of testamentary trustees is strictly limited by sec. 4030, and that acts in violation thereof are not only erroneous, but beyond its power,

83. And void as to those over whom personal jurisdiction is not obtained by notice or by their appearance or assent".

—*Bloor v. Smith*, 112 W. 340. 3

84. A power to trustees to sell, at the direction of a life tenant, was upheld where the trust otherwise failed under sec. 2081.

85. A sale to such life tenant, with mortgage in part payment taken, is upheld. See POWER. —*McLenegan v. Yeiser*, 115 W. 304, 309.

86. Where an order of license to sell realty for the payment of debts only, on petition to sell to pay debts and administration expenses, was entered May 23, 1898, and after appeal therefrom the supreme court directed an order for both purposes, which was thereupon entered by the county court, Jan. 16, 1900, the latter is held the only effective license from which the time was to run.

87. And, it is held, that, under sec. 3889, the county court may exercise its discretion, after the expiration of the first year from the date of the license, and "within the two-year limit", to extend the time for sale under the license;

88. But where the administrator was chargeable with delay of more than six years, and made application for extension more than a year after entry of the valid order of license, and more than three years after the original erroneous order, and more than six months after the dismissal of an injunction against him,

89. And there were then only administration expenses to pay,—he was held guilty of laches and the order was properly refused for that reason. See also LIMITATIONS OF ACTIONS.

—*Mackin v. Hobbs*, 116 W. 528, 531.

90. "A trustee can at best obtain but a voidable title by purchasing the subject of his trust at his own sale.

91. Such a proceeding is voidable" "at the election of the cestuis que trustent if they move seasonably, and that is so whether the sale was really injurious to them or not". (Citations); *Heyl v. Gœlzel*, 97 W. supra. So held in case of a receiver's sale.

—*Harrigan v. Gilchrist*, 121 W. 127, 363.

92. "To render a sale or mortgage of the lands valid within these provisions (for the payment of decedent's debts), there must be a substantial compliance therewith under the direction and authority of the county court.

93. In exercising these powers administrators act as the instruments of the law, and they are strictly bound by the special authority vested in them for this purpose.

94. A transfer of the real estate by an administrator, under the power and direction of the court, should therefore be viewed in the light of his relation to the property and the objects to be accomplished, and the words of transfer should be given interpretation limited to the occasion."

95. "We must observe at the outset that this transaction of the administrator differs widely from the duties imposed on him by the law

in the administration of the decedent's personal estate", where he has the title and assumes personal liability. (See SALE OF PERSONALTY).

96. "In the disposition of real estate his duties are imposed by law and directed by the court, under the authority of the statute, and can be carried out only in the prescribed manner.

97. He has no interest in or control over the property, except as he executes the mandates of the court to enforce the creditors' claims against the decedent's real estate.

98. These grounds have been held to furnish the distinction between the administrator's liability in his personal and representative capacities in performing his duties as administrator of the estate".

99. As to notes and mortgage given by the administrator pursuant to the statutory proceedings, administration having been concluded, and foreclosure instituted, it is held,—

100. That the notes and mortgage "cover the same transaction and must be construed together";

101. That the language, "administrator of the estate of B. deceased, acting under an order of the county court", etc., shows "that he acted in his representative and not in his personal capacity", and "gave notice to the purchasers" to that effect;

102. That the mortgagee "and its assigns can only enforce payment out of the proceeds of a sale of this real estate";

103. And that the administrator "is not personally liable for the amount due on the notes and mortgage".

—*Wis. Trust Co. v. Chapman*, 121 W. 479, 486.

104. Where an administrator, subsequent to a duly authorized attempt at public sale, sold at private sale lots, on false representation by diagram that such lots were on a sixty-foot street, and the purchaser paid the money which the administrator per arrangement was to pay, and mostly did pay out for mortgages and taxes thereon, before confirmation and before he and the purchaser discovered that such street was but twenty-four feet wide, and the county court thereafter confirmed such sale, the purchaser opposing,—it is held:

105. The purchaser "by the false representations" "was induced to make the purchase. He was entitled to a rescission by reason of such false representations, without proof of actual damage". (Cases).

—*Greiling v. Watermolen*, 128 W. 440, 446.

106. Power to mortgage future interests, under power of sale and management. See POWER.

—*Lueft v. Lueft*, 129 W. 534, 540.

107. Where a sale of lands under license to pay debts was made on "petition to sell the lands as if no question of homestead was involved, and the sale presumably was made accordingly", the lands including a homestead, it is held that the purchaser obtained no title.

—*Steinberg v. Saltzman*, 130 W. 419, 429.

108. "A transfer of real estate in fraud of creditors is not wholly void under sec. 2320. The word 'void', as used therein, means voidable". *French L. Co. v. Theriault*, 107 W. 627.

—*Hyman v. Landry*, 135 W. 598, 600.

109. A valid contract for sale of realty "may be made through the medium of letters". See also WRITINGS.

—*Curtis L. & L. Co., v. Interior L. Co.*, 137 W. 341, 345.

110. Where "gross and glaring irregularities were committed in the administration of the estate" "which amounted to constructive if not actual fraud", and the county court's order "to sell the homestead to pay" debts "was a purely lawless proceeding", and there being minors interested,—the administrator's deed, void in its inception, was held to give defendants, parties to the fraud, title to such realty, and the minors to be without remedy, for the reasons,—

111. That the defendants held possession adversely under color of title more than ten years, under secs. 4211 and 4215, which "make no exceptions in favor of minors" or "cases of fraud";

112. "Sec. 4218, does not aid the plaintiffs, as no action was commenced within" "five years after the disability" ceased on coming of age. (Cases);

113. "There can be no doubt that the administrator's deed involved in this case conveyed color of title. (Cases)".

114. "This action" "might well be governed by sec. 3918, which limits the time" on an administrator's sale "to five years after the sale" and "in case of minors" "within five years after they become of age".

115. "No right to an accounting exists" under subd. 7, sec. 4222, as the statutes referred to in effect also "vests title in the defendants. (Cases)."

116. Title by adverse possession under the ten-year statute as well as the twenty-year statute may be acquired although there is no element of good faith in the entry or in securing the deed".

—*Steinberg v. Salzman*, 139 W. 118, 122.

117. While "it is the settled practice of courts of equity to refuse a resale (foreclosure here) for mere inadequacy of consideration" (*Meehan v. Blodgett*, 86 W. 511),

118. "It must be strictly confined to cases where there is absolutely no fact appearing except that the price is inadequate.

119. Whenever other facts appear, such as mistake, misapprehension, or inadvertence on the part of interested parties or of intending bidders", "the court will readily refuse to approve the sale.

120. No fraud is necessary to justify the court in so withholding its approval".

—*Griswold v. Barden*, 146 W. 35, 37.

121. On appeal from an order reversing "an order of the county court confirming the sale of real estate by an administrator under license from the latter court", it is held:

122. Under sec. 2271, if there be children of a deceased woman, though no minors, the homestead "is not liable for debts in the ordinary sense of the latter term";

123. And "it cannot", under "sec. 3874a, be sold to pay the charges of administration". (Undoubtedly, since the repeal of sec. 3874a and amdt. of sec. 3874 by ch. 480 L. 1913, it can now be so sold if there be no widow or minor).

124. Where "it appears in the petition that certain claims had been filed, and in the order for sale that these claims had been filed, and remained unpaid, but it does not appear that they had been allowed at the time the order was made, except certain costs and charges of administration";

125. "We need not and do not decide" "whether sec. 3881 as" to debts 'justly due and owing', "was sufficiently complied with".

126. "The order of sale was invalid because it did not provide that the entire estate or interest, including the interest of the mortgagee, be sold", as provided by sec. 3884, "assuming that" "the homestead was part only of" the premises "the whole of which was subject to a mortgage";

127. It appearing also that "the mortgagee had no notice of these proceedings except such as might be inferred from publication from an order of hearing".

128. The "order nunc pro tunc after the land had been" "sold, and after objection made to such sale", correcting such defect in the order of sale, "was beyond the power of the county court and invalid". See also **HOMESTEAD**.

—*Milwaukee Trust Co. v. Clark R. Co.*, 146 W. 230, 236.

129. As to invalidity, laches, good faith, remedies, accounting, etc., on sale of realty by a trustee to himself. See **TRUSTEES**.

—*McClea v. Root*, 147 W. 60, 63.

130. Evidence of other sales, to show market value, held properly excluded. See **EVIDENCE**.

—*O'Day v. Meyers*, 147 W. 549, 553.

131. Where an administratrix S. conveyed title to estate realty to E., to be conveyed to herself, and she having paid the consideration and being in "open notorious possession" for more than ten years, when E. conveyed to plaintiff K. who had notice of such possession and controversy,—it is held:

132. That the title be vested in S.; that though the administratrix sale was "constructively fraudulent" and voidable under sec. 3914, she "committed a wrong in law without moral turpitude in the particular circumstances";

133. That K. "took title" "with efficient notice" of S.'s possession, and was "presumed to act with notice of all facts which such situation would suggest, or which could be obtained by diligent inquiry. (Cases)";

134. That until such "voidable" sale "be set aside in a proper action, the purchaser is vested with the legal title" until divested in a "proper action brought within a proper time by a person entitled to challenge, efficiently, the validity of the sale. (Cases).

135. The defect in the sale here, even as to a person the statute was designed to protect, was cured before commencement of this litigation by sec. 3918 limiting the operation of sec. 3914, in the circumstances of this case, for five years next after the sale.

136. Moreover", "neither E. nor appellant (K.) is within the saving grace of the law", sec. 3918. While S., to be entitled to equitable relief must "come into such jurisdiction with clean hands",

137. Yet, it is not "literally true" "that a person cannot successfully appeal to a court of equity unless he, himself, is without fault".

138. The contention of K. "is wholly without equity and, notwithstanding the initial fault, there is a very strong equity in" S.'s favor.

139. There was "in practical effect, a verbal sale (from E. to S.), void in its inception under sec. 2304, but after the lapse of time and under the circumstance of part performance, enforceable under general principles of equity jurisprudence and sec. 2305".

—*Keilly v. Severson*, 149 W. 251, 254.

140. "The purchaser has not the right to change the place of payment where he attempts to accept an offer, and" "an acceptance of this kind is not an unqualified one such as is necessary to make a binding contract to sell real estate by letter. (Cases)".

141. The owner "had the right to withhold the offer before there was an acceptance of it. (Cases)". —*Cram v. Long*, 154 W., 13, 22.

142. As to meaning of the words "more or less". See WORDS AND PHRASES. —*Frey v. Etzel*, 160 W. 311, 314.

143. "Where the vendor cannot convey title as agreed by the contract of sale the vendee may refuse further payments of the purchase price and recover the amounts paid thereon", (Cases). See also CONSTRUCTION OF DEEDS. —*Neff v. Rubin*, 161 W. 511, 515.

144. Where a contract for the sale of realty gave the number of acres 'more or less' and a gross sum to be paid therefor, and it appeared later, and before the deed was given, that there was in fact about eight acres more than named,—it is said: "Applying the law" "in *Doctor v. Furch*, 76 W. 153, we are of the opinion that the sale in the instant case is a sale in gross";

145. "That is, it is a sale of a tract in which, though a supposed quantity by estimation is mentioned in the contract, the reference is

only for the purpose of description and the circumstances are such as to show that the parties intended to risk the contingency of quantity. *Hackbarth v. Wollner*, 88 W. 476."

146. "There is no claim of fraud and the discrepancy is not so great as to indicate gross mistake".

—*Pereles v. Milwaukee Co.*, 164 W. 208, 21.

SANITY.

See INSANE PERSONS.

SEAL.

Authority under seal, 5.

By like instrument, 5.

Except partners, 5.

Certificate of clerk, 4.

Not of judge, 4.

Contract not requiring, 7.

Seal adds nothing, 7.

Corporations:

May act without, 9.

Except as provided, 9.

L. S. sufficient device, 3.

Neglect, with co-signers, 2.

Not different instruments, 14.

Presumed to adopt, 2.

Seal with first, 11.

Notes, chose in action, 1.

Presumption:

Adoption of later signers, 11.

Executory instrument, 10.

Import's consideration, 10.

Import's validity, 8.

"Sealed with our seals," etc., 15.

Omission of scroll, 16.

Several may adopt, same, 12.

Warrant of attorney, 6.

By a corporation, 8.

Not essential to validity, 8.

Not extend limitation, 6.

Wrong court seal, 13.

Allowed corrected, 13.

1. A sealed note is a chose in action and may be assigned by parol or deed.

—*Carrington v. Eastman*, 1 Pin. 650, 65

2. "When a party" neglects to affix a seal where co-signers do on the instrument purports to be sealed by all, he "is considered to have adopted the seal of some one of the other signers," he not indicating an intention not to be so bound.

—*Yale v. Flanders*, 4 W. 96, 10

3. "The printed letters (l. s.) inclosed in brackets or parentheses in the usual place of a seal, is a sufficient device" "to answer the purpose of a seal".

—*Williams v. Starr*, 5 W. 534, 54

4. The seal of a court must be annexed to the certificate of the clerk and not to that of the judge, to entitle the record to admission as evidence.

—*Kirschner v. State*, 9 W. 140, 14

5. "Authority to bind another by an instrument under seal, must itself be created by a like instrument", but partners may give each other authority even to deed real estate, by parol.

—*Wilson v. Hunter*, 14 W. 683, 68

6. "A warrant of attorney under seal, given with a promissory note," does not extend the period of limitation to an action on the note, or authorize judgment on the warrant after the note is barred.

—*Walrod v. Manson*, 23 W. 393.

7. In a contract not requiring a seal, made under seal by an agent, "the seal adds nothing to it". See PRINCIPAL AND AGENT.

—*Stowell v. Eldred*, 39 W. 614, 626.

8. As to a power of attorney by a corporation to confess judgment, "the seal would only be presumptive evidence that the execution of the instrument was a corporate act. If it be such in fact, or if the circumstances be such that defendant H. had a right to rely upon it as such, then the absence of the seal makes no difference; the seal was not essential to the validity of the instrument. (Citations)."

9. "Such bodies (corporations) may now act without a seal, very much as individuals can, except when otherwise provided by statute or their articles of organization", the old strict doctrine being "very much modified."

—*Ford v. Hill*, 92 W., 188, 198.

10. A bill of sale being under seal, held to import validity as to consideration. "A seal even upon an executory instrument is presumptive evidence of a sufficient consideration. Sec. 4195; *Warder v. Baker*, 54 W., 62."

—*Carey v. Dyer*, 97 W., 554, 559.

11. Where on an assignee's bond, "there was but one seal or scroll, and that was opposite the signature of the assignee, H., the first on the list", there being ninety-five sureties, the bond was sustained.

12. "It is, undoubtedly, the law that two or more persons may adopt a single seal. (Cases). This is not in conflict with *Yale v. Flanders*, 4 W. supra".

—*Rollins v. Humphrey*, 98 W. 66, 71.

13. A seal of the wrong court, after proceedings thereunder was allowed to be corrected as if originally so affixed. See NUNC PRO TUNC.

—*Davelaar v. Blue Mound I. Co.*, 110 W., 470, 473

14. Where the contract was under seal, a written guaranty not under seal, "though indorsed upon the back of the contract", "was nevertheless a separate and independent contract", is not governed by the seal and, six years having elapsed, "is barred by the statute of limitations. Subd. 3, sec. 4222".

—*Spencer v. Holman*, 113 W., 340, 345.

15. Where "a bond contains a penal clause with a defeasance, and also the following: 'Sealed with our seals and dated, etc.'," "this must be considered a sealed instrument.

16. The mere omission of a scroll or flourish after the names of the

signers" "cannot outweigh the consideration that" "it is expressly stated to be sealed with the seals of the signers".

—*Oconto Co. v. MacAllister*, 155 W., 286, 295.

SERVICE.

See also JURISDICTION. NOTICE. PUBLICATION.

Amend return:

- Amend, even after judgment, 26.
- By private person serving, 18.
- As an officer might, 18.
- Not after filing, without leave, 19.
- Better also; after notice, 20.
- Notice or leave; not always, 21.
- Appeal general, reversed, 17.
- Fact of service, not proof, 24.
- Proof may be faulty, 25.
- Amend; after judgment, 26.
- Insane, not judicially, 5.

Mailing:

- "Double the time required," 6.
- Acts to be done, 6.
- Notice of appeal, 8.
- Not of acts done, 6, 7.

Minors:

- Additional copies to parent, 9.
- Failure of jurisdiction, 10.
- Subsequent guardian, ineffective, 10.
- Officer's return must prevail, 29.
- Denial by interested party, 30.
- Officer's evidence supports, 31.
- Official certificate, evidence, 22.
- Not others, though by officer, 23.

- Personal; actual delivery, 3.
- Defined specifically, 14.
- Must be within the state, 16.
- Appeal general; reversed, 17.
- Proof must so state, 16.
- Privileged from service, 28.
- Attendance at court, 28.
- From another state, 28.
- Witness or party, 28.

Proof:

- Clerk's filing mark, proof, 15.
- Defective affidavit, 11.
- Condition precedent, 12.
- Jurisdictional, 11.
- Failure to state time, 13.
- Jurat date presumed, 13.
- Filed after many years, 27.
- After judgment, 27.
- Neglect in filing, 4, 27.
- Nunc pro tunc, 4, 27.
- Personal, within state, 16.
- Sheriff's return, conclusive, 1.
- Solicitor:
- Before notice of change, 2.

1. "The rule of law is, that as between parties and privies, the sheriff's return, made to returnable process, is not only competent, but generally conclusive evidence."

—*Knowlton v. Ray*, 4 W. 288, 291.

2. Service upon the solicitor of record, before being notified of his disconnection with the case, is "entirely sufficient".

—*Boyd v. Stone*, 5 W. 240.

3. Personal service means "actual delivery" to the person.

—*Moyer v. Cook*, 12 W. 335, 337.

4. Proof of service not filed "through inadvertence", may be filed after judgment nunc pro tunc. See NUNC PRO TUNC.

—*Sueterlee v. Sir*, 25 W. 357, 358.

5. Service of summons upon "a person insane in fact, although not judicially declared to be insane", is valid.

—*Gerster v. Hilbert*, 38 W. 609, 612.

6. The provision of the statute for service by mail allowing "double the time required", "appears to limit service by mail to papers relating to acts to be done in the future, and to exclude notices of acts done.

7. When a statute or rule requires notice of an act done to be given within a time limited there is no time of service to be doubled; and the provision of the sections (secs. 2821, 2822) in question is wholly inapplicable".

8. So held as to mailing of notice of appeal "on the clerk and the party, within the time limited for appealing".

—*Stevens v. Wheeler*, 43 W. 91, 92.

9. Under that statute (subd. 1, sec. 2636) requiring service of summons on a minor under fourteen, by delivery "to such minor personally, and also to his" parent, guardian, etc., it is held that delivery of a copy each to the mother and two such minors, where the three were defendants, was insufficient as to the minors without delivery of additional copies to the parent for the infants.

10. "The court having failed to acquire jurisdiction by proper service on the infants, the subsequent appointment of guardian ad litem was clearly irregular, and did not aid or cure such want of jurisdiction. *Foster v. Hammond*, 37 W. 185."

—*Helms v. Chadbourne*, 45 W. 60, 69.

11. Where the affidavit of service "fails to state that a copy of the summons was left with the defendant", "the circuit court had no jurisdiction to render the judgment appealed from, because" the service was not such as the statute requires. Sub. 2, Sec. 2642; *Matteson v. Smith*, 37 W. 333.

12. "Proof of service of the summons is a condition precedent or prerequisite to the rendition of a judgment by default".

—*Hall v. Graham*, 49 W. 553, 554.

13. Where the affidavit of service omits to state the time of service and "the jurat shows the date of signing and swearing to the affidavit, which was several months before the judgment was rendered, the jurat must be read with the body of the affidavit", and "we think the legal presumption is that the service was made on the day the jurat bears date".

—*Reed v. Catlin*, 49 W. 686, 689.

14. "Personal service is defined to be the 'delivery of an original writ, notice, or other paper, or a copy thereof, with oral information as to the contents, to the person who is to be affected by the service'.

Anderson, Law Dict. PERSONAL SERVICE. Black Law Dict., is to the same effect".
—*Minard v. Burtis*, 83 W., 267, 270.

15. The clerk's filing mark on a notice of appeal, it is held, "sufficiently proves the service" upon him. See also APPEAL.
—*Will of Madden*, 104 W. 61, 64.

16. "Personal service, in order to give jurisdiction, must be made within the state of Wisconsin, and the fact that service was so made is an essential element of the proof of service required for the entry of judgments by default by sec. 2891. *Sayles v. Davis*, 20 W. 302; *Weis v. Schoerner*, 53 W. 72."

17. A judgment so taken by default, with failure of jurisdiction for want of proof of proper service, will be reversed, though the appeal is a general one from the whole judgment.
—*Zimmerman v. Gerdes*, 106 W. 608, 609.

18. Where the service is legally made by a private person, the statute "by necessary implication gives such person authority to amend" a defective return "to the same extent as an officer might under the same circumstances".

19. "The general rule" is "that after the papers have been filed it (the return) cannot be amended except upon leave of court,

20. And the better practice is only upon leave granted after" notice to the adverse party.

21. However, it is indicated, notice is not essential, nor, necessarily, in all cases, leave of court.

—*First Natl. Bank v. Kromer*, 126 W. 436, 438.

22. "An official certificate is evidence only by virtue of the statute." "The notice in question (of sub-contractor's lien) is in no sense process. It issues from no court, but is wholly inter partes. (Case)".

23. "There is no evidentiary force whatever to the so-called return or certificate signed by the deputy sheriff", of inability to find the person for such service.
—*Ponti v. Eckels*, 129 W. 26, 29.

24. "This court has recently held that it is the fact of service and not the mere proof of it that gives the court jurisdiction. *Schmidt v. Stolarski*, 126 W. 55. In that case it was expressly held:

25. 'If the summons was in fact served upon the defendants the court has jurisdiction, although the proof of service be faulty;

26. And in such a case the court may, even after judgment, permit the record to be amended so as to show the service actually made'. See *Est. of Newman*, 75 Cal. 213.

27. So the mere fact that such affidavit showing the mailing and posting of copies of the summons and complaint, as required by the statute, was not on file June 21, 1890, did not deprive the court of

jurisdiction to order judgment in the divorce action Sept. 6, 1890", though it appears that the proof of service was not in fact filed until May 19, 1904. See also *NUNC PRO TUNC*.

—*Zahorka v. Geith*, 129 W. 498, 504.

28. "A witness or a party from another state necessarily present and in attendance upon a court within this state and present for such purpose only, is privileged from the service of a summons while so necessarily within the state. (Many cases)".

—*Rix v. Sprague, C. M. Co.*, 157 W. 572, 575.

29. "The rule" is "that an officer's return of service must prevail until shown to be false by the most clear and satisfactory evidence,

30. And that, ordinarily, the mere denial of service by the interested party is not sufficient therefor,

31. Especially so when the return is supported by the officer's evidence, as in this case". Service upheld.

—*Arapahoe S. B. v. Houscr*, 162 W. 80, 86.

SERVICES.

See also BOND FOR MAINTENANCE. CONSIDERATION. ENTIRE CONTRACTS. MASTER AND SERVANT. QUANTUM MERUIT.

Absent during period, 36.

Accepts, avails himself of, 30.

Adoption, parent and child, 24, 99.

Unofficially, receiving, 26.

After period, expiration, 35.

Board, no relation, 111.

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Certain rate per year, 11.

Child after at age:

At intervals many years, 162.

New contract, past, future, 163.

Conveyance, not voluntary, 33.

Must prove express contract, 57.

No promise implied, 19, 39, 56.

Not unless understanding, 4.

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Stepson, same rule applied, 110.

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Conversion:

Defense to a claim, 151.

Demurrer, proper objection, 155.

Otherwise waived, 155.

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Waive tort; implied contract, 153.

Executors same remedies, 154.

Title tried in action for, 154.

Conveyance: not voluntary, 33.

Part, and part cash, 43.

Custom to pay for, 47.

Declarations of payment by, 93.

Domicil separate, weaker, 72.

Employed by the month, 37.

Interest allowances, 38.

Six year bar, 37.

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By claimant, 145.

Sufficient competent, 142.

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Short of positive proof, 23.

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Remote relatives; weaker, 72.

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Going to give it to him, 131.

Surrounding circumstances, 98, 121.

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True value inquiry, 172.

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Border line conjecture, 124.

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Vague, doubtful, ambiguous, 29.

Void contract, rebutting, 69, 80, 102.

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Express contract to pay, 22, 23, 27, 40, 57, 110.

Guest hospitality, 106, 107.

Intervals; new contract, 162.

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Mother-in-law, separate house, 108.

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Niece as housekeeper, 96.

No promise implied, 19.

Not relative; family relation, 85, 127, 128.

Legacy proof failed, 86.

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Quantum meruit, 86.

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Parent and child relation, 4, 15.

Parent's services for child, 59.

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On neither express or implied, 150.

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1. The value of services is proved by the customary rule, and not by particular cases. See EVIDENCE. —*Pfeil v. Kemper*, 3 W. 315, 317.

2. The services of a child after arriving of age, might be recovered for, on an understanding that the services were not to be gratuitous, and the ordinary relation of parent and child not existing, without an express contract. (See also par. 23, post).

—*Fisher v. Fisher*, 5 W. 472, 474.

3. An orphan infant "not standing in loco parentis" may without an agreement, recover quantum meruit for services. See also INFANTS.
—*Mountain v. Fisher*, 22 W. 93, 97.

4. A son working for the father after arriving at age is not entitled to compensation, there being no prior "arrangement or understanding" to that effect. See PARENT AND CHILD.
—*Kaye v. Crawford*, 22 W., 320, 322.

5. "In law the claimant is entitled to recover of the estate enough to make up what his services were reasonably worth, provided they were rendered upon an understanding that they were to be compensated, in part at least, by a testamentary provision, no such provision having in fact been made".

6. Proof that the employe after leaving, was induced "to come back" on representation that "it should all be right, and that he had remembered him in his will", and claimant "thereupon remained in the service as long as the deceased continued the business", was held sufficient to allow recovery on quantum meruit, no testamentary provision having been made.
—*Bayliss v. Est. of Pricture*, 24 W. 651, 652.

7. "Past services are a sufficient consideration to support a promise to pay for them. It is immaterial whether the promise be made before or after the services".

8. "The subsequent promise to pay implies that the services were rendered upon previous request".

9. "Services rendered under promise of compensation by will, create a good claim against the estate, if no will be made", and such agreements "are not within the statute of frauds".

10. Such a claim is not "barred by the statute of limitations", as "the day of payment did not arrive until the death of the testatrix (promisor), and no cause of action occurred until that time, and until it appeared that she had failed to make the testamentary provision agreed upon".
—*Jilson v. Gilbert*, 26 W. 637, 641.

11. An agreement to compensate future services at a certain rate per year, is not of itself a hiring for a year or any definite time.
—*Prentis v. Ledyard*, 28 W. 131, 133.

12. "Where a man works by the day, he is required to exercise ordinary care and skill, and to do his work in an ordinary, fair, workman-like manner, and,

13. If he does not, he cannot recover as wages the value of work properly done, but the employer is entitled to a deduction for any defect in the labor, or in the manner of its performance".
—*Eaton v. Woolly*, 28 W. 628, 630.

14. In a claim by a relative for services, "the rule of law is not that the administrator or representative must establish a negative in order to defeat the claim".

15. "The relation existing between the parties, as parent and child, step parent and step child, brother and sister, and the like, is itself strong negative proof, and raises a presumption that no payment or compensation was to be made beyond that received by claimant at the time, which can only be overcome by clear and unequivocal proof to the contrary".

16. "The evidence must be clear, direct and positive that the relation between the parties was not the ordinary one of parent and child, or of brother and sister, (as here disallowed), but that of debtor and creditor or of master and servant".

17. "To establish this new relation, it is obvious that some arrangement or contract to that effect must be shown. No man is to be made debtor without his knowledge or assent, or under circumstances where he has no reason to expect that such is his position or liability".

18. "The party seeking to recover compensation for services rendered under such circumstances must show an 'agreement or understanding that they were to be paid for'." Per Dixon, C. J.

—*Hall v. Finch, Admr.*, 29 W. 278, 286.

19. Where the relation of father and son exists, "it is well settled that the law will imply no promise on the part of the father to pay for the services of the son rendered by the latter after he arrives at age".

20. "The presumption is that the child renders the services gratuitously, or in consideration of having a home with his father, of being furnished with board and clothing, and of receiving care and attention in case of sickness".

21. The "rule is, that the evidence of a contract to compensate the services of a child must be positive and direct, and the contract cannot be inferred from circumstances and probabilities".

22. It is held in this case that "there should be evidence which would warrant a jury in finding that there was an express contract or agreement to that effect".

23. And it is stated in an additional concurring opinion, by Dixon, C. J., that, "an express contract to pay, or the relation of master and servant, may be as fairly and incontrovertibly established by circumstantial evidence as by that which is direct. It was held in *Fisher v. Fisher*, 5 W. supra, that where a son continued to reside with and labor for his father, after arriving at the age of majority, there might be circumstances, short of direct and positive proof of an express promise on the part of the father, entitling the son to recover for such services".

—*Pellage v. Pellage*, 32 W. 136, 142.

24. "The adoption of an infant into a family as a child implies no contract to pay for its services to the family; and an infant so adopted (unofficially in this case) can recover for such services against the head of the family only upon express contract".

25. "The rule of evidence by which such express contract between parent and child, by blood or by adoption, must be established, is laid down in *Pellage v. Pellage*, 32 W. supra."

26. The mere receiving of such child into the family "implied no contract to pay her wages for any services", and if the circumstances indicated "that she was so received in the relation of a child, the law excludes an implied contract to pay her wages for her services".

27. But "she could recover upon an express contract to pay her, which might be established by direct and positive evidence or by circumstantial evidence equivalent to direct and positive".

28. "And mere expectation on his part (the testator's) to pay and on her part to receive wages, would not constitute an express contract, unless by mutual expression of the expectation it became consensual".

29. "And, though the express contract required by the rule may be established by circumstantial evidence, vague, doubtful, ambiguous circumstances are insufficient for that purpose; but only such circumstances, clearly proved, as are equivalent to direct and positive proof. *Pellage v. Pellage*." —*Tyler v. Burrington*, 39 W. 376, 380.

30. "If one accepts or knowingly avails himself of the benefit of services done for him without his authority or request, he shall be held to pay for them". —*Wheeler v. Hall*, 41 W. 447, 451.

As to step-son after at age. (See par. 110 post).

—*Wells v. Perkins*, 43 W. 160, 163.

31. "The defendant having denied all liability for the plaintiff's claim and refused to pay any part of it, he was not called upon to dispute the correctness of the bill presented, as to the amount of the claim,"

32. And, "we think the learned judge erred in holding that the evidence given in this case as to the presentation of the bill for services tended to establish the value of such services."

—*Hinton v. Coleman*, 45 W. 165, 171.

33. "Within the rule of *Tyler v. Burrington*, 39 W. supra, and the cases there cited, if an express agreement to pay wages was made," by a father with his son after arriving at age, a conveyance of real estate in payment thereof "is not a mere voluntary one," but is supported by "an adequate and valuable consideration," valid as against creditors.

—*Manseau v. Mueller*, 45 W. 430, 434.

34. Where the "plaintiff was negligent and unskillful" and "had not fully performed his contract of employment", he "would be entitled to recover what his services were reasonably worth, so long as the appellant allowed him to continue in his employment", the action being "brought in the quantum meruit".

—*McCormick v. Ketchum*, 48 W. 643, 646.

35. "A party contracting to labor for a limited period cannot be required, after the expiration of the period, to render additional services under such contract, without any new agreement, merely because he had lost certain days during the term".

36. "It is certainly equitable, and, we think, according to well established principles of law, to hold that when an employe for a fixed period, without any fault of his employer, absents himself for a short time, and then the employer, with knowledge of the fact, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered".

—*Bast v. Byrne*, 51 W. 531, 535.

37. "Where a person employed by the month is entitled to his wages at the end of each month, but fails to collect the same, and continues such services by the month for more than six years, the statute of limitations is a good bar to so much as accrued more than six years prior to a suit therefor".

38. In this case the major portion was collected for each month and recovery for each monthly balance with "interest on such balances as they accrued from time to time", was allowed, the "monthly balances being readily ascertainable by computation".

—*Butler v. Kirby*, 53 W. 188, 192.

39. "There is no implied contract on the part of a father to pay wages to his child who remains with him and renders him services after becoming of age.

40. To recover, in such a case, the child must show an express contract by the father to pay such wages, either by direct and positive evidence of the fact, or by circumstantial evidence equivalent to direct and positive. *Tyler v. Barrington*, 39 W. supra, and cases cited; *Wells v. Perkins*, 43 W. 160".

41. "But it is not essential that the rate of wages or the time of payment be agreed upon.

42. If there is an express contract in such cases to pay for the services, the child thereby becomes the servant of his father in respect to such services, and may recover quantum meruit. This is the doctrine of *Wells v. Perkins*, supra; also of *Manseau v. Mueller*, 45 W. supra".

43. In a conveyance of realty for part cash, and in part of such services, where the son has no actual knowledge of a judgment against

such lands which had ceased to be a lien thereon, it is said, "we do not think the defendant (son) chargeable with constructive notice" of such unpaid judgment, and that he took "his conveyance in good faith and without knowledge of any indebtedness owing by his father"; as to such judgment.

—*Byrnes v. Clark*, 57 W. 13, 21.

44. If an employer "hires a man or a machine by the day, at a stipulated per diem", indefinitely, "is present and sees for himself the quality of the work performed, he must pay the stipulated wages so long as he voluntarily continues the employment", and cannot "recoup for damages", on account of bad work.

—*Starke v. Crilley*, 59 W. 203, 204.

45. "In the absence of an agreement or understanding that the services were to be rendered without compensation, the law would imply a promise" "to pay what they were reasonably worth."

46. Evidence what a third person "had been paid for" similar services rendered, "had no relevancy whatever;

47. Nor would the fact, if shown, that it was the custom to pay for such services, and to prove or disprove the issue", as to whether "the services were gratuitously rendered".

—*Kelly v. Houghton*, 59 W. 400, 401.

48. A contract for services which "was a verbal agreement, and by its terms was not to be performed within one year from the making thereof", "was void under the statutes of frauds".

49. "Where a person renders services under a contract which is void, he can recover upon quantum meruit the value of such services. (Many cases)".

50. The void contract "is not admissible in evidence to determine the value of the services, but the servant recovers what he can show his services were reasonably worth."

51. Evidence of "general reputation", is "incompetent to establish the fact of skill".

52. Where "weekly payments were intended by the parties when made to be in full compensation for the services rendered", "there can be no further recovery for services which have thus been paid for".

—*Cohen v. Stein*, 61 W. 508.

53. Where there was a verbal contract for services for more than a year, it is said: "The statute making the parol contract absolutely void, it furnishes no ground of action in favor of the plaintiff, nor can it be used by the defendants as a basis upon which to found a defense."

54. "This court long ago repudiated the rule", of some other courts, as to a void contract, that "if a party enters upon a performance of it, he cannot recover for the value of his labor done under it, unless he performs the whole of the void contract on his part".

55. "In such case the parties must stand as though no express contract was made, and the plaintiff may recover upon quantum meruit for the work done upon an implied promise of the defendants to pay what the services are reasonably worth."

—*Salb v. Campbell*, 65 W. 405, 408.

56. Where a daughter continues to work for her father after becoming of age, such facts "raise no implied promise to compensate her therefor.

57. Before she can recover compensation for her services she must prove an express contract by her father to pay such compensation", "by positive and direct evidence, or by circumstantial evidence equivalent thereto". *Tyler v. Burrington*, 39 W. and other cases, *supra*.

58. In this case a verdict was upheld upon evidence that when she "became of age she proposed to leave her father, but remained in his service upon his assurance, repeated many times thereafter, that she should be well paid for her services".

—*Geary v. Geary*, 67 W. 248, 249.

59. "It seems to us that a father and mother living in the family of a son, having all the necessary wants supplied by the son as members of his family, the father being of the age of seventy-seven years when he commenced so living, and living with him until he was about eighty-two years old, ought to make out a pretty clear case of an agreement on the part of the son to pay him wages for his services, when he seeks to charge the estate of such son with a claim for such services after his death". (Many cases, *supra*).

60. "Most of the cases cited are cases where the son or daughter claims for services rendered for the father, but the same rule applies where the father claims for services rendered for the son under similar circumstances. See *Leary v. Leary*, 68 W. 662, 671, and *Harris v. Currier*, 44 Vt. 468". —*Bostwick v. Est. of Bostwick*, 71 W. 273, 275.

61. "If the principle can ever be extended to embrace strangers, or those not of kindred relationship, as members of the same family, which may be doubtful, most certainly there should be such circumstances of family relationship as would imply that the plaintiff's services should be gratuitous." *Orton, J.*

62. "Minority has nothing to do with the question as to whether kindred of the same family can recover compensation of each other for personal services. The same obligation to render to each other gratuitous services continues beyond minority." But the "question of gratuitous service", "is not in this case." —*McMillan v. Page*, 71 W. 655, 661.

63. "Undoubtedly the claimant, E., being the stepdaughter of the deceased, G., and a member of his family, cannot recover against his

testate for her services without proving an express promise or agreement on his part to pay her therefor.

64. And such promise or agreement must be established by direct and positive evidence, or by circumstantial evidence equivalent thereto."

65. "On her cross-examination, in answer to a question by counsel for administrator, she (claimant) testified that she had read the statement of her claim in the complaint and that the same is true. This is direct and positive evidence of the alleged express agreement, and is not controverted directly".

66. An oral agreement to devise both real and personal estate is "within the statute of frauds. Sec. 2304. The fact that it included personal as well as real estate does not take it out of the statute, even as to such personal estate.

67. Such a contract is indivisible, and, failing in part, the whole fails. It was so held in *Clark v. Davidson*, 53 W. 317. Such is doubtless the law". (Followed in *Dixon v. Sheridan*, 125 W. 60, 64.)

68. Performance on the part of the claimant, "is not alone sufficient to take the agreement out of the statute of frauds. This is well settled." But "had the deceased put her in possession under the otherwise void agreement, it is probable that we should have a proper case for specific performance, but he did not do so."

69. Held, in this case, "that the presumption of gratuitous service may be rebutted by proof of an express promise or agreement to remunerate therefor, which by reason of some provision contained in it is void as a contract", and claimant's recovery on quantum meruit was sustained.

—*Ellis v. Cary*, 74 W. 176, 183.

70. Under a void oral contract to pay for services by a conveyance of land, though the defendant offers and is desirous to convey pursuant to the agreement, such performance is held not permissible, but the plaintiff is allowed to recover quantum meruit. See also *QUANTUM MERUIT*.

—*Koch v. Williams*, 82 W., 186, 191.

71. While "the relation of aunt and nephew seems to be within the rule" which "rebutts the presumption which would exist in other cases that compensation was intended",

72. Yet "as between remote relatives, at least, there is great reason for holding that the presumption that the services were intended to be gratuitous is relatively weakened, especially if, as here, the parties had not previously been domiciled together. *Quigly v. Harold*, 22 Ill. App. 269.

73. And the more liberal rule may perhaps be applied where the evidence is such as to rebut the presumption arising from the relationship and mutual intercourse between the parties that the services were to be gratuitous, by evidence falling short of an express contract".

74. "The relation of master and servant, or an express contract to

compensate a relative for services rendered, may be established as fairly and fully by circumstantial evidence as by that which is direct.

75. 'Proof of expectation on the one hand to render compensation, and on the other to receive it, is competent evidence, in connection with the facts and circumstances of the case, to give color to them, tending to show that such expectations ripen into a mutual understanding,—an express contract'. (Cases supra)". (Approvingly quoted in *Marx v. Marx*, 132 W. post).

76. Having been sent for from abroad, and serving nine years, the aunt's declarations, "at various times, that 'what she had was to be his,' that 'when she got done with all she had, then it was to go to' " him, and similar statements, and "that she was going to give him her property", and the like, is, with other facts and circumstances held,—

77. To establish an agreement "to convey or devise and bequeath her real and personal property as compensation" for the services rendered.

78. Such agreement was "clearly within the statute of frauds (sec. 2304) as to the real estate, and, the contract being invisible and failing in part, the whole agreement therefore fails;

79. But the respondent may recover for his services rendered under such promise or agreement what they may be shown to have been reasonably worth,

80. And such void promise or agreement cannot be set up as a defense to the claim, but it may be shown in evidence to rebut the presumption that the services in question were rendered gratuitously. *Ellis v. Cary*, 74 W. supra; *Freeman v. Foss*, 145 Mass. 361; *Wallace v. Long*, 105 Ind. 522; *Schwab v. Pierro*, 43 Minn. 520".

81. "The cause of action quantum meruit did not accrue until the death of the intestate", and "filing his claim against the estate", is held a sufficient demand, and the claim is held not within the six year limitation statute. *Tucker v. Grover*, 60 W. 240,

82. (In *Taylor v. Thieman*, 132 W. post, where the statute was held a bar, it is said that this decision is not in conflict, because here "the services were continued up to the time of the death of the promisor"):

—*Est. of Kessler*, 87 W. 660, 664.

83. As to value of services, found at less than testified to, it is said: "The jury was not bound, as a matter of law, to credit the testimony of a witness so interested (being the party), given on his own behalf, even when uncontradicted by any other witness. *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549; *Kearney v. New York*, 92 N. Y. 617".

84. "Nor were the opinions of experts on the value of the services conclusive upon the jury. Such opinions are advisory only. The jurors must, in the end, use their own judgment in determining the value of the services, guided by the evidence and assisted by the opinions of the experts".

—*Moore v. Ellis*, 89 W. 108, 111.

85. Claimant, not being related, coming into the family as a boy and receiving board, clothing, and a little schooling, and then remained and worked for the widow, on her promise in consideration of his services during her life, she would, at her death pay and compensate him therefor;

86. Deceased having "failed to make any provision for him in any will," or otherwise compensate him, and claimant having failed to establish his claim that she agreed "to bequeath to the plaintiff all her property at her death," for such services, he is held on the evidence "entitled to recover the value of his services."

87. An amendment at the trial, at the conclusion of the evidence, of the "prayer for relief, so that it should pray to recover the value of his services in case he was adjudged not entitled to the whole estate," was held proper, it being "consistent with the facts proven on the trial, and, had there been no amendment, the judgment would not be reversed. Sec. 2886; *Forey v. Leonard*, 63 W., 353".

88. (Referring to this case, it is said in *Murtha v. Donohoo*, 149 W., post, that "it has (however) been decided by this court that an oral contract based upon a valid consideration to leave the promisee a legacy (personal property) is valid and enforceable".)

—*Slater v. Est. of Cook*, 93 W. 104, 106.

89. The deceased for about twenty years "had visited, boarded, and lodged at the home of the claimant (his son-in-law) and his wife," "at intervals of several weeks and months," and claimant has assisted deceased "in conducting, in part, his business correspondence", etc., but claimant never demanded compensation, nor gave deceased to understand that he expected compensation, and though the claim was allowed in the county and circuit courts, the judgment was held erroneous.

90. "It cannot make any difference that the testator did not become continuously a member of the claimant's family."

91. "The case falls within the rule that where near relations, by blood or marriage, reside together as one common family, and one of them renders services to another, and such other furnishes him board and lodging or other necessities or comforts, the presumption arises that neither party intended to receive or pay compensation for the services, on the one hand, or for the board and lodging or other necessities or comforts, on the other; that they were intended as mutual acts of kindness, done or furnished gratuitously. *Kessler's Est.*, 87 W., supra".

92. (In *Williams v. Williams*, 114 W., post, this paragraph is approvingly quoted, the court saying that "the rule laid down in these cases (supra) is well summarized" as here given.)

—*In re Schmidt's Est.*, 93 W., 120, 123.

93. Oral declarations of decedent vendor that a land contract was paid by services, instead of money as provided, were admitted, and specific performance decreed. See LAND CONTRACT.

—*Boles v. Welch*, 94 W., 189, 190.

94. Services to be paid by a legacy, and prior settlement by a receipt "in full of all demand," See *SETTLEMENT*.

—*Conant v. Est. of Kimball*, 95 W., 550, 552.

95. When payment is implied to be made for services of an officer of a corporation. See *ADMINISTRATION EXPENSES. ATTORNEY AND CLIENT*.

—*Lowe v. Ring*, 106 W. 647, 655.

96. On a claim for services of a niece "as housekeeper and servant, based upon a promise that, if she would perform such services he would leave her his property", she remaining until the uncle's decease, intestate,—on disallowance by the county court, and allowance by the circuit court as "reasonably worth the sum stated" on "relying upon such agreement," found as orally made as to both the realty and personalty, judgment is affirmed, following *Ellis v. Cary*, 74 W., and *Est. of Kessler*, 87 W., *supra*.

97. While the claimant, being a niece and becoming "a member of his family during her infancy," must establish "an express promise" to pay, to recover, "such promise may be established by admissions of deceased and by circumstantial evidence confirmatory thereof." See also *McDonald v. Provident S. L. A. Soc.*, 108 W., 213, 218 (under *PROMISSORY NOTES*).

98. Here, "such agreement is established by the claimant, by testimony drawn out on cross-examination, and by direct admissions of the fact made by the deceased to several witnesses. The surrounding circumstances very much confirm this view".

—*Leitgabel v. Belt*, 108 W., 107, 108.

99. Where an unofficially adopted boy of eight years is taken into a family, "with an oral agreement with the boy's parent to leave him" the property, realty and personalty, "in consideration of his services," and he does ordinary farm work until twenty-one, when he leaves, and eleven years later files a claim for services against the estate of the deceased adoptive woman, it is held:—

100. That being "received into her family as a son, and the services" so rendered, he must establish "an express contract to pay for them. *Tyler v. Burrington*, 39 W., *supra*; *Wells v. Perkins*, 43 W., 160.

101. The express contract which was shown was oral, and was in part a contract to devise real property, and hence within the statutes of frauds (sec. 2304), and, being void as to the real estate, and indivisible, is void in whole. (Cases *supra*. Contra: *Wright v. Wright*, 99 Mich., 170).

102. This contract, though absolutely void, still has the effect of rebutting the presumption that the services were to be gratuitous (*Est. of Kessler*, 87 W. *supra*), and so opening the way to a recovery of the reasonable value of the services. (Cases *supra*.)

103. Manifestly, however, the void contract did not extend the time

of payment for the services", which matured when the services ceased, and this action "was barred by the six-year statute of limitation (sec. 4222) before the death of the intestate" eleven years later.

104. "It was not necessary to plead" the statute of limitations. "The statute forbids the allowance of a claim which is shown to be barred by the statute of limitations. Sec. 3841".

—*Martin v. Est. of Martin*, 108 W., 284, 288.

105. As between brothers, between forty and fifty years of age, each married, and neither dependent on the other, where claimant first resided for six weeks with the deceased, and then, his family arriving, set up house-keeping on his own account, it is held, that there is no presumption of gratuitous services such as to prevent recovery upon quantum meruit for services rendered after claimant ceased to be a guest and set up house-keeping.

106. "As said in the case of *In re Schmidt's Est.*, 93 W. supra, 'The law would not imply a promise on the part of a guest to pay for board and lodging',

107. Nor, on the other hand, would it imply a promise to pay for services rendered by him while receiving the hospitality accorded to him as a guest. *Moulin v. Columbet*, 22 Cal., 508.; *Scully v. Scully's Extrs.*, 28 Ia., 548".

—*Williams v. Williams*, 114 W., 79, 83.

108. Following the principle of *Williams v. Williams*, 114 W., supra, recovery for services is upheld, where a mother-in-law, living in her own home, and supporting herself by "doing washing, laundry work and cleaning", performed such services for a neighboring son-in-law four days each week, for six years last past, at one dollar per day, she keeping no account thereof, and "no agreement was made between the parties whereby such labor was to be rendered gratuitously, or in consideration of benefits" rendered incidentally by the defendant.

109. "Had he been furnishing her with her support either wholly or in large part, the question would have been different."

—*Winter v. Greiling*, 114 W., 378, 380.

110. In the case of services by plaintiff after becoming of age, for his stepfather, the rule as to evidence of express contract given in *Tyler v. Burrington*, 39 W., supra, is followed and strictly adhered to.

—*Wells v. Perkins*, 43 W., 160, 163.

111. On a claim for board of decedent, there being no relationship, the rule of evidence as to express contract, of *Tyler v. Burrington*, 39 W., supra, does not apply, "as in the present case",

112. And "there is no presumption to be overcome, and an express contract may be shown by proof of independent facts and circumstances which convince the jury that the contract was in fact made, just as any other fact in issue may be proven by such evidence."

—*Oates v. Erskine's Est.*, 116 W., 586, 590.

..... 113. A contract to pay for services in part "by a provision out of" the employers property, the property being then and at his decease largely realty, and to be out of "the property left when 'they got through with it'," is held to contemplate "realty and personalty", and to be void as "ruled by *Ellis v. Cary*, 74 W. and *Martin v. Est. of Martin*, 108 W. supra," under sec. 2304.

114. Such contract "being void for one purpose it is void for all purposes, as regards forming the basis for a right measured in any sense by its terms". It can be "referred to", "only to rebut the legal presumption that would otherwise control, that her services were gratuitously rendered", to enable recovery quantum meruit.

115. Though the services terminated according to such contract on the marriage of the claimant, more than six years before the time of payment thereunder at the time of the decease, yet,

116. Since the "right to recover on the facts is limited to a cause of action upon implied contract, such right matured and was enforceable the instant the services were completed, and the six-years statute of limitations (Sec. 4022) then commenced to run.

117. Demand for payment was not necessary to set the statute in motion", and the claimant's "right was extinguished by the statute". See also AMBIGUITY. —*Loper v. Est. of Sheldon*, 120 W. 26, 31.

118. On partial performance, for services under a void contract, recovery may be for reasonable value. See FRAUDS; STATUTE OF.

—*Chase v. Hinkley*, 126 W. 75, 79.

119. As to contribution where several are liable for support of a mother. See CONTRIBUTION. —*Payne v. Payne*, 129 W. 450, 454.

120. In the case of a son's services, "it having been established" "that it is competent to establish the agreement by circumstantial evidence from which the agreement is reasonably inferable" (*Est. of Kessler*, 87 W.; *Leitgabel v. Belt*, 108 W.; supra),

121. And that declarations of the deceased together with suggestive circumstances may properly be regarded as controlling (*Leitgabel v. Belt*, supra),

122. It is easy to see how wide the door is open for the introduction of evidence of quite unsatisfactory character, as viewed here,

123. But of sufficient probative force that this court in the face of a decision of the trial court, who heard it, cannot condemn it as not being worthy of any credence at all".

124. Even where conflicting evidence of declarations pro and con, "leaves the truth of the matter" "quite close to the border line of mere conjecture", "the decision of the trial court" deserves affirmation.

125. Claim upheld for services from 1878 to 1895, when claimant "left the farm", and "made no claim for compensation till after the father died", presumably more than six years thereafter,—the claimant contending that the services were to "be paid for at the death".

126. As to allowing amendment that the services were to be paid for at death. See AMENDMENT. —*Longwell v. Mierow*, 130 W. 208, 212.

127. Following cases, *supra*, where claimant, "an orphan five years of age not related" "went to live with the deceased as a member of his family", and was "treated as a son, though not formally adopted", makes claim for board, lodging, and services, furnished deceased, after claimant's majority,—

128. He comes under the same rule as parent and child, as to presumption "that the board and services mutually rendered are intended to be gratuitous, and no contract to pay therefor on either side will be implied;

129. But there must be an express contract shown either by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive. (*Cases, supra*)".

130. "Considerable evidence" "that the deceased said at numerous times that he was reserving the house for his son J. (the claimant) or that he was going to give the house in which he lived to his son J. for the help which J. has always given him", with "no direct evidence of any contract", is held,—

131. "Were sufficient to go to the jury in connection with the other circumstances in the case upon the question whether an express promise to pay for the services in some way was made by the deceased."

132. "A recovery" on a void promise to give real estate, on the principle that, it "removes the presumption and leaves the ground clear for a recovery of the reasonable value", "is logically and truly a recovery upon the implied contract,

133. But it is differentiated from an ordinary recovery upon implied contract by the fact that it only becomes possible by virtue of the previous establishment of the express promise,

134. While in controversies between strangers no such previous express promise need be shown. (*Many cases, supra.*)"

135. In such cases, "the cause of action accrues when the services are rendered as in other cases of implied contract,

136. So that if the services were rendered (as here) more than six years before the death of the deceased the statute of limitations will run against them and bar a recovery, unless the operation of the statute be in some way suspended. *Martin v. Est. of Martin*, 108 W.; *Loper v. Est. of Sheldon*, 120 W.; *supra*.

137. The decision in the *Kessler Case* (87 W., *supra*), which might at first glance seem to be to the contrary, is not really so, because in that case the services were continued up to the time of the death of the promisor". Recovery held barred. See also LIMITATION OF ACTIONS.

—*Taylor v. Thieman*, 132 W., 38, 43.

138. As to recovery for services of an adult son for a father, on agreement established by declarations, but none as to amount, cases *supra*, followed.

139. An instruction "that the question as to the payment for such services was a matter of defense", held "no error".

—*Marx v. Marx*, 132 W. 113, 120.

140. While, in a claim disallowed, in the county court, and in "the first finding of the referee, to the effect that the claimant had been paid for his services",—"the facts and circumstances strongly indicate" such finding to be "correct",

141. Yet, "the court below had the right to re-refer the case because of failure to find on material facts", and a finding of recovery is upheld.

142. "It is well settled that if there is sufficient competent evidence to support the findings the judgment will not be disturbed because incompetent evidence was admitted. (Cases)".

143. A claim for "services performed at the special instance and request of the deceased and with her knowledge", with reasonable value stated, "is a good claim on quantum meruit", not on "express contract",

144. "And would be supported by proof of performance and value" on a "prima facie case" so made out.

145. "This he could do by his own testimony, because the performance of the alleged services and their value did not involve a transaction personally with the deceased, within the meaning of sec. 4069. Besides, there is "other evidence thereof.

146. "Payment being an affirmative defense, it was incumbent upon the appellants (the estate) to prove it".

147. Where claimant "was to receive for his services such remuneration" "as deceased might deem reasonable", and she "died without having determined the value", "the claimant became entitled to recover the reasonable value of his services. (Cases)".

—*In re Est. of Happel-Bossi*, 133 W. 119, 122.

148. Referring to *Taylor v. Thieman*, 132 W. supra, it is held, where a son after coming of age remains and serves his father "in reliance upon an express oral promise to deed or devise real estate", recovery quantum meruit may be had,

149. And "no reason is perceived why an express promise which is indefinite as to the duration of the services should not have the same effect as one which fixes a definite time".

—*Voss v. Voss*, 134 W. 52, 54.

150. As to services of husband for support of wife, not entitling recovery upon express or implied contract. See MARRIAGE CONTRACT.

—*Ryan v. Dockery*, 134 W. 431, 434.

151. On a claim by a son for twenty years' services to be paid for at a "fair value upon or prior to the death of the decedent" father, objections to allowance included "a counterclaim for the value of certain personal property" of the deceased, there being a reply that this

"was not pleadable in the action", and "a demurrer ore tenus was interposed to the counterclaim for" like reason,—it is not decided "whether sec. 2656 would admit the matter" "as a counterclaim".

152. "The answer stated facts sufficient to show a conversion, and we see no reason why executors may not in an appropriate case maintain an action for conversion.

153. Neither is any reason apparent why they may not waive (as "expressly" done) the tort and sue on implied contract. (Cases)".

154. "Title can be tried in an action of conversion as well as in an action of replevin, and" "personal representatives" have "the ordinary remedies that are open to other suitors" as to property "unlawfully converted".

155. "The objection should have been taken by demurrer, and, not having been so taken, it was waived. Sec. 2660."

156. The evidence of claimant's witnesses, there being no other, as to "prevailing wages" was held not "conclusive upon the court, or that it was error for the court to adopt a scale of wages within the figures testified to,

157. Inasmuch as such testimony did not go directly to the value of the services rendered by the claimant, and in view of" "other considerations."

158. The value of realty transferred to claimant several years before the decease, was held properly charged to claimant, in view of "the existence of the contract of employment" and decedent's indebtedness on account thereof.

159. While no reference to such payment was made in the answer, and "payment is a defense that must ordinarily be pleaded in order to be available"; yet,

160. "We find no statute or county court rule now in force requiring" such pleading by the "representative of a decedent" "to enable him to defeat recovery on a claim filed against the estate by showing payment.

161. On the contrary, county court rule 14 expressly provides that 'no claim shall be allowed, whether objected to or not, until the court is satisfied that it is a just claim'".

—*Heber v. Est. of Heber*, 139 W. 472, 474.

162. Where claimant M., after becoming of age, "worked for his father, the decedent, on the farm of the latter at intervals" from 1889 to Apr. 1905, and then on the "testimony of a girl then temporarily in the family", "his father said he would give M. \$1000 for the work he had done and \$20 per month for future work. M. said: 'All right'," and so continued to work until the father's death Oct. 1906. Held:

163. That by such "oral conversation" "and the subsequent acts of the parties, a new contract was created whereby" M. "agreed to continue to work" "in consideration" for such payment "for past services and" "for future services, and this was performed",—there being "a

valid consideration to uphold the whole contract". *Loomis v. Newhall*, 15 Pick. 159; (other cases). —*Olson v. Olson*, 149 W. 248, 249.

164. Where claimant performed services for decedent "during the six years prior to" 1898, and decedent in 1901 said to claimant that for such services "he would by his last will give to" claimant \$1000, and the latter said "that that would be all right",—recovery quantum meruit allowed.

165. "The statute of limitations in such cases must always be considered although not pleaded, Sec. 3841".

166. "Recovery is not barred under sec. 4243, notwithstanding the agreement to compensate by legacy was not in writing", it not being "regarded as a new promise", "but an independent and substitutionary contract within" the rule of *Jilson v. Gilbert*, 26 W. supra. (Other cases).

167. "An oral contract based upon a valid consideration to leave the promisee a legacy" is "enforcible",

168. And past services by a stranger "constitute a good consideration for a promise to pay for such services. (Cases, supra)".

169. Here the statute "had begun to run against" the "right of action" before the legacy promise for "services previously rendered", and the decedent "makes his promise to extend (for payment at his death) in consideration of a valid and binding promise to reward him by legacy".

170. "We must hold that the promisee suing to recover for a breach of agreement to provide for him by will, where the services are performed prior to the promise so to provide, is entitled to recover only the reasonable value of the services so performed.

171. The parties may offer" "evidence of the amount agreed to be paid by legacy as having some evidential bearing on the reasonable value of the services where the disparity is not too great, but this is not at all conclusive upon the court or jury.

172. The true inquiry" is as to "the reasonable value of services performed and the amount of money paid to or to the use of decedent at his request? and the amount so ascertained with interest at the legal rate will be the amount of recovery".

—*Murtha v. Donohoo*, 149 W. 481, 483.

173. "In order to raise an implied contract to pay for services", "the services must have been performed under such circumstances as to give the recipient thereof some reason to think they are not gratuitous, not performed for some other person, but with the expectation of compensation from the recipient".

—*Segnitz v. A. Grossenbach Co.*, 158 W. 511, 514.

174. Where S. was employed as a hired man by decedent in her lifetime on lands owned by her and her children, before her marriage to

S., and such labor continued after the marriage,—on a claim by such husband against her estate, disallowed in the county and allowed in the circuit court, the evidence was held insufficient for allowance on an express agreement, either as to services before or after the marriage.

175. The evidence indicates that about the time of the marriage seven years before her decease, “they made some settlement or adjustment of their differences, but what that new contract of settlement was does not appear.”

176. This showing that there was an express contract between them takes away any basis for a finding on the theory of an implied contract to pay the reasonable value of such services, for this would be to make a new contract for them.”

177. “The position of the parties” after “the marital relation” became “substantially different from that existing prior thereto,

178. And what might be considered a sufficient to support a finding of a contract between the two for services and compensation therefor before marriage would not necessarily be sufficient to support a finding of such a contract subsequent to marriage”.

179. A claim for money loaned “to deceased to be invested in personal property” and a claim of ownership of such personalty “by reason of his having advanced money to purchase the same”, being inconsistent, the claimant “cannot be permitted to occupy the two positions”, and such claim, as well as for services, “must also be disallowed.” See also HUSBAND AND WIFE. —*Est. of Simonson*, 164 W. 590, 594.

SESSIONS OF COURT.

See TERMS OF COURT.

SET-OFF. COUNTERCLAIM.

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- Purchase claim; setoff, 16.
- Right fixed at decease, 22, 27.
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- Legatee's note against share, 37.
- Liquidated, liquidatable, 3.
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- Action on deceased's note, 13.
- Perfectly actionable form, 5.
- Pleaded: as counterclaim, 12.
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- Setoff as counterclaim, 15.
- Qualify plaintiff's right, 11.
- Replevin by administrator, 41.
- Not claim against deceased, 41.
- Statute, not common law, 2.
- Borrowed from civil law, 7.
- When allowable, when not, 14.
- Withdrawal of setoff, 17.

1. Accounts accruing subsequent to the death of the intestate, cannot be set off against demands included in the assets of the estate. (See also par. 23, post).
—*Armstrong v. Pratt*, 2 W. 299, 307.

2. "The right of set-off is given by statute, and did not exist at common law." It must be a demand, "arising upon a judgment, or upon a contract express or implied", that is, "upon contract in contradistinction to those (demands) arising in tort."

3. The set-off must be liquidated or capable of calculation. In a suit for wages, set-off which would make the plaintiff guilty of larceny or embezzlement, is not allowed. —*Pierce v. Hoffman*, 4 W. 277, 278.

4. "A set-off or counterclaim is a distinct demand, the allowance or disallowance of which does not affect the existence or validity of the demand on the other side. If allowed, it is so much to be taken out of the sum legally due upon the demand against which it is pleaded."
Dixon, C. J. —*Parry v. Wright*, 20 W. 483, 484.

5. Our counter-claim statute does not change the common law rule that a cause of action, whether set up by plaintiff or defendant, must be one existing "in a perfectly actionable form at the time the suit was commenced".
—*Orton v. Noonan*, 29 W., 541, 545.

6. Dismissal of action by plaintiff, does not carry with it a counter-claim. See DISCONTINUANCE.

7. The "right or practice of counterclaim is borrowed from the civil law, where it is designated 'demand in reconvention'," and "by the rules of the civil law, a discontinuance of the action by the plaintiff is ineffectual to put a defendant out of court who has interposed a 'demand in reconvention'."
—*Bertschy v. McLeod*, 32 W. 205, 211.

8. The court cannot dismiss on plaintiff's motion, when a counter-claim is interposed. See DISCONTINUANCE.

—*McLeod v. Bertschy*, 33 W. 176, 179.

9. "An equitable defense in ejectment can be made by counterclaim only, and not by mere answer". *Lombard v. Cowham*, 34 W. 486.

—*DuPont v. Davis*, 35 W. 631, 639.

10. "The term counterclaim, of itself, imports a claim opposed to, or which qualifies, or at least in some degree affects, the plaintiff's cause of action".

11. "It has been held in New York that a counterclaim, to be valid, must to some extent impair, affect or qualify the plaintiff's right to the relief to which he would otherwise be entitled by his action"; which is here approved and followed.

—*Dietrich v. Koch*, 35 W. 618, 626.

12. In order that "the rule on this subject should be certain and uniform" "we take this occasion to say that hereafter no averment in an answer will be held to constitute a counterclaim, unless it is so denominated and the appropriate relief prayed".

—*Stowell v. Eldred*, 39 W. 614, 630.

13. "Claims growing out of the partnership business and dealings between" the defendant and the deceased "were not proper subjects of set-off or counterclaim in "an action by the widow on a note of the deceased, "as there had been no accounting or final settlement of the partnership affairs. *Linderman v. Disbrow*, 31 W. 465".

—*Tomlinson v. Nelson*, 49 W. 679, 683.

14. When allowable and when not, on claims and in actions fully set forth. See ACTIONS BY EXTRS. & ADMRS. CLAIMS.

—*McLaughlin, Admr. v. Winner*, 63 W. 120, 126.

15. A set-off "pleaded as a counterclaim", sec. 4264, "may be sustained as a set-off", and "not vitiate the pleading, or render it subject to a demurrer".

—*Schumacher v. Seeger*, 65 W. 394, 396.

16. "It has often been held in effect, at common law and under statutes similar to ours, to be contrary to public policy to allow a person indebted to an insolvent estate to purchase a claim against such estate after the death of the intestate and make it available as a set-off in order to escape payment of his own debt. *Root v. Taylor*, 20 Johns. 137; (other cases)". So held in this case. See also DEBTS.

17. Where "the administrator improperly interposed a set-off in the county court", he is not estopped from withdrawing it in circuit court on appeal.

—*Union Nat. Bank v. Hicks*, 67 W. 189, 192.

18. In an action for an accounting either party "is entitled to an affirmative decree," though no counterclaim is interposed. See also DISCONTINUANCE.

—*Hutchinson, Admr. v. Paige*, 67 W. 206, 209.

19. "A counterclaim is an action by the defendant against the plaintiff, and his rights are to be determined as though he was pursuing the plaintiff in a separate and independent action."

—*Hewitt v. J. W. Lumber Co.*, 77 W., 548, 554.

20. In the case of a voluntary assignment of an insolvent, who had a deposit in a bank to his credit, a promissory note against him, held by the bank, not due at the date of the assignment by reason of extensions, was held not "a proper set-off against the amount of said deposit."

21. "This was never allowed at common law." "By our statute (sec. 4258) the set-off in all cases must be due, and it makes no exception in favor of banks or on account of insolvency."

22. "All creditors must be treated alike, and their rights are fixed at the date of the assignment," as of an estate at the decease. *Union Nat. Bk. v. Hicks*, 67 W., supra (and see DEBTS).

23. "In *Armstrong v. Pratt*, 2 W., supra, the defendant sought to set off a debt which had not matured at the time of the death of the intestate against a claim of the estate held against him as one of the assets of the estate. This was not allowed, for the reason that it would affect the equal distribution of the assets of the estate, and tend to the prejudice of the claims of other creditors. The same reasons would obtain in voluntary assignment." (Many cases, N. Y., Ohio, Mich.,).

24. "In *Jordan v. Nat. S. & L. Bank*, 74 N. Y., 467, the court says that," "the bank has a lien on the funds of the depositor in its possession for the balance of the general account, if that balance is due and payable".

—*Oatman v. Batavian Bank*, 77 W. 501, 503.

25. "While cases have been cited to the effect that an equitable set-off may be enforced of a debt owing by the insolvent and due, against a debt owing to him but not due,

26. We are referred to no case which allows the holder of the debt not due to enforce such set-off against one that is due. The authorities are all to the contrary". *Spaulding v. Backus*, 122 Mass., 553; *Bradley v. Angel*, 3 N. Y. 475.

—*Kinsey v. Ring, Admr.*, 83 W., 536, 539.

27. "Undoubtedly the rights of the creditors and debtors of an insolvent assignor as to set-offs become fixed immediately upon the completion of the assignment, in analogy to the rule applicable to debtors and creditors in the case of a deceased insolvent. *Union Nat. Bk. v. Hicks*, 67 W., supra.

28. Accordingly it has been held by this court that 'a bank cannot set off, against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him, but not due at the time of the assignment'. *Oatman v. Batavian Bank*, 77 W. supra., 20 Amer. St.

Rep. 136". "To the same effect is the decision of this court *Kinsey v. Ring*, 83 W. supra; and see, also, *Fera v. Wickham*, 135 N. Y. 223".

29. But this case "turns upon a different principle. Here it was not the indebtedness (plaintiff's bank deposit) of the insolvent debtor (bank) that was not due", "but a portion of the indebtedness (notes) from the plaintiff" to the insolvent bank.

30. "An assignee of such insolvent debtor has no authority to waive the time of credit secured for the sole benefit of his assignor, and pay a debt not due, with credits or the avails of credits which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent's estate;".

31. But a debtor to such estate, whose debt was not due at the time of the making of such assignment, has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money or by the way of setoff of the amount due him from such estate.

32. This rule is firmly settled in other states, and has in effect been sanctioned by this court. (N. Y. & Ill. cases)." "As pointed out by Chancellor Walworth in *Lindsay v. Jackson*, 2 Paige 581, and in the opinions of the courts in some of the other cases cited, a court of equity will permit such equitable setoff whenever justice requires it, even in a case not coming within the statute of setoffs". *Seligman v. Heller, Bros.' Co.* 69 W. 410. Setoff of such debt not due, as well as due, allowed.

—*Jones v. Piening*, 85 W. 264, 267.

33. "The policy of courts to set off mutual judgments held in the same rights between the same parties is well established in the absence of countervailing rights or equities, as recognized in *Taylor v. Williams*, 14 W. 155; (other cases)".

34. So ordered, as to a judgment in the supreme court and one in the Dane County circuit court, on application in the former court "where the judgment exists against" the applicant.

—*Welsher v. Libby, M. & L.*, 107 W. 47, 48.

35. "The nature of a set-off is predicated upon the grounds that it constitutes, in effect, a cross-action by defendant against plaintiff, and requires that there be mutuality of claims.

36. In cases of statutory set-off the right thereto must exist between all the parties plaintiff and all the parties defendant, and from and to those persons only who are parties to the action, except in cases for equitable consideration. (Cases)".

—*Carpenter v. Fulmer*, 118 W., 454, 457.

37. A legatee's note, charged against her share of the estate. See FOREIGN JURISDICTION.

—*Fitch v. Huntington*, 125 W. 204, 207.

38. While in an action by an executor, a set-off under sec. 3847 must be one "enforceable" as a claim in the county court, it need not be so pleaded. See ACTIONS BY EXTR. & ADMR.

—*Rust v. Fitzhugh*, 132 W., 549, 555.

39. Where the objection to a counterclaim for the value of personal property was not but "should have been taken by demurrer",

40. It was allowed to stand as the facts stated were "sufficient to show a conversion". See also SERVICES.

—*Heber v. Est. of Heber*, 139 W. 472, 475.

41. In a replevin action by an administrator, the defendant who obtains possession of estate property cannot "off-set his demand against deceased" for his claim,—in this case a "demand for rent existing against the decedent". "Sec. 3847, relates to a different class of cases". Defendant "should have filed his claim in the county court".

—*Weissman v. Weissman*, 156 W. 26, 28.

SETTLEMENT.

See also ACCORD AND SATISFACTION. COMPROMISE. JUDGMENTS.

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- Receipt: in full, 4, 32.
- Amount named paid, 32.
- “Boiler account in full”, 41.
- Elements of contract, 28, 31, 41.
- Full of all claims, 29.
- Form of, conclusive, 27.
- Inconclusive, 8.

Receipt—continued

- Part for the whole, 9.
- Compromise, exception, 10.
- Subject to explanation, 8, 11, 30, 32.
- Though payor is deceased, 32.
- Varied, contradicted by parol, 30, 41.
- Rents:
 - Admr. charges himself, 13.
 - Waiver as devisee, 13.
- Services:
 - Legacy to be made, 26.
 - Receipt, conclusive, 27.
- Settled before administration, 3.
- “Settle”, legal meaning, 2.
- Signer neglects to read, 48.
- Full opportunity, 48.
- Six-year limitation, 20.
- Administered, as will, 21.
- Voluntary settlement, 42.
- Jurisdiction to dismiss, 43.
- Passed out of existence, 42.
- Waiver of appeal, 16.

1. “Principle and public policy alike require that when parties, after a full and fair opportunity of examining and deciding upon their mutual accounts, have adjusted and settled them, that the settlement should be conclusive”.

—*Martin v. Beckwith*, 4 W. 219, 220.

2. “The word ‘settle’ has an established legal meaning, and implies the mutual adjustment of accounts between different parties and an agreement upon the balance.”

—*Baxter v. State*, 9 W. 38, 44.

3. Where a will was duly probated, but nothing further done, no executor appointed, and no administrator appointed until some eight years thereafter, there being then no personal estate and no debts, and the devisees having entered into possession of the land, it was held that the “estate had been settled long before letters of administration were granted”, though “it had not been settled through the instrumentality of formal proceedings in the county court;” and such settlement “cut off the right of the administrator to the possession of the land”.

—*Flood Admr. v. Pilgrim*, 32 W. 376, 379.

4. Certain legatees accepted legacies and gave receipts in full, under a construction of the will by the circuit court, while certain other like legatees appealed and were awarded more in the supreme court; on subsequent appeal a like ruling was made as to the original paid legatees, without prejudice to the right to further litigate said matter. See also APPEAL.

—*Wheeler v. Catlin*, 44 W. 464, 466.

5. “Although the estate has not been settled and distributed by judgment of the probate court”, and administration is pending, “the heir

may maintain ejectment for the land'', if not in possession of the administrator. See *REAL ESTATE*.

—*Filbey Admr. v. Carrier*, 45 W. 469, 471.

6. "Receipts in full given by the legatee plaintiffs to the executors, upon the actual receipt by them of only a part of their legacies given by the will" according to the decision on appeal (*Wheeler v. Catlin*, 44 W. supra) are held not conclusive.

7. "There is greater reason to hold these receipts not conclusive in this case than there was for holding similar receipts in full not conclusive in *Butler v. Regents*, 32 W. 124; *Smith v. Schulenberg*, 34 W. 41; and *Woodman v. Clapp*, 21 W. 350".

8. "There is not such sacredness, or rather sacrilege, about a mere receipt, which is never to be held conclusive if there is any good legal reason that it be held otherwise, and which is always subject to explanation and construction, in view of the circumstances under which it is given.

9. The law is, 'that the payment of a part of a debt, or of liquidated damages, is no satisfaction of the whole debt, even when the creditor agrees to receive a part for the whole, and gives a receipt for the whole demand'.

10. The only exception is when the payment of the part is in compromise of the whole, which is in dispute, and we have seen that this was not the case here. 2 *Parsons on Con.*, 614.

11. 'A receipt for money is peculiarly open to evidence', and may always be explained. 2 *Parsons on Con.* 554".

—*Catlin v. Wheeler*, 49 W. 507, 522.

12. The record must show that the administratrix filed "some proof that she had paid the moneys in her hands to the proper person, in order to have made a final distribution of the estate" even though she claims to be the sole heir at law; otherwise there is no such final settlement as to prevent "the appointment of an administrator de bonis non." See *ADMRS. DE BONIS NON*.

—*Oakes v. Est. of Buckley*, 49 W. 592, 598.

13. Where the executor charges himself with rents as such, he waives the right to settle as a devisee in possession. See *ACCOUNTS OF EXTRS. & ADMRS.*

—*Baker v. Baker*, 51 W. 538, 546.

14. "A full and final settlement of mutual accounts, which has been fairly and deliberately made, is held conclusive, and will not be set aside except upon clear and satisfactory evidence of mistake or fraud therein."

15. But where the trial court has set aside such settlement, the foregoing rule "is met by another well established rule of this court, which is, that it will not set aside the findings of the trial court, on questions

of fact, unless they appear to be contrary to the fair preponderance of evidence.” —*Birkett v. Hird*, 55 W. 650.

16. A settlement including waiver of appeal “would probably be enforced.”—See APPEAL. —*Sloane v. Anderson*, 57 W. 123, 129.

17. The rule, “as often stated by this court, is that a settlement once deliberately made is not to be opened except upon the clearest and most positive proof of fraud or mistake therein. (Many cases)”.

18. Settlements may be made to include compound interest, notwithstanding the statute. See INTEREST. —*Case v. Fish*, 58 W. 56, 108.

19. The executor may deduct from legacies, the amounts of notes and mortgages of the estate against legatees. See LEGACIES.

—*Brunn, Extr. v. Schuett*, 59 W. 260, 271.

20. Under the six-year limitation (sec. 3850), held that after six years, and at the assignment, “the functions of the executor, as such, had ceased”. See LIMITATION OF ACTIONS.

—*In re Est. of Pierce*, 56 W. 560, 564.

21. While the six-year limitation under sec. 3850, “is to secure a speedy settlement,” yet “the estate is to be administered according to the will”. See LIMITATION OF ACTION.

—*Scott, Extrs. v. West*, 63 W. 529, 555.

22. “The mere failure to mention all the items of work or deal between the parties at time of the settlement, did not prevent its being conclusive”.

23. “A settlement of mutual accounts or claims presumptively covers everything, whether mentioned or not; and is conclusive unless impeached for fraud or mistake”.

—*Freeman v. Bolzell*, 63 W. 378, 379.

24. The settlement of estates is a proceeding in rem, and administration is had to preserve the same for all parties interested. See ADMINISTRATION.

—*State ex rel. Sanderson v. Mann*, 76 W., 469.

25. As to distinctions between settlement, compromise, and accord and satisfaction. See COMPROMISE.

—*Continental Natl. Bnk. v. McGeoch*, 92 W. 286, 312.

26. Where services were to be compensated “by a legacy to be made”, and the “contract clearly was entire”, in that claimant was to serve during the lifetime of, but “abandoned the deceased six years” before his death, and also gave “a receipt, showing a full settlement of all

matters between them", "shortly before the latter's death",—a finding of recovery, was reversed.

27. "But, if we concede that", on the evidence, recovery on the contract might otherwise be sustained, yet, the receipt of claimant for "ten dollars in full of all demand to date", establishes "that all the claims and demands", "were fully settled and discharged during the" decedent's lifetime.

28. "Where the instrument is in the form of and contains all the elements of a receipt, and also includes the elements of a contract, the latter part is governed by the same rules as other contracts, and cannot be varied, explained, or contradicted by parol evidence, though it may be set aside and avoided for fraud or mistake. (Citations); *Fire Ins. Asso. v. Wickham*, 141 U. S. 564. (Approvingly quoted in *Twohy M. Co. v. Est. of McDonald*, 108 W. post).

29. A receipt in full of all claims is of such a character. *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304". So held here.

—*Conant v. Est. of Kimball*, 95 W. 550, 552.

30. "The rule of law is well settled, not only in this state but elsewhere, that a mere receipt for money is open to explanation, and may be varied or contradicted by parol". *Catlin v. Wheeler*, 49 W. supra.

31. "No less well established, however, is the rule summarized in *Conant v. Est. of Kimball*, 95 W. supra," that where the elements of a contract enter, it cannot be so varied.

32. "But in the ordinary custom of commerce the words, 'Received payment in full', written at the foot of a bill specifying the amount due (as here), ordinarily have no significance except to declare that the amount thereof has been in fact paid. They do not indicate an agreement" as to anything else, and oral "evidence to contradict the fact of payment" was held properly admitted, though the purported payor was then deceased.

—*Twohy M. Co., v. Est. of McDonald*, 108 W. 21, 23.

33. In an action commenced in circuit court, more than six years after the entry of final judgment in the county court assigning the estate of a decedent, to vacate and set aside such judgment, giving securities to five heirs, "amounting in all to \$43,547.15", "in equal shares, being one-fifth thereof to each", \$8,709.43 to each, under sec. 3940, and a partition of such securities was made by heirs, some of such securities being subsequently discovered to be fraudulent and forgeries,—it is, in effect, held;

34. "That this statute did not require the county court to name the aggregate amount of such residue, nor the amount in dollars and cents which each person was to receive".

35. That such was merely a recitation from the final account, and

the statute "did not require, and the court did not find, nor undertake to find, the value of any notes and mortgages on hand.

36. The court was not called upon to make partition of the estate, and did not undertake to make such partition. Secs. 3942, 3947, 3952.

37. The court might have ordered the sale of such notes and mortgages, but it did not. Sec. 3924."

38. "Such recital of amounts was merely incidental, and was not necessary under the statute quoted (Sec. 3940), and hence did not constitute an essential part of the decree, and is not conclusive upon the parties. This has recently been held by very high authority. (English case); *Frame v. Thormann*, 102 W. 653, 671, affirmed in *Thorman v. Frame*, 176 U. S. 350, 356 (see FOREIGN JUDGMENTS)".

39. "Partition and settlement having been made under such mutual mistake or ignorance of fact as to the fraud and forgery, the plaintiffs are justly entitled to relief from the same. Such is the settled law in this state as well as others. (Cases)."

40. The action was brought within less than three years after discovery of the fraud, and it is held "upon the facts alleged, the case is not barred by any statute of limitations nor by laches".

—*Maldaner v. Buerhaus*, 108 W. 25, 31.

41. A signed memorandum,—“Received \$200 from S. to balance boiler account in full”, following cases supra, “must be held to be a mere receipt”, with no additional “elements of a contract”, and “it was competent for the parties to make an agreement” at the time in connection therewith, concerning which parol evidence was admissible.

—*Seeger v. Manitowoc S. B. W.*, 120 W. 11, 14.

42. Where there was a “voluntary settlement of the controversy by the parties pending the litigation”, “although there was no jurisdiction to try the controversy because the controversy had passed out of existence,

43. Still there was jurisdiction left in the court to dismiss” the proceedings, that the action need not “be left forever hanging between heaven and earth, like Mahomet’s coffin”.

—*Shoop F. M. Co., v. Schowalter*, 120 W. 663, 667.

44. A settlement between the parties, made after administration proceedings, and before a supposed will was found and probated, was held effective, both on the ground of estoppel and as “a compromise of doubtful rights”. See ADMINISTRATION.

—*Perkins v. Owen*, 123 W. 238, 241.

45. “While no defense of settlement was pleaded, the evidence of settlement was received without objection on that ground, and hence” “the question must be considered as having been litigated by consent”.

—*Petersen v. Elholm*, 130 W. 1, 9.

46. "The agreement of settlement expressed in the written release is of course, a complete defense unless impeached for fraud or mistake. (Cases)."

47. To accomplish impeachment of a formal written instrument on such grounds the proof must be clear and convincing beyond reasonable controversy. (Many cases)".

48. "The law does not allow a plea of mistake as to the contents of a written instrument which the signer has full opportunity to read but neglects to, unless deterred by some act or representation by the other party. (Cases)".

49. The testimony "indicates that the prior negotiations and conversation proceeded upon the basis of a gift instead of a settlement, but all such negotiations became merged in the written expression of the agreement finally executed,

50. And that becomes the conclusive and exclusive proof of the contract upon which the minds of the parties met and to which they are bound. (Cases)". —*Steffen v. Supreme A. of D.*, 130 W. 485, 486.

51. A settlement of a claim in favor of an intestate estate, made with the sole heir before administration granted, is held binding on the administrator subsequently appointed, there being sufficient other assets to protect creditors.

52. Administrators are trustees "in the broad sense"; "beneficiaries of trust property" "may deal with and convey their equitable interests"; "and the trustees will be required to" recognize such dealings, if "not contrary to the terms of the trust". See also TRUSTEES.

—*McKeigue v. C. & N. W. R. Co.*, 130 W. 543, 546.

53. "Settlements fairly made and untainted by fraud are to be encouraged rather than law suits."

54. "To impeach a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy. (Cases)".

—*Schweikert v. John R. Davis L. Co.*, 147 W. 242, 249.

55. "Offers of settlement made before or after suit are not admissible in evidence against the party making them, because the settlement of controversies is favored in the law." Taylor v. Tigerton, 134 W. 24.

—*Tobin v. Nichols*, 156 W. 235, 237.

56. As between partners, attorneys, it is held "there may easily have been settlements from time to time resulting simply from acceptance by the partners without question of the reports or statements submitted to them by" the partner "intrusted" with "the financial matters of the firm". See also CONTRIBUTION.

—*Est. of Ryan*, 157 W. 576, 579.

57. While "legal heirs or legatees" "obtain no legal title to personal property by the death of the ancestor", they, "however, are beneficially interested in the estate, and they doubtless possess the equitable title subject only to the expenses of administration and the payment of debts. *McKeigue v. C. & N. W. R. Co.*, 130 W. supra".

58. Where the heirs, adults, entered into an agreement appointing one E., 'as trustee of the estate of' their deceased mother, "to settle her estate without legal proceedings", and allow the mother B., to retain the estate personalty and B. with L. as accommodation maker giving their note for the amount thereof payable to E. as such trustee,—upon suit by E. four years later on said note, it is said:

59. That while "the right of a creditor to procure" administration, or "the rights of an administrator or executor", are unaffected, "no reason is perceived why the parties now before the court should not be bound by their agreement on well established principles of estoppel". So held.

60. The heirs having relied "on this note as a valid obligation", and lost the "enjoyment of their shares of the estate for several years", "it is clear that both defendants are estopped from asserting the defense of lack of consideration". See also *ESTOPPEL*.

—*Schoenwetter v. Schoenwetter*, 164 W. 131, 134.

SEVEN-YEAR ABSENCE.

See PRESUMPTION OF DEATH.

SHALL.

SHARES IN CROPS.

See RENTS AND PROFITS.

SICKNESS.

Entire contract, 3.

Excuses performance, 3.

Excuses non-performance, 1.

Personal services, 1.

Recovery quantum meruit, 2.

1. "Sickness is sufficient to excuse delay, or even non-performance of contracts for personal services, and is regarded as the act of God. See *Wolfe v. Howes*, 20 N. Y. 197, and authorities there cited.

2. But in such cases the recovery is not for the contract price (for part performance), but on quantum meruit”.

—*Green v. Gilbert*, 21 W. 395, 400.

3. Sickness is held generally to excuse the performance of an entire contract. See ENTIRE CONTRACT.

—*Jennings v. Lyons*, 39 W. 553, 557.

SIGNATURE.

See EXECUTION OF WILLS. HANDWRITING.

SOLE BENEFICIARY BOND.

See BOND TO PAY DEBTS AND LEGACIES.

SOLE EXECUTOR.

See EXECUTORS AND ADMINISTRATORS.

SPECIAL ADMINISTRATOR.

Administrator, defective notice, 6.

Power of special, 6.

“Granting of letters”, 9.

Included in, 9.

Auxiliary; procedure, 11.

Intervene in action, 3.

To preserve property, 4.

Irregular appeal, 5.

Personal representative, 7.

Personal, etc.—continued

Bring an action, 8.

Subsequent administration, 8.

Power:

Take and preserve property, 10.

Fully as regular, 10.

Preservation of property, 4.

Responsible as such, 1.

Until admr. qualifies, 2.

Specific purposes; procedure, 11.

1. The special administrator is “responsible as such” and is holden until the administrator is regularly appointed.

2. He continues “to hold the property and effects of the estate, and was responsible as such, notwithstanding his appointment as administrator”, and so remained “until the requisite statutory security was given, or expressly waived by the parties in interest”.

—*In re Fisher*, 15 W. 511, 521.

3. "There can be no question of the right of the special administratrix to intervene in the action against her intestate, for the purpose of avoiding the judgment against him."

4. "This was necessary in order to preserve the property of the deceased for the administrator thereafter to be appointed, which is one of the chief functions of a special administrator. Sec. 3811."

5. An appeal from an order denying her motion, erroneously signed by her as special administratrix, she having in the meantime become general administratrix, is held "too trifling and inconsequential to work so serious result as a dismissal of the appeal" especially as "she had an individual right to appeal" from the order which "imposed costs upon her individually".

—*Jefferson Co. Bank v. Robbins, Admx.*, 67 W. 68, 70.

6. In the case of a defective notice as to probate and appointment of an administrator, and after assignment of the estate and the personality in question, it was held, in foreclosure proceedings fifteen years later, that "for the purpose of making such transfer of the note and mortgage we think the administrator in question must be regarded as having at least the powers of such special administrator", the legal title being in him "and the court (having) had power to appoint a special administrator without notice to any one".

—*Portz v. Schantz*, 70 W. 497, 506.

7. While it is doubtful whether, under "sec. 3811, a special administrator would have power to bring" an action for damages for "the wrongful death" of his decedent, yet, sec. 4256 empowers the "personal representative" so to do, and "a special administrator is 'the personal representative' of the deceased so long as he continues in office".

8. "He may bring such an action", and the general administrator when appointed "may be admitted to prosecute the action to judgment. Sec. 3813".

—*Swan v. Norvell*, 107 W., 625, 626.

9. In strictly construing the phrase 'before the granting of letters testamentary or of administration', in the conversion statute, sec. 3824, "penal in its nature", "special administration" is held to be included in the terms of such phrase.

10. "A special administrator has such power,"—"to take and preserve the property",—"for the time being as fully as a regularly appointed administrator".

—*Dixon v. Sheridan*, 125 W. 60, 65.

11. (As to the detailed procedure both concerning auxiliary special administration and independent special administration for specific purposes,—see Zimmerman's Probate Practice, §§ 78-94.)

SPECIAL GUARDIAN.

Appoint after general, 1.

No jurisdiction, 1.

Though appeal and stay, 2.

Appointment, without notice, 3.

Whether constitutional, 3.

1. Under sec. 3995c, (L. 1905, ch. 89), where a special guardian was appointed, after the general guardian had been appointed and qualified, it is held, "that the jurisdiction of the court to appoint a special guardian" "terminated with the appointment and qualification of the guardian,

2. Although an appeal had been taken from the order of appointment and a stay of proceedings had. (Cases)". Therefore the special guardianship proceedings "are void and should be set aside and vacated."

3. Whether this "law, which provides for the appointment of a special guardian without notice", is constitutional, "we do not determine".

—*State ex rel. Deleglise v. Parsons*, 131 W., 606, 607.

SPECIFIC LEGACY.

See LEGACIES.

SPECIFIC PERFORMANCE.

Circumstances control right, 7.

Conditions governing refusal, 28.

Discretion; inequitable, 7.

Facts of particular case, 29.

Well founded objection, 8.

Damages, remedy, 8.

Definition of, 6.

Redemption distinguished, 6.

Discretion of court, 7, 14.

Not absolute right, 21.

Essential requisites, 36.

Fails to specify time, 4.

Homestead:

Parol agreement of both, 26.

Husband's deed alone, 26.

Void; son as against heirs, 27.

Inadequacy of consideration, 15.

Inchoate dower withheld, 34.

Wife not having signed, 34.

Mutual relief right, 13, 31.

Parol land sale, 9.

Essential requisites, 36.

Fraud is practiced, 23.

Parol land sale—continued

Part, and offer of balance, 35.

Possession and part payment, 25.

Possession trespasser, 24.

Tenant in common, 10.

Void, not voidable, 22.

Other states, contra, 22.

Parol lease; fraud, 11.

Estoppel as to statute, 11.

Parol to devise land, 30.

Performance, possession, 30.

Part performance; fraud, 11, 12.

Personalty and land, 32.

Realty, part performance, 33.

Reform, with decree, 1.

Not actual contract, 5.

Signed by one party, 18.

Terms definitely expressed, 2.

Authorized presumption, 3.

Time not of essence, 16, 17.

If possible before decree, 16, 17.

Uncertain description, 19.

Can be made certain, 20.

1. Courts of equity will reform a contract and decree specific performance in the same suit. See REFORMATION.

—*Waterman v. Dutton*, 6 W. 265, 273.

2. "No rule is better established than the rule that a court of equity will not decree specific performance of a contract unless the terms of the contract are clearly and definitely expressed.

3. If the court is unable from the contract itself, aided by authorized legal presumption, to arrive at a clear result of what its all essential terms are, the contract will not be specifically enforced. (Cases cited)".

4. Where the contract "fails entirely to specify the time when a portion of the purchase money shall become due and payable" and only provides that it 'may stand upon the farm', "the defect cannot be supplied by any authorized legal presumption", and specific performance cannot be decreed.

5. "There is no claim that the written agreement does not fully express the contract which the parties actually made, and no reformation of the writing is sought. Hence, *Waterman v. Dutton*, supra, is not applicable here," to allow parol evidence to supply the omission.

—*Schmeling v. Kriesel*, 45 W. 325, 327.

6. "Specific performance enforces a contract by giving a party something to which he had not title before. Redemption gives a party nothing new, but enforces his right to repurchase his own, incumbered for a debt. Redemption restores the parties to their former rights of property. Specific performance gives them new rights of property".

7. "Circumstances control the right of specific performance. It is therefore discretionary. Specific performance will not be decreed when, for any reason, it would be inequitable."

8. "A court of equity must be satisfied that the claim for a deed is fair and just and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before it will interpose with this extraordinary assistance. If there be any well founded objection on any of these grounds, the practice of the court is to leave the party to his remedy at law for a compensation in damages. (Cases)." (Quoted approvingly in *Engberry v. Rousseau*, 117 W. 52).

—*Williams v. Williams*, 50 W. 311, 316.

9. "The rules which govern the courts of this state in granting or refusing specific performance of" "a parol contract for the sale of land", "are laid down in" *Horn v. Ludington*, 32 W. 73 (see PART PERFORMANCE).

10. Seemingly contrary to *Workman v. Guthrie*, 5 Casey, 512, and other cases, it is held, "that a tenant in common in possession" can purchase "by parol of his co-tenant also in possession", and "take the exclusive possession of the land from thenceforth, and on performance of the contract maintain an action for its specific performance, especially if in good faith he makes valuable improvements upon the land".

—*Littlefield v. Littlefield*, 51 W. 23, 29.

11. Where on a verbal agreement to lease for five years, a written lease being tendered and through neglect unexecuted, and the lessor

"was put to great expense to change and remodel" the premises, and the lessee went into possession and for two years paid the stipulated rent and then removed from the premises and refused to further pay rent,—equity will enforce a specific performance of the oral lease on the ground, as stated in *Potter v. Jacobs*, 111 Mass. 32, that "the refusal to complete it is in the nature of a fraud, and the defendant is estopped to set up the statute of frauds in defense".

12. "In *Paine v. Wilcox*, 16 W. 202, this court has laid down the same doctrine, as follows: 'But verbal agreements for the sale of lands are enforced in equity when there has been such a part performance that it will operate as a fraud upon either party to allow the other to repudiate'."

13. "It is self-evident that this equitable relief must be mutual. If there has been sufficient execution or performance of the parol contract to entitle the lessee to enforce it, the lessor has the same equity, and both will be equally entitled to specific performance".

—*Seaman v. Aschermann*, 51 W. 678, 681.

14. "The law is well settled, that a specific performance of a contract of sale rests largely in the sound discretion of the court, upon a view of all the circumstances. *Williams v. Williams*, 50 W. supra".

—*Benson, Admx. v. Cutler*, 53 W. 107, 113.

15. Where the value of the land is given as \$1,300, and the contract price \$900, "this is not such an inadequacy of consideration as will defeat the right to specific performance of the contract".

—*Conrad v. Schwamb*, 53 W. 372, 378.

16. "It seems to be settled that a court of equity will decree specific performances of a contract for the sale of land in which time is not of the essence of the contract, if the vendor is able to make a good title at any time before the decree is pronounced. *Hepburn v. Dunlop*, 1 Wheat. 179".

17. The same rule applies in case of foreclosure of a contract, where "the vendor can make a good title at the hearing", but could not "when the action was commenced".

—*McKinney v. Jones*, 55 W. 39, 50.

18. "The mere fact that the agreement to convey was signed by the defendant alone will not prevent specific performance if it was otherwise sufficient".

19. "The law will not declare an agreement void for uncertainty when the light which contemporaneous facts and circumstances furnish renders the description definite and certain. (Cases).

20. A description which can thus be made certain by proof of an extrinsic fact referred to in the agreement must be regarded as sufficiently certain to enforce specific performance".

—*Doctor v. Hellberg*, 65 W. 415, 421.

21. "Specific performance is not a matter of absolute right, but rests in the sound discretion of the court, in view of all the circumstances. *Williams v. Williams*, 50 W. *supra*."

—*T. of Menasha v. Wis. Cen. Ry. Co.*, 65 W. 502, 506.

22. Under our statute (contrary to other states and 29 Car. II) sec. 2304, a parol contract for the sale of land is void, not merely voidable.

23. "In *Smith v. Finch*, 8 W. 245, *Whiton*, C. J. says: 'It is only in cases where the defendant would be enabled to practice a fraud upon the complainant unless the contract is specifically executed that a court of equity will interfere.

24. If the purchaser has gone into possession of the land so as to render him liable as a trespasser if the agreement is held void, the court will enforce the performance'". —*Popp v. Swanke*, 68 W. 364, 368.

25. In an oral contract for the sale of land, "the payment of any considerable part of the purchase money, and entering into the possession of the purchased premises and making improvements thereon, are sufficient to take the case out of the statute and justify the enforcement of the contract. *Bowen v. Warner*, 1 Pin. 600; *Blanchard v. McDougall*, 6 W., 167; *District No. 3 v. Macloon*, 4 W., 79; *Fisher v. Moolick*, 13 W., 321; *Ingles v. Patterson*, 36 W., 373; *Smith v. Finch*, 8 W., 245; *Cameron v. Austin*, 65 W., 652; *Seaman v. Aschermann*, 51 W., 678, 682."

—*McWhinne v. Martin*, 77 W., 182, 196.

26. On the deed of homestead by husband alone, with oral agreement of husband and wife to son, specific performance is granted as against the other heirs. See HOMESTEAD.

27. Where a void deed of a homestead was given to a son, it was held that he was, "entitled to a specific performance" as against the heirs. See HOMESTEAD.

—*Whitmore v. Hay*, 85 W., 240, 249.

28. For some years "the plaintiffs not only failed to perform during the time mentioned, but, after having expressly refused to perform, they attempted, during all that period, to compel the performance of an alleged contract never made, and thereby caused great expense to the defendants", and specific performance was refused. (Many cases).

29. "While courts are to be guided by the settled principles of equity in decreeing or refusing to decree specific performance, yet it is always to be done with reference to the facts of the particular case. *Hennessey v. Woolworth*, 128 U. S. 438; *McCabe v. Matthews*, 155 U. S., 550."

—*Doctor v. Furch*, 91 W., 464, 478.

30. It is intimated that specific performance of an oral contract to devise lands for services, might be had, on performance of the services and being "put in possession by the promissor". See PAROL.

—*Rodman v. Rodman*, 112 W., 378, 384.

31. "The law seems to be that, in case the vendee might have specific performance for a similar breach on the part of the vendor, the doctrine of mutuality requires equity to give similar relief to the vendor on his application".

32. "Where part of an entire contract relates to personal property, and the rest to a subject matter such as land, over which the jurisdiction is ordinarily exercised, specific performance may be had of the contract as a whole, including the clause relating to personal property. (Cases)".

33. Part performance as to the realty is held to entitle specific performance as to the personalty. See also FRAUDS, STATUTE OF.

—*Kipp v. Laun*, 146 W. 591, 602.

34. Value of wife's inchoate dower interest computed and withheld, she not having signed the contract, and refusing to deed. See LAND CONTRACT.

—*O'Malley v. Müller*, 148 W., 393, 394.

35. In an oral contract to convey lands, "a partial and substantial performance with an offer to perform the balance", is considered "equivalent to an obligation to perform.

36. But", "the contract itself meets with the requirements entitling it to specific performance. It is definite, mutual, and founded upon a valuable consideration. It is free from fraud or mistake, and is reasonable in its scope and purpose. These are the essential requisites. *Mulligan v. Albertz*, 103 W. 140".

—*Dingman v. Hilberry*, 159 W. 170, 178.

SPENDTHRIFT.

See GUARDIAN AND WARD. INCOMPETENTS.

STARE DECISIS.

See also JUDICIAL DECISIONS.

Appellate court's errors, 9.
Corrected without prejudice, 6.
Long stood at rest, 2.
Stand for all cases, 3.
Once decided by court, 1.

Trial courts guide, 7.
Though may be righted, 8.
Wrong rule firmly fixed, 4.
Rule of property, 5.

1. "When the precise point in controversy has been once decided by this court in a case where it has properly arisen, and such decision has not been overruled by this court, it will be treated as settled in future

cases, except where, conceding the decision, this court is asked or deems it proper to review or overrule it.

2. And even then it should not be disturbed after it has long stood at rest as an established principle of law, affecting the rights of property, which have for a long time been adjusted in accordance with it, without the most cogent reasons.

3. Affirmatively and prima facie, at least, it will stand as the law of all cases, and require no authorities or decisions elsewhere to support it".
—*Hawks v. Pritzlaff*, 51 W. 160, 161.

4. "The rule of stare decisis" "is grounded upon the idea that it is better to abide by a wrong rule firmly established than to seek to avoid or right it at the expense of those who have relied upon it.

5. That doctrine has controlling force where the wrong rule of law has become the rule of property, unless the circumstances indicate an overpowering necessity to change it, which necessity cannot be satisfied by the exigencies of any particular case.

6. When, however, the rule of stare decisis is invoked to secure adherence to a wrong doctrine which may be corrected without prejudice to anyone other than a party before the court, and others similarly situated as regards pending litigations, where no rule of property is required to be changed, courts are not so firmly bound by a previous ruling but that they may correct it with considerable freedom, if firmly convinced that it stands in need of correction".

7. "Trial courts are expected to be guided by the decisions of this court, and where they reasonably submit to such guidance and considerately decide accordingly, their decisions should not be disturbed even though the result be that the question involved, as an original proposition, is decided wrong.

8. The rule of stare decisis must go that far, even where the judicial rule involved, though wrong, need not be sustained as a rule of property, the disturbance of which would be injurious to public interests".

9. Such adherence may cause occasional "sacrifice of individual rights", but "that does not militate at all against judicial freedom in appellate courts to correct their own errors in all proper cases".

—*Whereatt v. Worth*, 108 W. 291, 295, 303.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATION.

See LIMITATION OF ACTIONS.

STATUTES

See also CONSTRUCTION OF STATUTES.

Administration of estates, 2.
 Substantially as most, 2.
 Conveniently classified, 4.

Judicial notice, publication, 1.
 Probate courts, from statutes, 3.

1. Courts will take judicial notice of the fact and time of publication, and "the certificate of the secretary of state, appended to the published volumes of laws," will be taken as proper proof of such fact and date, in the absence of other evidence.

—*Atty. Gen. v. Foote*, 11 W. 14.

2. "Our statutes regarding the administration of the estates, the sale of the property, the payment of the debts and distribution of the assets of deceased persons, are the same substantially as those which prevail in most of the states".

—*Williams v. Ely*, 13 W. 1, 7.

3. Probate courts derive their powers solely from the statutes. See COUNTY COURT.

—*Sitzman v. Pacquette*, 13 W. 291, 305.

4. (For the statutory provisions conveniently classified under the various chapters covering the specific proceedings in the administration of estates, and matters akin thereto,—see Zimmerman's Probate Practice.)

STAY OF PROCEEDINGS.

Ancillary proceedings authorized, 5, 11.
 Separate action, pleading appeal, 6.
 County court order staying, 15.
 Bond order, acted upon, 13, 14.
 Interpret such stay, 12.
 Within judicial powers, 16.
 Guardianship appeal:
 From order appointing, 1.
 Not authorized to act, 1.
 Matter appealed from only, 4, 11.

Sale vacation, appeal:
 Suspended the order, 3.
 Judgment in force, 3.
 Will probate appeal:
 Creditor's order after appeal, 10.
 Executor qualifies before, 7.
 Order notice to creditors, 7.
 Effective pending appeal, 8, 9.
 Letters not granted, 2.

1. On an appeal to the circuit court from the order of the county court appointing a guardian of an incompetent person, it is held that the guardian could not "be authorized to act", "because the appeal would have the effect to suspend the order appointing him, until the determination of the appeal". —*Gaston v. Babcock*, 6 W. 503, 508.

2. "The county court could not proceed and act upon the petition for letters of administration with the will annexed, pending the appeal

from the order approving the will. All proceedings in that respect were suspended until the matter of the appeal was finally decided, and the cause remitted to the county court".

—*In re Fisher*, 15 W. 511, 521.

3. An appeal having been taken from an "order vacating the sale," under a judgment of foreclosure, it is said,—“we are of opinion that the appeal suspended the order appealed from, and made it entirely inoperative, and consequently that the judgment remained in force during the pendency of the appeal”.

—*Aetna Life Ins. Co. v. McCormick*, 20 W. 265, 272.

4. Quoting the statute, sec. 4036, as to staying proceedings on appeal, it is said, of *Gaston v. Babcock*, 6 W. supra, and *In re Fisher*, 15 W. supra, “that the decisions so far made have only gone to the extent of holding that no proceedings could be taken in the county court in furtherance of the matter appealed from, pending the appeal.

5. It was not the purpose of the statute to limit or suspend the right the party might have to commence and maintain ancillary proceedings authorized by law in some other court”, unless the judgment or order “entirely suspends its efficacy for any purpose”. See also *Smith v. Schreiner*, 86 W. 19, 23 (under RES ADJUDICATA).

6. Here a claimant who obtained judgment, was sustained in bringing an action as a creditor to obtain uninventoried assets under section 3835, pending an appeal from his judgment on his claim.

—*Richter v. Leiby*, 99 W. 512, 515.

7. Where “a will was duly admitted to probate, and the executor qualified”, “an order was made limiting the time for” claims, and “publication of the notice of such order was begun”, and “a few days after the first publication, an appeal to the circuit court was taken from the order admitting the will to probate”, and there such order was reversed, and subsequently the supreme court reversed this judgment “and the cause remanded with directions to affirm the original order of the county court”, it is held,—

8. That “it is clear that” neither sec. 4036, or any other, “operates to stay the running of the limitation” as to claims.

9. “Neither the publication of the notice to creditors, nor the running of the limitation, can properly be called a proceeding ‘in pursuance of’ the order admitting the will to probate.

10. The order limiting the time for creditors to present claims may perhaps be so called, although this is not decided; but this order had been made at the time the appeal was taken, and hence it could not be affected thereby”.

—*Butler v. Templeton*, 115 W. 382, 384.

11. Following *Richter v. Leiby*, 99 W. supra, it is held that “the appeal from the order of county court”, in a guardianship accounting,

“did not serve to stay the institution of suit in circuit court on the bond, but merely further proceedings in the county court in pursuance of the order appealed”. —*Wescott v. Upham*, 127 W. 590, 596.

12. “The county court has power, after requiring an executrix appointed by the will without bond to give bonds and after stay of proceedings on such order (by special order here), to interpret such stay as extending the time within which she must give bond,

13. Or its expiration as fixing the commencement of the period within which she must give bond”,

14. And “he has power to accept and approve such bond given by her more than twenty days after the date of the order requiring the bond”, there being nothing in secs. 3794-3796, “forbidding the county judge to do” so.

15. It was done here and assumed to be within the court’s power, to enter “an order staying all proceedings for thirty days”, on application of parties “intending to appeal from” an order made, they not appealing until after the expiration of the stay.

16. As to “what was done in this case” by the county judge, “his action was well within the powers of any judicial officer at common law”. —*Schnorenberg v. Schnorenberg*, 150 W. 537, 539.

STIPULATION.

Counsel fees out of estate, 6.

Held not binding, 6.

Counsel for client, 3.

Binding on client, 3.

Counsel in open court, 2.

Entered of record, 2.

Imports absolute verity, 2.

Mandamus to vacate, 2.

Material date stipulated, 8.

Different date correct, 8.

Parties stipulate action, 9.

Carried out generally, 9, 11.

Court not stultify itself, 10.

Parties, etc.—continued

Precluded themselves, 12.

Referee report; signing, 1.

Relieve from effect, 4.

Cannot place in statu quo, 15, 16.

Plain fraud, mistake, 17.

Discretion of court, 4, 14.

Waiver of jury trial, 5.

Properly set aside, 5.

Will contest adjusted, 7.

Disallow will; ineffective, 13.

Not to thwart will, 7.

Substitute different disposition, 18.

Widow’s portion; against will, 19.

1. On reference, and report, and stipulation that such report should be signed by the judge, he cannot be compelled “to sign it, since it is not an act resulting from his office.”

—*State ex rel. Orton v. McArthur*, 23 W. 427, 430.

2. “Curious ground of error is assigned, that a stipulation of counsel in open court, and entered of record, was not made in fact. Possibly, in such a case, we might take jurisdiction by mandamus to the court below to vacate the entry. But upon appeal we can listen to no sugges-

tion, accept no proof, that such an entry is untrue. While it stands, it imports absolute verity. *Germann v. Schwartz*, 21 W. 661”.

—*Wilcox v. Bates*, 45 W. 138, 146.

3. “Stipulations entered into in relation to the management and conduct of an action by an attorney are binding upon his client, and cannot be set aside or disregarded at his mere caprice or option.

4. The court, however, may, upon proper cause shown, relieve a party from the effect of a stipulation, or set it aside; and what is proper cause is a matter of discretion with the court, the exercise of which will not be interfered with on appeal, unless this discretion has been abused”.

5. A stipulation to waive a jury trial was held properly set aside, conditions and the importance of facts appearing different from what were supposed.

—*Brown v. Cohn*, 88 W., 627, 636.

6. A stipulation of the parties to a will contest, for counsel fees out of the estate, is held not binding, and against public policy. See COSTS AND FEES.

—*Fox v. Martin*, 108 W. 99, 101.

7. A will contest adjusted by stipulation, held not to thwart the will,—the parties being enabled otherwise to effect adjustment accordingly. See TRUST VARIATIONS.

—*In re Luscombe's Will*, 109 W., 186, 198.

8. Where a material date was stipulated, “and that no testimony should be received in conflict with the stipulation”, and the testimony taken indicated a different date,—“as no application was made to the trial court by the appellant to be relieved from the stipulation, it must be held to control”.

—*Abrams v. U. S. Fidelity & G. Co.*, 127 W. 579, 585.

9. “When all parties to a litigation stipulate or consent to certain action by the court, such stipulation should be carried into effect” “as a general proposition, though obviously with some limitations.

10. For example, a court could not be compelled to stultify itself by solemnly adjudging absurdity or a falsehood because parties stipulated for such act.

11. Independently however, of” such exceptions, “doubtless it should give effect to a stipulation so far as it affects the individual rights of the parties thereto”.

12. And parties to a stipulation may “preclude themselves individually from setting up any rights in opposition to such stipulation”.

13. A stipulation by all the heirs as to incompetency of testator, and to disallow a will, is held not to control. See also PROBATE OF WILLS.

—*Will of Dardis*, 135 W. 457, 461.

14. The authority to set aside a stipulation, “is a judicial discretion to be exercised in promotion of justice and equity and not in subversion thereof”.

15. "Especially impregnable is such a contract (of mutuality) when the one party thereto has received and enjoyed the fruits thereof, and the other, on the faith of it, has so changed his situation that he will be seriously and irremediably prejudiced."

16. Where "the parties have so acted in execution thereof that the statu quo cannot be re-established as to one of them,

17. It is only in a plain case of fraud, mistake, or oppression that the court should set it aside." See also ATTORNEY AND CLIENT.

—*Ill. S. Co. v. Warras*, 141 W. 119, 124.

18. An agreement by all parties to a will contest to substitute a different distribution than the will provides, is held void though approved by the judgment of the court. See PROBATE OF WILLS.

—*Will of Rice*, 150 W. 401, 448.

19. An agreement to settle a contest and that the widow's proportion of the residue be intestate estate, after widow's election,—contrary to the will,—held inoperative. See DESCENT AND DISTRIBUTION.

—*Will of Reynolds*, 151 W., 375, 384.

STRANGER.

Administration granted, 1.

Cannot move the court, 2.

Though subsequent purchaser, 3.

First procure status, 2.

1. Administration granted to a stranger within thirty days of the decease, is irregular and should be annulled. See ADMINISTRATION.

—*Brunson v. Burnett*, 2 Pin. 185, 188.

2. "Stranger to the record, and not in any sense a party to the suit," is not competent "to appear therein and make a motion. He must procure a status in court by petition or bill", first.

—*Ward v. Clark*, 6 W. 509, 512.

3. "A stranger to the record", though a subsequent purchaser of lands upon which a judgment has become a lien, cannot move the court to vacate a judgment for irregularity in entering or docketing it.

—*Packard v. Smith*, 9 W. 184.

SUBROGATION.

Compelled to pay mortgage, 24.

Interest by verbal contract, 25.

Possession; improvements, 25.

Contribution, between sureties, 4.

American, statute, rule, 6.

Equity; and law, 5.

Contribution, etc.—continued

Keep judgment alive, 6.

Surety has creditor's rights, 6.

Surety who has paid, 4.

Definition of, 10, 20.

Independent of contract, 13.

Misapplied by trustee, 22.

Recognized equity principles, 14.

Rights of original, only, 11.

Favored by the law, 20.

Homestead:

Mortgage paid by wife, 12.

Laches; third persons, 19.

Limitation period, 19.

Life tenant; incumbrance, 8.

Existing mortgage paid, 15.

Mortgage on the fee, 16.

Life tenant—continued

Remainderman; grantee, 9.

Security turns out void, 17.

Loan to pay estate debts, 1.

Defective mortgage security, 1.

Not treated as volunteer, 2.

Money: for purchase price, 3.

Failure to secure; fraud, 7.

To pay off a mortgage, 7.

Security turned out void, 17.

Not regarded as volunteer, 18.

Volunteer:

Interest to protect, 18, 21.

Misapplied by trustee, 22.

Without security promise, 23.

No subrogation right, 23.

1. Where the plaintiff loaned money to executors to pay a \$600 mortgage of M. and taxes, "which were incumbrances" and liens prior to subsequent mortgages of M., "at the solicitation of the executors, to take up and relieve the estate," and took as security and relied on a mortgage from the executors under license of the court, which proved "defective and does not bind the heirs",—his money has been "applied to the discharge of just debts against the estate, and he has the prior right to be reimbursed out of the estate to the extent of the incumbrances which he has removed", on the principles of subrogation, though the \$600 mortgage was not assigned, but paid.

2. "Plaintiff loaned his money at the request of the executors, relying upon the validity of the mortgage which they had been ordered by the probate court to execute, and is not to be treated as a volunteer in the legal sense of that term." —*Levy v. Martin*, 48 W. 198, 206.

3. One who furnishes the money actually paid, may be "subrogated to the right of the vendor to an equitable lien upon the land for such purchase money." See LIEN. —*Carey v. Boyle*, 53 W. 574, 579.

4. "Actions to enforce contribution between sureties, and to subrogate a surety who has paid the debt of the principal debtor to the securities and rights of the creditor, are constantly sustained by courts of equity, and have been from the earliest time".

5. "Although courts of law have a very extensive concurrent jurisdiction over the same subject, the right of the plaintiffs (co-sureties who paid the judgment) to be subrogated to the remedies of the judgment creditor, is, also, clearly a matter cognizable by a court of equity".

6. "The American rule is fully recognized in our statute", (secs. 3021-24), and as "formerly held in England, following the Roman law", provides "that a surety subrogated to the rights of a creditor had precisely the same rights the creditor had, and stood in his place", i. e. he "may keep the judgment alive, and retain the lien thereof upon the

lands of the other judgment creditors, for the purpose of enforcing contribution by the latter". —*Mason v. Pierron*, 63 W. 239, 244.

7. Where one loans money to two of the defendants to pay off a mortgage on their land, and by "agreement, was to have equal security on the land, and, to protect that interest, caused the first mortgage to be discharged," on the principle of *Levy v. Martin*, 48 W. and *Carey v. Boyle*, 53 W., supra, is entitled to "be subrogated as mortgagee to the mortgage paid and discharged," where these two defendants failed to execute a new mortgage, but instead conveyed the land to the third defendant with knowledge and with intent to defraud.

—*Wilton v. Mayberry*, 75 W. 191, 193.

8. A life tenant paying an incumbrance, when and when not subrogated.

9. As between life tenant and remaindermen, and subsequent grantee. See *WIDOW*. —*Melms v. Pabst Brewing Co.*, 93 W., 140, 148.

10. Subrogation "may be said to be that equitable right by which one person who has paid a debt for which he is only secondarily liable is entitled to succeed to and utilize the security and remedies possessed by the original creditor. *Bispham Eq.*, 335.

11. Manifestly, the right of the person subrogated is measured by the right of the original creditor, and cannot be extended further. *Franklin S. Bank v. Taylor*, 131 Ill. 376". —*Evison v. Hallock*, 108 W. 249, 251.

12. As to subrogation upon payment of a mortgage on a homestead, by the wife, and as to recovery being barred. See *CLAIMS. LIMITATION OF ACTIONS*. —*Charmley v. Charmley*, 125 W. 297, 303.

13. "The right of subrogation exists independently of contract and is equitable in its nature.

14. It is a means by which justice may be accomplished by subrogating one party to the rights of another in accordance with the recognized principles of equity jurisprudence. (*Citations*)."

15. Where a life tenant and executrix gave a mortgage to H. on the whole property, and with the proceeds paid an existing mortgage due thereon, which was satisfied, and the parties intended to give and receive "a mortgage upon the fee to the extent, at least, of giving" such mortgagee "all the rights of the original mortgagee",

16. "The agreement of the life tenant and executrix to give a mortgage on the fee, and the execution and delivery of it and payment of the original mortgage with the money, would bind the fee to the extent of subrogating H. or his assignee to the interest of the original mortgagee. (*Many cases*)."

17. "Where the security given for the loan which is used to pay off an encumbrance turns out to be void, although the party taking it expected to get good security, he will be subrogated to the right of the holder of the lien which the money advanced is used to pay, and,"

18. "In such case the party advancing the money cannot be regarded as a stranger or volunteer".

19. As to laches, where "no rights of third parties have intervened who are prejudiced by the delay", it is said that "in the absence of an equitable estoppel the ordinary rule is that nothing short of the statutory period of limitations will bar the right" of subrogation. See also LIMITATION OF ACTIONS.
—*Hughes v. Thomas*, 131 W. 315, 319.

20. "The doctrine of subrogation, by means of which a debt once paid or a security discharged is kept alive as against the principal debtor for the benefit of a third person who, not being a mere volunteer, has paid the debt, is an equitable doctrine, favored by the law."

21. "It is well settled that one who is legally bound to pay the debt or who has an interest to protect thereby is not a volunteer.

22. It is also held without substantial conflict of opinion that where a fund is misappropriated by an agent or trustee without the owner's consent to the payment of the debt to another, the owner of the fund is not a volunteer, but will be entitled to subrogation if necessary for his due protection."
—*Reddington v. Franey*, 131 W. 518, 521.

23. "This court is committed to the doctrine that in the case of a loan of money or credit unaccompanied by a promise to give security, no right of subrogation exists, even where it is understood that the money is to be used in paying a secured debt. (Cases)".

—*Murphy v. Baldwin*, 159 W. 567, 571.

24. "One who is compelled to pay off a mortgage on land in order to protect his own interest therein is entitled to be subrogated in place of the mortgagee and have the mortgage lien enforced in his own favor so far as necessary to protect himself against loss. *Charmley v. Charmley*, 125 W. supra."

25. So held, where the "interest in the land" was acquired "under a verbal contract of purchase" of the life estate, the purchaser "having taken possession" and made improvements. See also TITLE.

—*Tellett v. Albregtson*, 160 W. 487, 491.

SUBSCRIBING.

See EXECUTION OF WILLS.

SUBSCRIPTION.

Action; part for all, 3.

Have incurred obligations, 2.

Sufficient consideration, 2.

Liability is a debt, 4.

But not absolute, 4.

Telegram attached, 1.

1. A subscription by telegram, attached to the subscription list, with a condition, "was a continuing offer" and "revocable until accepted", and "made a binding contract", where acted upon "within a reasonable time", and before revocation.

2. "The doctrine is well settled in this court, and the authorities are collected in *Gibson v. Grinsel*, 79 W., 365, 371, where it is said that all the authorities agree that, where 'the persons to whom the subscriptions run have expended money or incurred obligations on the faith of such subscriptions, it is sufficient consideration to support the promise to pay'. (Citations.) No formal acceptance was necessary," expending money, etc., being "a sufficient acceptance."

—*Superior C. L. Co. v. Bickford*, 93 W., 220, 222.

3. "An action at law by a part of the subscribers to a building fund. who had incurred obligations" thereunder, may, under sec. 2604, be brought for all, there being seventy-five. The liability is several, and "is to be enforced in an action at law against" one. *Superior C. L. Co. v. Bickford*, 93 W., supra; *Gibbons v. Grinsel*, 79 W., 365.

—*Hodges v. Natty*, 104 W., 464, 467.

4. "A subscription liability for capital stock in a corporation is a debt, as said in 1 *Cook, Stock*, § 105, and in *Hatch v. Dana*, 101 U. S., 205": "but not an absolute debt", being "payable in the future." See also CONTINGENT CLAIM.

—*South Milwaukee Co. v. Murphy*, 112 W., 614, 622.

SUBSTITUTION.

See ATTORNEY AND CLIENT.

SUCCESSION TAX.

See INHERITANCE TAXES.

SUNDAY.

See also UNLAWFUL CONTRACTS.

Burden of exception, 10.

Car-load of potatoes, 34.

Delivery, payment, Monday, 35.

Oral; void two reasons, 34.

Contracts mature; next day, 4.

Deed, checks, recording, 32.

Defense not set up, 28, 33.

Delivered after, valid, 37, 42.

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| Estoppel no aid, 40. | Ratification, etc.—continued |
| Executed on week day, 14. | Dated following day, 38. |
| Last day Sunday; years, 22. | Deed, check, recording, 32. |
| Days under sec. 4971, 23. | New contract made, 30, 35. |
| Performed preceding day, 22. | Recognition acts, 29, 35. |
| Lease; absolutely void, 15. | Release of damages, 18. |
| Incapable of ratification, 15. | Remedy: neither party, 20. |
| Not competent to prove, 16. | Not enforce or set aside, 19. |
| Materials furnished, 21. | Services quantum meruit, 13, 31. |
| Account stated, 21. | Amend to conform, 13. |
| Unless subsequent promise, 21. | Ground not set up, 28. |
| Money loaned; business, 5, 9, 11, 24. | New contract shown, 31. |
| Money paid and retained, 17. | Settlement, old account, 25. |
| Not enforced in law, 7, 8. | Kentucky law same, 26. |
| Not void for all purposes, 6. | Signing of a petition, 12. |
| Partial payments, effect, 39. | Signed, delivered after, 37. |
| Pleadings, secular day, 41. | Mailed after, valid, 42. |
| Might not be conclusive, 41. | Subscription; build church, 27. |
| Publication Sunday, 36. | Subsequent promise to pay, 2. |
| Ratification, incapable of, 15, 29, 34, 38, | Tort; defective bridge, 1. |
| 40. | Navigating on canal, 3. |

1. The fact of driving cattle across a defective bridge on Sunday in violation of law, will not prevent recovery in “an action of tort, founded not on the contract, but on the tort or wrong subsequently committed by the defendant.” Cases fully discussed.

—*Sutton v. Wauwatosa*, 29 W. 21, 27.

2. “Where a contract, otherwise valid, is void by reason of having been made on Sunday, as where property is sold and delivered on that day on credit, a subsequent promise to pay for the goods, made on any other day than Sunday, is valid, and an action can be maintained on such new promise”. See also CONSIDERATION.

—*Melchoir v. McCarty*, 31 W. 252, 256.

3. In a tort action, “the same state of facts which would entitle the plaintiff to recover, had the injury happened on any day other than Sunday, will entitle him to recover in this action, notwithstanding the injury was received on Sunday, and when he was unlawfully navigating the canal with his boats”.

—*McArthur v. Green Bay & M. C. Co.*, 34 W. 139, 150.

4. Contracts maturing on Sunday are applied to the succeeding day. See HOLIDAYS.

—*Siegbert v. Stiles*, 39 W. 533, 535.

5. After a review of many cases, it is said: “The decisions of this court are clearly in harmony with the weight of authority upon the point here involved.”

6. “In *Moore v. Kendall*, 2 Pin. 99, the court said: ‘Admitting the sale of the goods to have been made on Sunday, it by no means follows that it was void for all purposes’”.

7. "Following that decision, this court, in *Hill v. Sherwood*, 3 W. 343, held that 'a contract or agreement made on Sunday will not be enforced in a court of law'. *Melchoir v. McCarty*, 31 W. supra, is to the same effect, and there too there was a subsequent promise".

8. In this case "there was no subsequent express promise, written or oral", and "without questioning *Melchoir v. McCarty*, we desire simply to hold:

9. (1) The loaning of money on Sunday is 'business', within the meaning of the statute, and presumptively illegal.

10. (2) Any party desiring to bring himself within the exception of the statute has the burden of doing so.

11. (3) The mere fact that a person borrowing money on Sunday retains it and converts it to his own use, does not raise an implied promise binding in law, and upon which an action can be maintained".

—*Troewart, Admr. v. Decker*, 51 W. 46, 52.

12. The signing of a petition to issue bonds in aid of a railroad, is held to be "business" within the meaning of the Sunday statute, as to avoid such petition where the number of petitioners is insufficient without such Sunday signatures.

—*DeForth v. Wis. & M. R. Co.*, 52 W. 320.

13. Where a contract for services was void, because found by the jury to have been made on Sunday, "on proper pleadings the plaintiff would be entitled to recover for his services quantum meruit," and the court properly allowed such amendment "after verdict to agree with the proofs".

—*Thomas v. Hatch*, 53 W. 296, 297.

14. An agreement for damages for a trespass, made on Sunday and "fully performed and executed on a week day, was valid. (Cases)".

—*Taylor v. Young*, 61 W. 314, 324.

15. A lease was dated Saturday, possession was to be given by its terms, Monday, and in fact was executed and possession delivered on the intervening Sunday. Held, the "lease was absolutely void under the decisions of this court, and was incapable of ratification."

16. Whatever tenancy and subsequent payment of rent there was, was governed by such subsequent proceedings only. The written instrument "was not competent to prove the contract", between the parties.

—*Vinz v. Beatty*, 61 W. 645, 648.

17. "It is settled that money paid out on Sunday, and retained, discharges the debt. *Johnson v. Willis*, 7 Gray, 164."

—*Shields v. Klopff*, 70 W. 69, 73.

18. An "agreement of release of damages", from a railway company, executed and delivered on Sunday, is held void following *De Forth v. Wis. & M. Ry. Co.*, 52 W., supra.

—*Smith v. C. M. & St. P. Ry. Co.*, 83 W. 271, 273.

19. "The court will neither enforce nor set aside a contract which is illegal, and not fraudulent, from being made on Sunday. (Many cases).

20. The full statement of the principle is that when both parties enter into an illegal contract, without fraud on the part of either, the courts will leave the contract as they find it, without a remedy to either party." Dismissal upheld. —*Cohn v. Heimbauch*, 86 W., 176, 180.

21. Recovery cannot be had for materials furnished on Sunday, but "a recovery might have been had if there had been a subsequent promise on a secular day to pay for the materials, or if there had been an account stated between the parties (*Melchoir v. McCarty*, W., *supra*)", but not with an account merely "rendered for it".

22. "By the great weight of authority, where the time for doing an act is one or more years, and the last day falls on Sunday, it cannot be lawfully performed on the next day. In such case the act should be performed on the preceding day. (Many citations.)

23. The case is not within the statute (sec. 4971), which applies only to cases where the time in the statute 'is expressed in days', and is not controlled by *Buckstaff v. Hanville*, 14 W. 77". So held as to a labor lien. —*Williams v. Lane*, 87 W., 152, 158.

24. "Loaning money and taking a note therefor is business within the meaning of the statute. (Sec. 4595.) *Troewert v. Decker*, 51 W., *supra*.

25. By the same reasoning the settlement of an old account for merchandise sold, and the taking of a note therefor, is business".

26. Such business under a similar Kentucky law, on Sunday, is held invalid there, and therefore here. See also FOREIGN LAWS.

—*Howe v. Ballard*, 113 W., 375, 378.

27. "A subscription" to build a church, made on Sunday, is held "to come within the exceptions of the statute", sec. 4595, and is valid.

—*Hodges v. Natty*, 113 W., 567, 573.

28. Where the proof showed the contract made on Sunday, no recovery could be had though such ground was not set up in the answer. See also QUANTUM MERUIT.

—*Pearson v. Kelly*, 122 W. 660, 663.

29. A contract made on Sunday, notwithstanding "acts of subsequent recognition," is "absolutely void, and hence incapable of ratification.

30. A new contract might be made between the parties, either expressly or by implication, from their dealings; but this would be an independent contract, and not a ratification of that which was void."

31. On such "subsequent dealings", a party may "prove either that a new contract was made", or "show the reasonable value of" labor and material furnished in such dealings.

—*Sherry v. Madler*, 123 W. 621, 624.

32. Where the transaction, including delivery of the deed and of a check therefor, occurred on Sunday,—the fact of subsequent payment on the check and subsequent “acknowledgement, the recording, and the transmission of the deed”, “were mere incidents to the transaction”, and the contract being void was “not susceptible of ratification”. (Many cases.)

33. “The fact that the defendant in his answer did not assert the invalidity of the contract upon the grounds” that it was made on Sunday, “does not preclude him from insisting that the agreement cannot be enforced.” See also CHECKS. —*Jacobson v. Bentzler*, 127 W. 566, 568.

34. While an oral contract for a car-load of potatoes at a given price, made on Sunday, is void and incapable of ratification, and is also void under the statute of frauds, (cases, *supra*) yet,

35. A delivery and payment therefor made on Monday following, and a warranty, “was tantamount to a sale on that day” and “to an agreement upon the price to be paid, and the conclusion therefore follows that the transaction on Monday constituted a complete contract of sale and delivery”. —*King v. Graef*, 136 W. 548, 551.

36. Citing *Williams v. Lane*, 87 W. and other cases, *supra*, it is held that, in an action “on quantum meruit to recover” for advertising in Sunday issues of a newspaper, “no recovery could be had therefor”. Sec. 4595.

—*Sentinel Co. v. A. D. Meiselbach M. W. Co.*, 144 W. 224, 229.

37. “A contract signed on Sunday but not delivered till a secular day is valid. (Cases)”. —*O'Day v. Meyers*, 147 W. 549, 556.

38. A “contract having been made and delivered on Sunday”, and dated the following day, “was void and incapable of ratification. *King v. Graef*, 136 W. *supra*; (other cases)”.

39. “Partial payments made under a Sunday contract are not sufficient to import a new contract. (Many cases)”.

40. “The terms of a Sunday contract cannot be given life upon the principles of estoppel any more than upon the principles of ratification. (Many cases)”. —*Gist v. Johnson-Cary Co.*, 158 W. 188, 194.

41. Where “the complaint alleges and the answer admits that the contract was made on a secular day”, it “might not be conclusive if it appeared beyond doubt that the contract was fully completed on Sunday. (Case)”.

42. If “drawn and signed on Sunday”, and “delivered by mail on a secular day”, it “thus became a valid contract. *Gibbs & S. M. Co. v. Brucker*, 111 U. S. 597”. —*Zielica v. Worzalla*, 162 W. 603, 607.

SUPPLEMENTARY PROCEEDINGS.

In the action itself, 1.

Substitute; creditor's bill, 2.

1. "A supplementary proceeding is a proceeding in the action itself, and not a distinct and independent action or proceeding, like the former creditor's bill in equity". 15 How. Pr. R. 412.

2. "The very name supplementary proceeding implies that it is a proceeding in the same action, although it is to some extent, and in many cases, perhaps, fully, a substitute for a creditor's bill under the old practice."
—*Barker v. Dayton*, 28 W. 367, 380.

SUPPORT AND MAINTENANCE.

See BOND FOR MAINTENANCE. WIDOW.

SUPPORT OF INSANE, POOR, ETC.

See PAUPERS.

SURETIES.

See also BONDS. CONTRIBUTION. SUBROGATION.

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"Appointment of guardian", 53.

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Sureties and ward; not liable, 69.

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Valid oral promise, 61.

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Four-year statute; ward, 85.

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- Runs from each installment, 44.
- Six years from payment, 45.

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- Separate estate; applicable, 7.
- Husband; third person, 7.

Not binding at law, 5.

- Likewise in equity, 5, 6.

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- Not concluded or relieved, 87.

Obligation of:

- Nothing by inference, 22.
- Not materially changed, 23.

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- Fraud upon his sureties, 33.
- Judgment against principal, 21.
- Evidence against sureties, 21.

Open judgment, when, 65.

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- Without demand or notice, 38.

Probate bonds:

- Concluded by proper decree, 52, 55.
- Though not parties, 56.

Contribution at law; equity, 50.

- Permission unnecessary, 50.

Contribution; co-surety, 11, 36.

- Accounting order conclusive, 11.

Co-surety, subrogation rights, 37.

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Discharge powers statutory, 62.

Failure, object to inventory, 48.

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Two sureties, expected others, 51.

Promissory notes:

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- Credit extended principal, 10.
- Creditor; act injurious, 3, 16.
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Promissory notes—continued

Discharged—continued

- Extension; usurious agreement, 26.
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No final distribution, 84.

Without having paid, 54.

May sue in equity, 54.

1. A singular note signed by A., and by B. "surety", is held to be joint and several, and both liable as principals.

—*Dart v. Sherwood*, 7 W. 523.

2. A surety "might at any time become a creditor of" his principal's estate by paying the note. "It was not necessary that he should be sued *, in order to render him a creditor".

3. "If a creditor does any act injurious to the surety, or inconsistent with his rights, or omits to do any act when requested by the surety, which his duty enjoined him to do, and the omission proves injurious to the surety, in all such cases the surety will be discharged".

—*Gardner v. Van Norstrand*, 13 W. 543, 544.

4. A surety who signs as principal is held "absolved from responsibility as surety" where the time of payment on a note was extended; parol evidence is admissible "to show his real relations to the other contracting parties".
—*Riley v. Gregg*, 16 W. 666, 671.

5. "The obligation of a surety is *stricti juris*; and if his contract is not binding at law, there is no liability in equity founded on the consideration between the principal parties".

6. "A court of equity will not enforce a liability upon a surety, where he is not held at law".

7. "The principle governing the rights of sureties in general, is equally applicable to the case of a married woman having a separate estate, who has entered into a contract as surety for her husband or some third person. *Yale v. Dederer*, 18 N. Y. 276."

—*Leffingwell v. Freyer*, 21 W. 392, 394.

8. "A promise to indemnify a surety for becoming responsible for the principal, which is made by a third party at whose request and upon whose credit the surety enters into his engagement, is not within the statute" of frauds.
—*Vogel v. Melms*, 31 W. 306, 311.

9. A surety on an administrator's bond is not entitled to notice before permission to sue is granted: See BONDS.

—*Elwell, Judge, v. Prescott*, 38 W. 274, 278.

10. Where credit is extended by the principal "without the consent of the sureties" for the payment of "any sum which had become due", "the sureties were thereby discharged from liability on the bond for such sum".
—*Weed & M. Co. v. Oberreich*, 38 W. 325, 328.

11. In an action by a surety against a co-surety for contribution, the order of the probate court on an accounting is conclusive on the sureties. See BONDS.

—*Shepard v. Pebbles*, 38 W. 373, 378.

12. "The contract of a surety is essentially different from the contract of a guarantor. (Cases). The contract of a surety is collateral to the contract of his principal, and binds the surety for the contract of the principal.

13. It is not merely a contract to perform upon failure of the principal, but binds the surety equally with the principal for the performance of the contract of the principal.

14. The surety assumes for himself the liability of his principal".

15. "And, as Lord Eldon remarks in *Wright v. Simpson*, 6 Vesey, jr. 714, as between the creditor and the surety, the creditor assumes no obligation of active diligence against his principal; and it is the business of the surety, not of the creditor, to see that the principal performs".

16. And it is held that *Gardner v. Van Norstrand*, 13 W. supra, "does

not attempt to define the rights of the surety, or the duty of the creditor”.

17. While the foregoing states the legal contract, yet, “because the surety has no interest in the contract of his principal, and because the creditor or the principal debtor may prejudice the surety by delay, equity will sometimes interfere in behalf of the surety, either against his principal or against his creditor.

18. In such a case the surety may proceed in a court of equity against the principal, to compel him to pay the debt, or against the creditor to compel him to proceed at law to collect his debt, from the principal. (Cases)”.

19. “This well established equitable jurisdiction appears to preclude the legal right claimed in this case for the surety: the right to notify the creditor to proceed, and, upon failure to do so, to stand released at law”.

—*Harris v. Newell*, 42 W. 687, 690.

20. “A demand upon sureties is not requisite. *Elwell, J., v. Prescott*, 38 W. supra”.

—*Vincent v. Starks*, 45 W. 458, 463.

21. “Whilst we are compelled to admit that the authorities are conflicting upon the question under consideration, we are clearly of the opinion that the weight of authority is in favor of holding the judgment against the principal in an official bond (of a deputy sheriff) prima facie evidence against the sureties,” in an action against them thereafter.

—*Stephens v. Shafer*, 48 W. 54, 65.

22. “The obligation of a surety of a bond is strictissimi juris, and nothing can be taken against him by inference or intendment’. *Smith v. Lockwood*, 34 W. 72.”

23. “In *Sage v. Strong*, 40 W. 575, Mr. Justice Lyon, in his opinion, says: ‘The rule is elementary, and of almost universal application, that a surety for the performance of a contract or obligation is discharged if such contract or obligation be materially changed without his consent’”.

—*Nichols v. Palmer*, 48 W. 110, 111.

24. Notwithstanding “the well settled rule of evidence, that a written contract cannot be contradicted or varied by parol testimony”, still “where the creditor knows, when the note is executed, that a party signs as surety, then, as we understand, the great weight of authority admits parol testimony to show that fact. It was so decided by this court in *Riley v. Gregg*, 16 W. supra, where the question was directly presented”, “and we are all now fully satisfied that the latter case lays down the true rule upon the subject”.

25. “It is not necessary that it should appear from the contract itself that one signed as surety and not as principal. Suretyship, being a collateral fact, may be shown by evidence aliunde. *Carpenter v. King*, 9 Met. 511”.

26. Where the time of payment was several times extended without the knowledge of the surety by "an executory usurious agreement" which, "under the decisions of this court, does not constitute a 'basis or consideration upon or out of which any binding promise for that purpose could arise or be created (cases)', such agreements were void, did not bind the plaintiff not "to enforce collection of the note by action", and "under such circumstances the surety was not released".

—*Irvine v. Adams*, 48 W. 468, 474.

27. "An agreement, which was neither executed nor based upon any new consideration", to extend the payment of notes, does not release the surety.

—*Jaffray v. Crane*, 50 W. 349, 351.

28. A "usurious bonus" for extension taken by the holder of a note, though illegal, is "a sufficient consideration to bind" him, "so that he could not maintain a suit on the note until after the twenty days extension had expired," "the defense of usury is so far personal to the borrower and those in privity with him".

29. "We therefore hold, (1) that an agreement for an extension of the time of payment of a note past due for twenty or thirty days, is for a definite period of at least twenty days; (2),

30. That an agreement by the holder of a note past due, with the maker, for an extension of the time of payment for a definite period, in consideration of an usurious premium paid in advance, without the knowledge or acquiescence of the endorers, discharges the latter."

—*Hamilton v. Prouty*, 50 W. 592, 594.

31. "Where the principal maker of a note past due, without the knowledge or consent of his sureties to the same, borrows money upon a new note with other sureties, for the purpose of taking up the first note", which was to "be transferred to such new sureties as collateral security and the money so borrowed is" so used, "it amounts to a payment of the" first note, "and the sureties thereon are thereby discharged".

32. "The principal maker, by so transferring the first note, after its payment, to the new sureties in consideration of their becoming such, is thereby estopped from alleging that such first note was in fact paid".

—*Greening v. Patten*, 51 W. 146, 151.

33. The obligee "is not interested in the question whether D. (principal) committed a fraud on his sureties in obtaining their signatures to the bond upon condition that he would procure" another "to sign it also".

—*School Dist. v. Dreutzer*, 51 W. 153, 155.

34. A surety on an appeal bond cannot impeach for fraud the judgment appealed from, though he may so impeach an affirmance of the judgment by fraud or collusion.

—*Krall v. Libby*, 53 W. 292.

35. Liability under additional guardian's bond, insolvency of guardian, interest where the damages exceed the penalty, and otherwise. See BONDS.
—*Clark Gdn. v. Wilkinson, Extr.*, 59 W. 543.

36. As to claims for contribution by co-sureties on an executor's bond, against a deceased surety. See CONTINGENT CLAIM.

—*Ernst v. Nau, Extr.*, 63 W. 134, 139.

37. A co-surety who has paid the judgment against sureties, has the rights of the creditor, by subrogation. See SUBROGATION.

—*Mason, Admr. v. Pierron*, 63 W. 239, 245.

38. "A surety may, without compulsion, pay the debt when due, and immediately sue his co-surety for contribution without demand or notice. (Citation). -Indeed, the rule is elementary".

—*Mason, Admr. v. Pierron*, 69 W. 585, 590.

39. "The general rule undoubtedly is that the release of the principal debtor, without the consent of the surety, releases the surety.

40. But if the surety is fully indemnified against loss by reason of having become such, a release of the principal without payment of the debt does not release the surety.

41. This is the rule laid down in *Fay v. Tower*, 58 W. 286, as applied to a case in which an unauthorized extension of credit had been given to the principal."

—*Jones v. Ward*, 71 W. 152, 154.

42. Sureties may file their obligations against a deceased principal debtor's estate, as contingent claims, within one year after it becomes absolute by payment. See CONTINGENT CLAIM.

—*Webster v. Est. of Lawson*, 73 W. 561, 571.

43. In an action at law "by a paying surety against a co-surety for contribution", it is held "that the plaintiff's right of action upon the liability of the co-surety is limited to the six years from the time he pays the creditor more than his proportion of the debt. (Citations).

44. Where a note payable by installments is paid by a surety, the statute begins to run against him from the time he pays each installment. *Bullock v. Campbell*, 9 Gill, 182.

45. It seems to be clearly established that, where a surety has paid more than his share of the debt, every such payment gives a right of action for contribution, and, as a matter of course, the six years statute (subd. 3, sec. 4222) begins to run upon it".

46. While a court of equity might "take jurisdiction to enforce contribution," and the ten years statute, (subd. 4, sec. 4221) might then apply, the question is not determined.

—*Bushnell v. Bushnell*, 77 W., 435, 437.

47. "The circuit court properly held that the judgment of the county court, charging P. as administrator de bonis non", on the usual notice for final settlement, "was in this action (on the bond) conclusive as against his sureties. *Heard v. Lodge*, 20 Pick. 58. This is the necessary result of the conditions of the bond." See also *GUARDIAN AND WARD*.

—*Holden v. Curry*, 85 W., 504, 512.

48. The sureties are not held released because of failure to object to the inventory by interested parties, who had knowledge of exclusion of property therefrom. See *ESTOPPEL*.

—*Murray v. Kluck*, 87 W., 566, 571.

49. Where a surety on an executor's bond paid the liability in full after demand made and suit threatened, it is held not a voluntary payment.

50. An action by such surety against a co-surety for "contribution may be enforced in a suit at law as well as in equity", and such "is not an action on the bond," and "there was no necessity for obtaining any permission from the county court before commencing the action," sees. 4014, 4016, not applying.

—*Hardell v. Carroll*, 90 W., 350, 351.

51. Two sureties who expected others to sign, who did not, are held liable on their administrator's bond. See *BONDS*.

—*Belden v. Hurlbut*, 94 W., 562, 567.

52. It is alleged "that the final account of the guardian has been settled, the amount that he should pay over determined, an order entered for its payment, and neglect or refusal of the guardian to comply with such order. That is conclusive on the sureties, and sufficient to authorize suit upon the bond, as held, in effect, in *Holden v. Curry*, 85 W., supra."

53. Alleging "appointment of the guardian," is held to include qualification and due approval of the bond as a condition precedent.

—*Schoenleber v. Burkhardt*, 94 W., 575, 577.

54. "It seems to be well settled that a surety against whom a judgment has been rendered may, without making payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety. (Many citations)". So held.

—*Dobie v. Fidelity & C. Co.*, 95 W., 540, 541.

55. "This court has definitely adopted the rule that the sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of the proper court, rendered upon an accounting by their principal, as to the amount of the principal's liability;

56. And this is the rule even though the sureties be not parties to the accounting. (Cases, supra.) The same rule prevails in many courts.

(Cases,—Mass., Cal., Ark., Ala., Ill.); *Stovall v. Banks*, 10 Wall., 583.” So held as to a testamentary trustee bond.

57. While sec. 4014, subd. 4, and sec. 4015, require prosecution by the county judge, it is held that the subsequently appointed trustee as “the real party in interest,” is entitled to recover in his action against the defaulting predecessor and his sureties.

—*Meyer v. Barth*, 97 W., 352, 355.

58. In all cases, though the “trustee has died, or has absconded,” “it would seem, the breach of the bond must be fixed by the judgment, decree, or finding of the court having jurisdiction, before an action will lie against the sureties on the bond. (Cases).” (Modified as to sec. 4014. See *Wallber v. Wilmanns*, 116 W. post).

59. Where an insolvent trustee deposited the trust funds in an insolvent bank, and absconded, there being no proceedings in the court fixing liability, “we must hold that there was no default in the bond which would have authorized an action thereon in favor of the estate and against the sureties at the time the defendants (sureties) levied their attachment” against the principal.

60. “It is well settled that no action could have been maintained by the sureties upon” the implied promise of the principal to indemnify them, even had the latter “been adjudged in default, without first making payment; and then only to recover back the amount so paid, with interest.” (Many cases);

61. Nor upon an express valid oral promise to indemnify the sureties, “without first making payment, except where the principal has broken his promise to do or refrain from doing some particular act or thing, or to save the sureties from some particular charge or liability”. So held, and that in this case such promise was not then broken.

—*Barth v. Graf*, 101 W. 27, 37.

62. “County courts, in the absence of express statute (as now exists in sec. 4281b), have no power, either by taking a new bond or otherwise, to discharge sureties from liability for either past or prospective misconduct”.

—*Richter v. Leiby*, 101 W. 434, 443.

63. Where of two sureties to a note of a corporation, the first merely a stockholder and the second an officer also, the latter extended the note as such officer, “in consideration of the prepayment of interest”, the first was discharged, but the second was not though he acted merely as officer in the extension, and giving no notice as to no consent “in his character as surety, we think that well-known rules of estoppel must be held to prevent him from asserting that he is discharged as surety because of lack of consent”.

64. The release of the first “must be given the same effect as a voluntary release”, and as sec. 4204 applies “to joint sureties as well as to

principal debtors", such release "will operate to relieve his co-surety from liability for one-half of the debt."

—*Hallock v. Yankey*, 102 W. 41, 43.

65. Following the principle of *Meyer v. Barth*, 97 W. supra, it is held that a surety "would have no right to open the judgment", against his principal "where the principal would not have such right".

—*Ingersoll v. Seatoft*, 102 W. 476, 479.

66. Sureties to a penalty bond are not discharged "by a discharge of the principal by operation of law." See BONDS.

—*Whereatt v. Ellis*, 103 W., 348, 352.

67. "If sureties are bound for a common principal, to insure the performance of the same duty or obligation, the fact that they may be bound by different instruments given at different times is immaterial; the right to contribution exists." *Thompson v. Dekum*, 32 Ore., 506. So held, as to sureties on an executor's bond and a subsequent bond, before sec. 4281b, ch. 335, L. 1897, allowing a county court to discharge the original sureties. *Richter v. Leiby's Est.*, 101 W., supra.

—*Rudolf v. Malone*, 104 W., 470, 473.

68. Where a "defaulting trustee was properly cited to account", and he did account, the indebtedness established, the "order for its payment entered", and a showing of service on him, and "that he had neglected to comply therewith,"—"this was conclusive upon the sureties, and sufficient to authorize suit upon bond (*Holden v. Curry*, 85 W., supra; *Schoenleber v. Burkhardt*, 94 W., supra)", and a sufficient "de-stavit was established" as a "demand and refusal to pay".

—*Richter v. Est. of Leiby*, 107 W., 404, 409.

69. Neither the sureties on the guardian's bond in an incompetent's sale of realty, nor the ward, are liable to the assignee of the purchaser who paid an existing mortgage on the realty,—such mortgage not having been mentioned or considered in the sale proceedings, the guardian having "made the usual guardian's deed" "without warranties", though he received the consideration "for a clear title" "and agreed to pay the mortgage and have it discharged, but failed to do so" and embezzled the money and died insolvent.

70. The sureties' liability was "limited to the stipulations of the bond", and failure to pay the mortgage "was not the breach of any duty", as "no court has at any time directed or authorized the guardian to pay off this mortgage".

—*Evison v. Hallock*, 108 W., 249, 251.

71. "A surety who has not paid the debt cannot bring a suit to have a fraudulent conveyance of property made by his principal set aside. (Cases)".

—*Ellis v. Southwestern L. Co.*, 108 W., 313, 315.

72. "The liability of a surety to contribute to one who has paid more than his share of the common debt is one that is now recognized and enforced both at law and in equity."

73. "It may be said to be the established law in this state, as well as others, that when one surety has paid the whole debt, he may compel contribution from such of his co-sureties as are solvent and within the state. (Many cases); *Hardell v. Carroll*, 90 W., supra."

74. And "reasonable attorney's fees, prudently incurred for the common benefit of the sureties," were held properly recovered. *Faurot v. Gates*, 86 W., 569.

75. In an action for contribution, "the insolvency of the principal need not be averred or approved." 1 *Brandt Surety. & G.* 290.

—*Boutin v. Etsell*, 110 W., 276, 278.

76. "It is not essential to the validity of a bond that the signatures of the parties thereto should be in their proper places",

77. But, "if the signature of a surety to a bond is placed as to fairly raise a question as to whether it was affixed with intent to execute the instrument, that question must be solved as one of fact upon evidence". *Richardson v. Boynton*, 12 Allen 138; (other citations).

—*Polacheck v. Moore*, 114 W. 261, 265.

78. "The statement in *Barth v. Graf*, 101 W. supra (par. 58), referred to, must be considered as modified as to all cases coming within the purview of sec. 4014;"

79. And it is held, that where, on an executor's accounting, "the amount that should go into the hands of the trustee had been established by the court, and a demand and refusal of the trustee to pay over shown", permission to commence an action on the executor's bond, against a deceased surety's legatee was properly granted",

80. And that a judgment against such legatee is not "void because a devastavit and default had not first been determined as against the executor".

81. "The order permitting the trustee to commence this action was one which might have been secured without notice, and was not open to collateral attack. *Roberts v. Weadock*, 98 W. 400 (See BONDS".)

82. Where a surety died and his estate was settled long before the account of the insolvent principal was filed and settled, the fact that "no claim was filed against the estate of deceased surety", did not bar an action against such surety's legatee. (Cases)

83. "The executor's liability is held to continue until his account is settled and the estate fully administered. (Citations)".

84. The fact that the executor was himself a beneficiary under the will, does not invalidate a judgment in "an action at law on the bond" for the full amount coming to the trustee, there having been no final distribution of the estate. See also TRUSTEES.

—*Wallber v. Wilmanns*, 116 W. 246, 250.

85. Action against sureties under the four-year limitation of sec. 3968, accrues at the ward's majority, independent of the guardian's accounting. See GUARDIAN AND WARD.

—*Wescott v. Upham*, 127 W. 590, 593.

86. On an appeal bond, it is held that "the sureties are only held according to the language of their bond", and were held not liable where the judgment could not "be construed as an affirmance even in part".

—*Lehman v. Amsterdam C. Co.*, 151 W., 207, 209.

87. A surety not being made a party to a suit on a breach, is held not concluded nor relieved by the judgment. See LANDLORD AND TENANT.

—*Mohawk Co. v. Bankers Surety Co.*, 162 W. 272, 276.

88. A surety is held liable to a third person on a bond made for the latter's benefit. See CONTRACTS.

—*Concrete S. Co. v. Ill. Surety Co.*, 163 W. 41, 43.

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1. The surviving partner "is entitled to the assets of the firm, for the purpose of paying its debts", and "can, as such survivor, maintain actions at law for the purpose of collecting debts due the firm, to the exclusion of the administrator of the deceased partner", and may maintain an action against such administrator for the property.

—*Shields v. Fuller*, 4 W. 102, 104.

2. "An agreement for a partnership to consist in dealings in real estate, is within the statute of frauds, and void unless in writing".

—*Bird v. Morrison*, 12 W. 138, 162.

3. The partner of an executor is not entitled to share in the latter's fees, though the executor intended to so allow him.

—*King v. Whiton*, 15 W. 684, 689.

4. "A surviving partner has the exclusive right to the possession of the assets of the firm, as against the representatives of the deceased partner, for the purpose of paying its debts and settling its affairs" and choses in action should be prosecuted in the name of the survivor and not joined with the executor or administrator.

5. "The surviving partner may transfer the title to a chose in action of the firm, as he could transfer any other partnership property", and the executor could so receive the title and sue as executor in that case.
—*Roy's v. Vilas*, 18 W. 169, 173.

6. "Each partner is * the agent of such (partnership) firm." See
PRINCIPAL AND AGENT.
—*Lawrence v. Vilas*, 20 W. 381, 388.

7. "It is a general rule, that a partner is not entitled to compensation for his personal services in the business of the partnership".
—*Drew v. Ferson*, 22 W. 651, 655.

8. "Notice or knowledge of any one partner is notice or knowledge affecting all the rest, or rather the partnership as a whole".
—*Hubbard v. Galusha*, 23 W. 398, 399.

9. It is held in New York, per Selden, J., in *Voorhis v. Child's Extr.*, 17 N. Y. 354, as to creditors of a partnership, "either that the remedy against the survivors must first be exhausted, or that it must appear that they were insolvent and unable to pay," before the remedy could be pursued against the personal representatives of a deceased partner.

10. In an action on a note, pending against partners, one of them died, and his administrators "saw fit to waive the equitable forum, asked and obtained leave to litigate the liability of the estate in a court of law" in this action. "The order making the administrators parties was granted on their application; they filed an answer, and contested the liability of the estate, and must abide by the result".

11. "But while we hold this, we are disposed to adopt the New York rule, that, in order to recover against the administrators, the plaintiff should allege and show that the surviving partner is insolvent, the same as he would be bound to do were the proceeding in equity." See also
JOINT OBLIGATIONS.
—*Sherman v. Kreul*, 42 W. 33, 39.

12. Where there had been no accounting of partnership affairs "claims growing out of the partnership" "were not proper subjects of set-off" in an action against the surviving partner on a personal note.
—*Tomlinson v. Nelson*, 49 W. 679, 683.

13. "A community of interest in the profits and losses of the business", "is one of the usual tests of a partnership".
—*Nicholaus v. Thielges*, 50 W. 491, 492.

14. "The rule would seem to be elementary", as "held by Lord Chief Justice Holt, in *Hyat v. Hare*, 1 Comb. 383, that 'if there be two partners in trade, and one of them buy goods for them both, and the other die, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead and he survived'."

15. And it is held that an action for services in part "to the defendant's firm, and a portion to him personally after the death of his" partner, may be brought as one cause of action.

—*Butler v. Kirby*, 53 W. 188, 191.

16. "If there had been no provision (in the will) for continuing the business, it would have had to be closed up on the death of D. (testator). Its continuance, therefore, was a favor, and could not have been claimed as a right by the surviving partner".

—*Dean, Extr. v. Dean*, 54 W. 23, 35.

17. The surviving partner acting as administrator of a deceased partner, while the co-partnership "debts remained unpaid", he held the partnership "property as surviving partner, not as administrator".

18. The rule as stated "by Chancellor Walworth in *Buchan v. Sumner*, 2 Barb. Ch. 165" is: 'As between personal representatives and the heirs at law of a deceased partner, his share of the surplus of the real estate of the co-partnership, which remains after paying the debts of the co-partnership and adjusting all the equitable claims of the different members of the firm as between themselves, is considered and treated as real estate'. Page 201. *Bird v. Morrison*, 12 W. 138, 170; *Pierce v. Covert*, 39 W. 252; etc. —*Martin v. Morris*, 62 W. 418, 427.

19. "It is very clear to our minds that the claim of the plaintiffs against the estate of D., for contribution for the payment of the debts of said partnership, was a contingent claim of the surviving partners against said estate,

20. And that such claim did not become absolute in favor of said survivors until they had settled and paid all the debts of said firm, and applied all the assets of said firm to the payment thereof;

21. And if such contingent claim was one which might have been presented to the county court for adjustment (a question which we do not decide), still the plaintiffs were not bound under the law to present the same until it became absolute and ascertained by the settlement and payment of the debts and liabilities of said firm and the application of the assets of the firm to that purpose.

22. The law is very plain that the surviving partners must wind up the affairs of the partnership. (Cases)."

23. "Until the affairs of the firm are wound up and all the debts paid, 'neither partner has any remedy against or liability to the other for

payment from one to the other of what may have been advanced or received' in said business. (Cases)

24. The representative of a deceased partner may, however, upon a proper showing apply to a court of equity for the appointment of a receiver and the settlement of the partnership business in that way. (Citation).

25. After the affairs of the partnership are closed up and the debts paid," "if the firm is insolvent, and some of the partners have paid more than their proportionate share towards the discharge of such debts, they may maintain an action for contribution against those members of the firm who have not paid their just proportion of such debts. (Citation)".

26. "It is very clear that the surviving partners could not maintain any action or proceeding" against a deceased partner until the firm affairs had been settled, and "their claim against the estate of the deceased was a purely contingent claim, not clearly ascertainable until the business of the firm was wound up and settled.

27. The surviving partners hold the property of the firm in the character of trustees, for the settlement and payment of the debts of the firm, and for the purpose of distributing the surplus, if there be any, to the several members of the firm, and to the representative of the deceased member. (Citation)."

28. "In any view of the case, the claim of the surviving partners against the estate of the deceased partner for contribution is a contingent claim within the meaning of the statute, and became absolute only when the business of the firm was finally settled, the assets converted, and the debts paid. This, we think, was fairly settled by this court in the case of *Ernst v. Nau*, 63 W., 134." See also CONTINGENT CLAIM. —*Logan v. Dixon*, 73 W. 533, 536.

29. " 'It is clear that the petition (for lien) might be made and filed with either of the partners in the name of the firm, in the absence of the other, and without his knowledge. Each partner is the agent of the firm for the transaction of all matters pertaining to its ordinary business and affairs.' *White v. Dumpke*, 45 W. 454.

30. In the petition the pronoun 'him' is used for 'them', but this is a mere clerical mistake, and could mislead no one", "and should be disregarded". —*Garland v. Hickey*, 75 W. 178, 181.

31. "A dormant partner is one who takes no active part in the business of the firm, and whose name does not appear in the title of the partnership, and who is unknown to those who give credit to the firm. 17 Am. & Eng. Ency. of Law, 928". He is not a necessary party "in an action to recover partnership demands."

32. The ostensible partners are "trustees and agents of such dormant partner", and it is indicated that they are trustees of an express trust in harmony with sec. 2607 as to such trusts.

—*Platt v. Iron Exch. Bank*, 83 W., 358, 360.

33. As to husband and wife as partners, or wife with a stranger.
See HUSBAND AND WIFE.

—*Fuller & Fuller Co. v. McHenry*, 83 W., 573, 578.

34. "As accurate and satisfactory as any we have seen", and which "definition seems to be preferred" by the Am. & Eng. Ency. of Law, 828, "is as follows: 'A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business, as principals, for the purpose of joint profit.' 1 Bates Partn. 1".

—*Spaulding v. Stubbings*, 86 W., 255, 262.

35. "A partner has no claim against his co-partner individually, on account of partnership transactions. If a partner is in arrears in his partnership accounts, he is the debtor of the firm, not of his co-partner. *Sprout v. Crowley*, 30 W. 187.

36. But if he owes an individual debt to his co-partner (as in the case just cited) the firm has nothing to do with it, and a claim therefor by the creditor partner cannot have any place in an action to dissolve the partnership and settle its affairs." So held here.

—*Smith v. Diamond*, 86 W., 359, 360.

37. "The doctrine of 'equitable conversion,' by which partnership lands remain personal property until the indebtedness is paid and the equities between the partners are adjusted, has grown into an elementary principle of law in this state. (Many cases)." *Orton, J.*

38. "The right of a surviving partner to dispose of the partnership real estate, so far as necessary to pay partnership debts and close its affairs, is undoubted." *Winslow, J.*

—*Weld v. Johnson Mfg. Co.*, 86 W., 552, 561-2.

39. "Since partnership contracts are to be considered as joint merely, and not joint and several (17 Am. & Eng. Ency. of Law, 1062), a judgment against one partner for a firm debt releases the other partners, so that no new action can be maintained against them upon it. *Bowen v. Hastings*, 47 W., 232; *Lauer v. Bandow*, 48 W., 638."

—*Keith Bros. & Co. v. Stiles*, 92 W., 15, 17.

40. Where the estate of a deceased partner has been settled in county court and no firm debts were made claims therein or there paid,—in an action under secs. 3274 et al, by the surviving partner against the heirs for settlement of partnership transactions, and payment of claims arising therefrom, it is held, that a demurrer ore tenus should have been sustained;

41. That there was a misjoinder of a legal cause of action against the heirs, and an equitable one for a partnership accounting, "and requiring different parties";

42. Until a settlement of partnership affairs, "whatever is due from

each partner is due to the partnership, and whatever is due to a partner is due from the partnership." *Smith v. Diamond*, 86 W., supra. (Other cases).

43. So, until such settlement, it cannot be said whether there is any claim. "It was, indeed, little more than a possibility of a claim." "Even if it should be deemed that the plaintiff had a contingent claim against the estate, such claim remains contingent, and has not become absolute." —*Blakely v. Smock*, 96 W., 611, 613.

44. Where O. & S. by virtue of their agreements were "co-partners, not only as to creditors, but also as between themselves", "yet, as the business was conducted wholly in the name of O., S. was what is known in law as a 'secret' or 'dormant' partner. *Benjamin v. Covert*, 47 W. 382, and cases there cited.

45. As O. was the ostensible proprietor of the business, he was, as has been held by this court, a trustee of an express trust, within the meaning of the statute, to the extent that he might have sued upon a partnership demand of the firm without joining his dormant partner. Sec. 2607; *Platt v. Iron Exch. Bank*, 83 W. supra.

46. The death of O., the ostensible proprietor, "of itself dissolved the firm for all purposes. The reason is that a surviving partner is not to be bound by the acts of agents not of his own choosing, as the representatives of the deceased partner would be". This is applicable to a partnership, either for a fixed or an indefinite period. 2 Bates Part. 580.

47. Upon the death of O., then S., the "surviving partner, was undoubtedly entitled to the possession of the assets of the firm for the purpose of paying the debts and settling the partnership business. *Shields v. Fuller*, 4 W. supra; *Roys v. Vilas*, 18 W. supra.

48. But as such surviving partner he would have no right to mix the assets of the firm with his own and continue the business the same as though there had been no such dissolution. *Jennings' Admrs. v. Chandler*, 10 W. 21.

49. Where the heirs of the deceased partner O., continued the business for a time, and subsequently with administrators appointed, with the knowledge and acquiescence of the surviving partner, and the latter "did not take, nor assume to take, actual possession of any part of such assets", and the business became insolvent, "we must hold that after the death of O. the business was conducted by the administrators alone for the benefit of the estate".

50. The deceased's interest in the "property and business in question did not descend to his heirs, but became vested in his administrators, immediately upon their appointment; and such vesting related back to the time of such death." (Cases).

—*Stubbings v. O'Connor*, 102 W. 352, 360.

51. Where, from a partnership assets, material, as a basis for a lien, was furnished after the decease of a partner F., while "S. was

running the business as a surviving partner", he being also the administrator of the estate of F., "the title to the property was in him, and the debt for the material furnished was due to him, as absolutely and individually as if there had never been any partnership. (Many citations).

52. The only difference resulting from the fact of his being a surviving partner was that he owed a duty, after disposing of all assets and paying all debts, to account to the estate of his deceased partner for the proper share of the net proceeds.

53. But this gave, neither him as administrator nor to those beneficially interested in the estate, any interest whatever in either the stock of lumber or choses in action".

54. Therefore a "conveyance of this demand" to a new firm, by S., was effective, but such conveyance by him as administrator, was not "an assignment of this account", but "a transfer of a mere equity to a share in the net proceeds of all the assets of that business, and conveyed no interest in this particular chose of action. *Rommerdahl v. Jackson*, 102 W. 444". —*Shearer v. Browne*, 102 W. 585, 586.

55. A surviving partner, and also as administrator of the deceased partner, continued to conduct the partnership business for a term, then mentally and subsequently actually, sold the estate's share to a corporation of which he was the guiding spirit, the sale being practically to himself; the heirs of the deceased partner thereafter brought an action in equity against the administrator for mismanagement, and for a proportionate share of the profits, and of the interests of the corporate business; recovery was sustained, the decree being a "supersession of an accounting in county court", and a "complete settlement of their respective trusts in that court";

56. Although the "heirs or distributees, have no title to any property left by" the deceased partner, the legal title "being vested in the administrator" as "to any specific personal property" (cases),

57. "Nevertheless the equitable beneficial interest in all property of a solvent estate is in the legal distributees during the whole period of administration".

58. When the administrator, as here, "allies himself with the wrongdoer, and serves as an obstacle to, instead of a protector of, the rights of his cestuis que trustent, courts of equity" properly may act directly,

59. And, there being no other "legal right of the administrator" to enforce, "the circuit court, under its plenary jurisdiction to do all that the county court could, may disregard this question of mere temporary legal title, and pass the" property directly. (Cases).

60. The sale "as administrator and also as surviving partner", practically to himself, of the partnership property, "is valid or voidable at the choice of those for whom he was fiduciary, and that, too, without regard to any conscious purposes to wrong or defraud them. (Cases)."

61. And, "the beneficiary may in such case hold the fiduciary to account for all profits he has actually realized from either use or ultimate disposal of the trust property.

62. In addition, of course, he must respond for the full value of the property, if he has disabled himself from returning it."

63. And here, a high value on "the 'good will' of the old firm", was held properly included in the disposal of the partnership property. (Good will, fully discussed). —*Rowell v. Rowell*, 122 W. 1, 9.

64. Where a partner dies in 1886, leaving will, which was proved but no executor or administrator was appointed until 1903, when plaintiff, a son just attained majority, made application and was appointed administrator, and brought an action against a surviving partner H., and the executors of another subsequently deceased partner K., for an accounting of the partnership business which had been continued,—it is held:

65. The circuit court had jurisdiction, "for the reason that the county court, in the settlement of the K. estate, cannot bring before it, or render judgment against, the surviving partner H., whose presence is essential to the ascertainment and full adjudication of the rights of all parties. (Cases)."

66. "All rights in any of the personal property left by the deceased, including the right to recover his interest in that co-partnership, are now vested in that administrator, and must be sued for by him;"

67. "No cause of action can accrue until there is some person in existence who can bring it, and there is no person in existence to bring an action in favor of the estate of a deceased person, which arises after death, until an executor or administrator is appointed. (Cases)";

68. "Hence this cause of action did not accrue until the appointment of plaintiff as administrator in 1903", and the time of limitation, ten years under subd. 4, sec. 4221, not having doubled as provided in sec. 4251, the action is not barred;

69. Sec. 3844, as to filing claims in the K. estate, "cannot have any effect to prevent the partnership accounting, nor the reaching of property belonging to the partnership, whatever its effect on any money recovery against the K. estate". Order overruling demurrer, sustained. —*Stehn v. Hayssen*, 124 W. 583, 587.

70. "It is fundamental in partnership transactions that creditors have no other claim or lien than creditors generally have on the debtor's property.

71. A partnership has the same right of disposition of the partnership assets that individuals enjoy in the law. (Citation).

72. There is an equity between partners giving them the right to compel application of firm assets to the payment of its debts", and "this right" when "preserved by an outgoing partner" "will inure to the benefit of creditors".

73. The sale of his interest by an outgoing partner "operated as a dissolution of the partnership", and relinquishment of "his equities to have the firm assets applied in payment of the firm's debts".

—*Reddington v. Franey*, 124 W. 590, 592.

74. In an action for accounting in the circuit court of a large mercantile business, by the surviving partner, at the decease of the other partner, though "the personal element was extinguished" and "the advantage of the particular location passed likewise",

75. A finding for "good will" of about one-eighth of the value of the stock and book accounts, the two latter on the "basis of cash, as if the business were to be presently discontinued and the property turned into its money equivalent",—was sustained.

76. "All the property had to be considered, the merchandise, the book of accounts, and the good will, such as there was, which could pass with a transfer of the whole as practically one thing.

77. The plaintiff (survivor) was entitled to his share of the whole as an organized going business with its line of customers and connections with sellers as well as buyers."

—*Ott v. Boring*, 139 W. 403, 411.

78. "There can be no partnership as between the parties themselves unless a contract of partnership be shown, and" "it must include an agreement to share profits as profits, i. e. as common owners thereof. *Sullivan v. Sullivan*, 122 W., 326.

79. But it is not necessary that the partners should call themselves such.

80. If they engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share profits as such, there will be a partnership whatever they may call themselves.

81. Nor need any express contract, either written or oral, be shown. Like other contracts which the law does not require to be in writing,

82. A contract of partnership may be proven by circumstantial evidence,

83. That is, by showing acts and conduct of the parties from which the fact may be inferred that the parties have agreed to become partners and share profits as such. (Citations)".

—*Bartelt v. Smith*, 145 W., 31, 35.

84. "A verbal agreement (in partnership dealings) to deal in land, unexecuted, is void and cannot be enforced. (Cases).

85. But it is well settled that a verbal contract to deal in land may be rendered enforceable by performance. (Cases)".

—*Steuerwald v. Richter*, 158 W. 597, 601.

SURVIVORSHIP.

See also DESCENT AND DISTRIBUTION.

Death of two or more, 1.

From a common disaster, 1.

Absence of evidence, 2.

Death at same time, 2.

Question of evidence, 1.

Death of two, etc.—continued

Succession of causes, 3.

Burden on those claiming, 4.

Realty; and personality, 4, 5.

1. In *Pell v. Ball*, 1 Cheves Eq. 99, the “adjudication as well as the weight of the authorities and reason, is to the effect that where the death of two or more persons results from a common disaster the case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding of such survivorship;

2. But in the absence of any such evidence the question of such survivorship must necessarily be regarded as unascertainable, and hence, in such case, the rights of property must be determined as if death occurred to all at the same moment of time. (Many cases)”. .

3. In this case the circumstantial evidence shows that “the death of the several victims resulted from a succession of causes. The probable location of the several members of the household is established beyond controversy;”

4. And it is held that as to real estate vested in infant children. “those who claim any part of such real estate by descent from children (subd. 2, sec. 2270), under J. (the father), have the burden of proving that he survived the death of each and all of those children. *Newell v. Nichols*, 75 N. Y. 78; *Fuller v. Linzee*, 135 Mass., 468;”

5. And as to the personalty and “property owned by him in his own right”, by the father J., the burden “of proving that the widow and children, or some of them, survived J., rested upon those claiming under and through such widow and children. (N. Y. & Mass. cases, supra)”.
—*Will of Abram Ehle*, 73 W. 445, 459.

SUSPENSION OF POWER OF ALIENATION.

See PERPETUITIES.

TAXATION OF ESTATES.

See also INHERITANCE TAXES.

Income, annuities:

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Re-assessment, previous years, 8, 9.

Personalty—continued

- Administrator, in town, 8.
- Appointed before May 1, 14.
- Assessable against executors, 10.
- Back taxes, omitted, 9.
- Because tax roll, evidence, 11.
- Burden on executors, 12.

Personalty—continued

- City, not against estate, 8.
- If executors have personalty, 13.
- Realty: without the state, 19.
- Special admr. is administrator, 7.
- Trustees; one in state, two without, 22.
- Resident receives income; taxable, 22.

1. Where the decedent died April 29th, a resident of A., and a special administrator residing at O. in the same county, was appointed May 14th, under the statute (sec. 1033) providing "that all personal property shall be assessed in each year as of the first day of May in such year", and under section 1040, "that no change of location or sale thereof" after May 1st "shall affect the assessment made in such year", and under section 1044 which "makes personal property assessable to an administrator only when the same is in his charge or possession as such", it is held that the personalty of such decedent was not "assessable in that year in the city of O." against the administrator.

2. So held because the administrator was not in possession of the personalty May 1st, not having been then appointed;

3. The doctrine "that the title of the administrator to the property relates back to" "the date of the death of his intestate", is not "sufficiently elastic to authorize us to hold, not only that the administrator was on the first day of May, 1885, the legal owner by relation of the demands against the O. banks evidenced by their certificates of deposit, but that he was also, on that day, in charge or possession thereof as such administrator. We find no sanction in the law for such a ruling".

4. It is not determined whether this property was assessable that year at A. "as parcel of the estate of H., awaiting the appointment of an administrator to determine who was the legal owner thereof".

—*Hayden v. Roe*, 66 W. 288, 290.

5. "In but one case can it (estate personalty) be assessed to the estate of the deceased owner, and that is when no executor or administrator has been appointed before the 1st day of May".

6. It "must be assessed in the assessment district where the owner resides" sec. 1040, "as of the 1st day of May in the year in which the assessment is made", sec. 1033, "to the owner, save as provided in sec. 1044" and "assessed to such executor or administrator", if in his hands, and so assessed in the district in which such personal representative resides.

7. "A special administrator is doubtless an administrator within the meaning of the word as used in sec. 1044. *Hayden v. Roe*, 66 W. supra".

8. And it is held "that the city could not make the reassessment" for previous years against the estate, and that the property should have been assessed to the administrator, who "resided in another assessment district", being in the town.

—*Fond du Lac v. Est. of Otto*, 113 W. 39, 43.

9. In an action brought by executors "to restrain their collection of a tax lexied in 1907 (after decease) for the years 1904, 1905, and 1906 upon property alleged to have been omitted from the roll in such years",—judgment was directed against the executors for the amount of such tax on defendants' counterclaim therefor.

10. "We think the omitted property was properly assessable against the executors, under existing statutes, though not in possession of the executors May 1, 1907.

11. Sec. 1044b, makes the tax roll prima facie evidence of the justice and regularity of the tax;

12. Hence the burden was upon plaintiffs in all respects, and especially" as to its being "omitted property or merely undervalued property".

13. "'Back taxes' against the personal representatives" "upon property of deceased which escaped taxation" may be assessed, "when the personal representatives have personal property in their possession belonging to deceased subject to taxation" (secs. 1059 and 1044 et al), "even though not the identical property omitted."

14. "The instant case is unlike *Hayden v. Roe*, 66 W. supra", "since in that case the administrator was appointed after May 1st of the year of the assessment".

15. It was not "necessary to file the claim against the estate before the expiration of the time limited for filing claims" as to "omitted" or "other property" as "the assessment is against the executors". See also JUDGMENTS.
—*Bogue v. Laughlin*, 149 W. 271, 280.

16. Where an "inheritance tax is paid" on an annuity in a trust estate, "the yearly payments made thereafter to the annuitant" do not "constitute income under the income tax laws". Subd. i. sec. 1087m-4.

17. Such annuity was "subject to the inheritance tax law" and "could be valued, the transfer tax be assessed thereon, and be wholly liquidated". Subd. 4 and 5, sec. 1087-15 et al.

18. "Whether the income of the estate paid by the trustees to the annuitant should form part of their taxable income, is not affected by what is here decided".

—*State ex rel Kempsmith, v. Widule*, 161 W. 389, 391.

19. "Assuming, without deciding, that relators inheritance of real estate located in the state of Michigan is income within the meaning of this statute", it is, not "assessable under the provisions of this act", being from "without the state", and not included in subd. 3 of sec. 1087m-2,—as "construed in the case of *State ex rel Arpin v. Eberhardt*, 158 W. 20". —*State ex rel Brenk v. Widule*, 161 W. 396, 398.

20. Subd. 3, sec. 1087m-2, of the income tax law, "imposes a tax only upon such part of a non-resident's income as is derived from sources within the state or within its jurisdiction". (Cases).

21. And where the securities and the property represented by them, and the cestui que trust entitled to the income, and the trustee, are all without the state, and non-resident,—the fact that the property was derived from the estate of a resident, and that a “county court in Wisconsin was administering the trust”, it is held, does not make such property taxable.
—*Bayfield Co. v. Pishon*, 162 W. 466, 470.

22. Where two of three testamentary trustees are non-residents, one of them also being the beneficiary, and the third resident trustee receives the income “fund for which it was assessed”, being “dividends derived from stocks and interest derived from money loaned or invested in notes, credits, bonds, or other evidences of debt”,—such fund is held “subject to taxation as income” in this state, under secs. 1087m-2, 1087m-10.
—*State ex rel Wis. Trust Co. v. Widule*, 164 W. 56, 61.

TELEGRAMS.

Dispatch delivered, first, 2.
Default, contents shown, 2.

Message received, original, 1.
For evidentiary purposes, 1, 2.

1. The message received was held to be the original for evidentiary purposes, and the court states “that the law applicable to this case is correctly stated by Judge Redfield in *Durkee v. Vt. C. Ry. Co.*, 29 Vt., 127”, as follows: “In regard to the particular end of the line where the inquiry is first to be made for the original, it depends upon which party is responsible for its transmission across the line, or, in other words, whose agent the telegraph is.

2. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case, inquiry should first be made for the very dispatch delivered. In default of that, its contents may be shown by the next best proof”.
—*Saveland v. Green*, 40 W. 431, 441, 442.

TENANTS IN COMMON.

Each seized of his share, 2.
Lease, possession, expiration, 6.
Established by evidence, 7.
Hold-over presumption, 6.
Otherwise, original tenancy, 8.
One tenant:
Convey undivided part, 2.
Lease distinct portion, 1.
Oral contract of purchase, 9.

Possession once obtained, 11.
Can hold by force, 11.
Property not severable:
One not exclusive possession, 5.
Property severable:
Creditor may seize share, 4.
One could take share, 3.
Become owner thereof, 3.
Take property by force, 10.

1. “One tenant in common could not demise (lease) a distinct portion by metes and bounds”, of the real estate so owned.

2. "A demise or conveyance of an undivided share of an estate by a tenant in common is valid, because each tenant is considered to be solely and severally seized of his share. 4 Kent, 368."

—*Shepardson v. Rowland*, 28 W. 108, 112.

3. "As to all property in its nature severable", (as oats, hay and wheat, in this case,) held that "the plaintiff had the right, without the consent of his co-tenant, to sever and take exclusive possession of his share of the property so held in common; which share would upon such severance become the exclusive property of the 'plaintiff'". See also COMMON LAW.

4. "It would follow from this, that a creditor of the plaintiff might lawfully seize and sever the plaintiff's share therein, or at least, so much thereof as is not exempt by law from being thus seized".

—*Newton v. Howe*, 29 W. 531, 536.

5. But as to property not severable, as "horse, buggy and harness," they "are incapable of division, as a matter of course, and it is impossible for the court to say that the plaintiff might have the possession of them to the exclusion of his co-tenant".

—*Wright v. Pratt*, 31 W. 99, 104.

6. "Unlike an ordinary tenancy, where possession is taken under a lease and continues after its expiration", under lease in case of a tenant in common "no presumption that he continues to hold under the lease (from his co-tenant) arises after its expiration".

7. "But such tenure, if relied upon, must be established by evidence aliunde, showing, either expressly or impliedly, that he has recognized his continuing relation and obligation as tenant under the lease, and occupies subject to its conditions and the payment of rent as therein specified".

8. In the absence of such "evidence aliunde", he will hold possession "in virtue of his original right as tenant in common, which entitles him to the use and enjoyment of every part of the premises, one as much as another, until his co-tenant comes and demands admission, and subject, of course, to account to his co-tenant".

—*Rockwell v. Luck*, 32 W. 70, 72.

9. A tenant in common can have specific performance of an oral contract of purchase of his co-tenant's interest. See SPECIFIC PERFORMANCE.

—*Littlefield v. Littlefield*, 51 W. 23, 31.

10. "It is well settled in law that one tenant in common has no right to take personal property from his co-tenant by force;

11. But if he can get possession without a resort to force, then he can hold it and protect his possession by force. Coke's Litt. 199b".

—*Tallman v. Barnes*, 54 W. 181, 185.

TENDER.

See also MONEY.

Check: deposited in court, 3.

Good to stop interest, 14.

Ground of objection, 14.

Claim on land contract, 2.

Conclusive admission, 11.

Due, to, tenderer, 11.

Where not essential, 12.

Court rule; legal actions, 9.

Dispute as to amount due, 16.

Tender kept good, 16.

Equity:

Court rule, legal actions, 9.

More liberal than law, 10.

Offer to bring money in, 8.

Legal tender:

Absolute and unconditional, 7.

Check good when, 14.

Legal tender—continued

When stop interest, 14.

Mere offer to pay, 7.

Not necessarily money, 5.

Paper currency, bank-notes, 4.

Unless objected to, 4.

What constitutes valid, 1.

Without condition, 1.

Rescission:

Tender to return, 6.

Unconditional offer, 13.

Not part for whole, 13.

Valid legal tender, 1.

Without condition, 1.

Waiver:

Refusal to accept, 15.

Repudiate contract in toto, 17.

1. "To constitute a valid legal tender, there must be an actual offer of the sum due, unless the actual production of the money be dispensed with by a refusal to accept, or something equivalent thereto, and this offer must be an absolute one, not coupled with any condition".

—*Hunter v. Warner*, 1 W. 141, 147.

2. A tender of a deed before allowing a claim on land contract therefor, is unnecessary. See CLAIMS.

—*Gale v. Best*, 20 W. 44, 47.

3. Where a check was deposited in court, it was held "no valid tender either under the statute or at common law".

—*Lewis v. Larson*, 45 W. 353, 354.

4. "Paper currency, bank-notes which are current de jure et de facto, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. (Many cases)".

5. "The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money." See also MONEY.

—*Klauber v. Biggerstaff*, 47 W. 551, 560.

6. In rescission, no formal tender to return the property, is necessary. See RESCISSION OF CONTRACT.

—*Potter v. Taggart*, 54 W. 395, 401.

7. "A mere offer to pay" and a "refusal to take it", and demand for more, "falls far short of a legal tender. The tender must be understood as a tender, and be absolute and unconditional".

—*Elderkin v. Fellows*, 60 W. 339, 341.

8. "In *Breitenbach v. Turner*, 18 W., 140, it was held that in equity it is sufficient for the party relying on a tender to offer to bring the money into court, and to be ready to comply with the direction of the court in regard to it.

9. The circuit court rule (16), "evidently relates to legal actions on instruments for the payment of money only", and "was not intended to be broader than the statute (secs. 4265, 4266), or to disturb or modify the decisions on the subject made in equitable actions under it."

10. "It is well established that the rules in respect to tender are much more liberal and flexible in equity than at law."

—*Mankel v. Belscamper*, 84 W., 218, 225.

11. "The tender and payment into court, for the tenderee, of the money tendered, is a conclusive admission that the amount so paid in is due to the tenderee; and, hence, that money belongs absolutely to him, whatever may be the fate of the action. *Schnur v. Hickcox*, 45 W. 200; 25 Amer. & Eng. Ency. of Law, 943.

12. The fact that the tender was not essential to the plaintiffs' right to relief does not make the case an exception from the rule."

—*Fox v. Williams*, 92 W. 320, 324.

13. "In order to constitute a valid tender it must be an unconditional offer of the amount tendered. An offer to pay a certain sum of money in satisfaction of the whole debt is not sufficient. (Cases)''.

—*Mann v. Roberts*, 126 W. 142, 146.

14. "The offer of a check constitutes a good tender so as to stop interest if no objection be made to it at the time on the ground that it is not legal tender, but it is refused on some other ground, as for instance that it is not enough. 38 Cyc. 147; *Mitchell v. Vermont C. M. Co.*, 67 N. Y. 280." See also PLEADINGS.

—*Kiefert v. Maple V. M. H. F. Ins. Co.*, 158 W. 340, 342.

15. "The cases of *Kreutzer v. Lynch*, 122 W. 474, and *Inglis v. Fohey*, 136 W. 28", "to the effect that plaintiff waived the tender by refusing to accept the money,

16. Do not apply to a case like the one at bar where the dispute is as to the amount due", and where the tender must be "kept good."

17. "The cases mentioned are where the party to whom the tender was made repudiated in toto the contract relied upon by the party making the tender"

—*Weigell v. Gregg*, 161 W. 413, 420.

TERMS OF COURT.

Adjournment:

No specific time, 12.

Subject to judge's order, 11.

Adjourn from day to day, 4.

Effect of omission, 4.

County courts:

Adjournments; continuances, 15.

General and special terms, 15.

Final adjournment, 2.

Not delegated to clerk, 3.

Motion; not decided, 10.

Entered at next term, 13.

Order made and signed, 13.

Presumption of regularity, 14.

Power as to business, 8.

Limited by abuse, 9.

Sessions of court, 1.

Many within term, 6.

Term:

Anciently a single session, 7.

Continuance of term, 5.

May be many sessions, 7.

Until court acts, 5, 12.

Until next term, 5, 12.

End and commencement same day, 14.

Presumption of regularity, 14.

1. "For all general purposes, the court is considered as in session from the commencement till the close of its term. The jurors, officers and parties are all under its direction".

—*Barrett v. State*, 1 W. 175, 181.

2. "Final adjournment is a judicial act, requiring the presence of the court to perform".

3. "Many of the authorities hold that the power to perform such act cannot be delegated to the clerk; so that, even had Judge B." "definitely instructed the clerk to finally adjourn the term on January 1st, it would not have been effective to authorize such act. In re Terrill, 52 Kas. 39; In re McClaskey, 2 Okl. 568".

4. Under sec. 2572, "no omission to adjourn from day to day, previous to final adjournment, shall vitiate any proceedings in such court. The same conclusion has been reached by other courts without such legislation. Schofield v. Horse Springs C. Co., 65 Fed. Rep, 433; People v. Sullivan, 115 N. Y. 185; In re Dossett, 2 Okl. 369.

5. According to modern policy and methods, a term of court, having been duly commenced, continues until the court itself, by an affirmative judicial act, terminates it, or until the next term. Freeman, Judgments, 90; Hume v. Bowie, 148 U. S. 245; Schofield v. Horse Springs C. Co., supra; U. Pac. R. Co., v. Hand, 7 Kas. 380.

6. In deference to modern methods of business in court, involving in many jurisdictions the combination of equitable and legal proceedings, the term of court has come to mean a period of time within which there may be many sessions,

7. While anciently it meant a single session, indeed, originally, a single day, which in order to meet the demands of business was enlarged in fact to several, although in theory the single day extended over the whole sitting".

8. "It may safely be said that between the legal commencement of the term, and the time when it is expressly terminated by a judicial determination or by the commencement of a new term, the power of the court over the time when, and the manner in which, business before it shall be conducted, is complete (*Barrett v. State* 1 W., supra; *Green v. Morse*, (Neb.) 77 N. W. Rep, 925),

9. With only the limitation that if such power is abused to the prejudice of a litigant error may be predicated thereon and may be reviewed and corrected". —*State ex rel Barber v. McBain*, 102 W. 431, 434,

10. "The statute (sec. 2878) provides that a motion made but not decided during the term is deemed to be overruled, and an exception to such constructive denial is to be allowed".

11. Adjournments of court "subject to the order of the judge, without any adjournment to a specific day", do not operate "as a termination" of the "term of the court".

12. "Under this section (2572) it has been held that 'a term of court does not come to an end by failure to adjourn to a specific time, but once commenced it continues until terminated by an affirmative judicial act or by the commencement of a new term'. State ex rel Barber v. McBain, 102 W. supra".

13. Where a term had not been specifically terminated, an order reciting a hearing "on an adjourned day of said June, 1904, term of said court", being Jan. 3, 1905, on which day the order was made and signed", the record so showing and that "the court adjourned 'sine die', " "was effectual though not entered of record until June 6, 1905", and though a new term commenced Jan. 3, 1905.

14. "The adjournment of the June 1904, term was the same day as the opening of the new term. The fair presumption is that such adjournment of the June 1904, term took place prior to entering upon the business of the new term. Certainly, error is not to be presumed".

—*Cooper v. Granger*, 129 W. 50, 53.

15. (As to terms in county court, including detailed commentaries on special and regular terms, and on adjournments and continuances,—see Zimmerman's Probate Practice, §§ 9-10, and §§ 483-488.)

TESTAMENTARY CAPACITY.

See also INCOMPETENTS. INSANE PERSONS. PRIVILEGED COMMUNICATIONS.

Competent giving directions, 26.

Presumption to execution, 26.

Declarations of testator, 57, 58, 64.

Evidence:

Affirmative proof required, 43.

Before sanity presumption, 44.

Burden then on contestant, 45.

Attesting clause presumption, 76, 77.

Many years later; wit. memory, 74, 77.

Attorney, witness testify, 88.

Burden upon contestant, 21, 45.

Presumption; some proof, 22.

Confidential relations, 33, 34.

Burden of proving fairness, 34.

Evidence—continued

Declarations of testator, 57.

About time of will, 57.

After the will execution, 58.

Prior and subsequent, 64.

Guardianship proceedings, 92, 98.

Persuasive effect, 93, 98.

Impeaching scrivener, witness, 61, 86.

Own contradictions, 61, 62.

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Strong evidence required, 100.

Non-expert opinions rejected, 67.

Much favorable evidence, 66.

Opinion without grounds, 60.

Evidence—continued

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- Physician, witness, impeached, 85, 86.
- Witnesses; against experts, 87.
- Physicians present; witnesses, 95.
- Against experts; witnesses, 95.
- Physician, witness, testify, 89, 90.
- Scrivener and witnesses favor, 82.
- Physicians, experts, contra strong, 83.
- "Seemed intelligent, reasonable", 68.
- Sufficient at deed execution, 48.
- Overshadowed by circumstances, 48.
- See also Guardianship.
- Slight affirmative required, 46.
- Burden on contestant, 47.
- Wife as to knowledge of will, 28.
- Wife; deceased husband, 79.
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 - Capable and comprehending, 50.
 - Condition been the same, 54.
 - Adjudication admissible, 55.
 - Does not disqualify, 49.
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 - Pending at will making, 98.
 - Filing, effect on wills, 99.
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- Testimony substantially same, 91.
- Not res adjudicata, 92.
- Persuasive in effect, 93, 98.
- Ward's declarations, 56.
- After execution of deeds, 56.
- Ignoring existing heirs, 41.
- Incompetency indicia:
 - Approved by bowing head, 74.
 - Attesting clause presumption, 76.
 - Corroborating evidence, 77.
 - Contents from widow, 75.
 - Years after, witness old, 74.
 - Capacity up to signing; death, 84.
 - Change of former habits, 63.
 - Greater susceptibility, 64, 65.
 - Immoral tendencies, 63.
- Eccentric, arbitrary, prejudiced, 80.
- Prejudices explainable, 81.
- Relationship not determine, 81.
- Referring to deceased heir as living, 94.
- Not overcome strong evidence, 94.
- See also Insanity indicia.
- Suffering, responded by nods, 72.
- Will imposed on him, 73.
- Tortured with pain, 59.
- Not incoherent or deluded, 59.
- Violent, suspicious, unreasonable, 70.

Insanity indicia instances:

- Belief in clairvoyants, 9.
- Dementia and delusions, 10.
- Despondent; attempted suicide, 68.
- Afterward became insane, 69.
- Seemed intelligent, reasonable, 68.
- Epileptic fits; unconscious, 23, 24.
- Before and after making, 23.
- Faculties up to fit, 25.
- Poisoning motives imputed, 35.
- Otherwise of sound mind, 36.
- Separately or collectively, 9.
- Softening of the brain, 42.
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 - Delusion; impute motives, 17, 18.
 - Distinctions, difficult, 20.
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 - Partial insanity may defeat, 13.
 - Presumption of sanity, 21.
 - Burden upon contestant, 21, 22.
 - Some sanity proof required, 22.
- Rules governing:
 - "Correct statement of the law", 2.
 - By Davies, J., of New York, 3, 11.
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 - Collect without prompting, 4.
 - By Selden, J., of New York, 5.
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 - By Chancellor Walworth, 6.
 - Sound discerning mind, 6.
 - By Redfield, J., of Vermont, 7.
 - Foregoing N. Y. rules, 7.
 - English and American cases, 8.
 - Referred to and upheld, 30, 59, 73.
- Understand the nature, 37.
- Affections not poisoned, 39.
- Appreciate the claims, 38.
- No insane delusions, 40.
- Test: not best or wisest will, 71.
- Relationship not determine, 81.
- Testamentary qualifications, 71.
- Weakness of understanding, 1.
- Person ninety years old, 31.
- Clearer proof required, 33.
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1. "Mere weakness of understanding or the liability to be sometimes deceived and duped, will not in general suffice for this purpose (to set aside a conveyance), but it must be such as to render the party in a legal sense non compos." The conveyance was set aside.

—*Henderson v. McGregor*, 30 W. 78, 80.

2. In the opinion, per Lyon, J., denying a motion for re-hearing, it is said: "We unhesitatingly accept the foregoing views of Judges REDFIELD, DAVIES and SELDEN, and of Chancellor WALWORTH, as correct statements of the law concerning what is, and what is not, testamentary capacity". The Judges' views thus endorsed follow:

3. "'We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should or might have been, the objects of his bounty, and the scope and bearing of the provisions of his will.

4. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them'". Judge DAVIES, in *Delafield v. Parish*, 25 N. Y. 9, 29.

5. In a dissenting opinion in the same case (*Delafield v. Parish*, supra) as to the capacity of the testator, SELDEN, C. J., says: "'It is not enough that he should be found to have possessed some degree of intelligence and mind. He must have had sufficient mind to comprehend the nature and effect of the act he was performing, the relation he held to the various individuals who might naturally be expected to become the objects of his bounty, and to be capable of making a rational selection among them'. p. 105."

6. "The same rules of law were laid down by Chancellor WALWORTH in *Clark v. Fisher*, 1 Paige 171, * . The Chancellor there said: 'The general principles in relation to the capacity of a person to make a will are well understood. He must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property, and to the relative claims of different persons who are or might be the object of his bounty'."

7. "In *Converse v. Converse*, 21 Vt. 168, Judge REDFIELD states the law as it is stated in the foregoing quotations. Indeed that portion of Judge DAVIES' opinion which refers to the language of the cases, is copied from the opinion in *Converse v. Converse*.

8. The cases, both English and American, which hold the same doctrine, are very numerous. It is not my purpose to review them. The doctrine is so reasonable and just, and commends itself to the approval of the judgment so readily, that neither labored arguments nor citations of numerous authorities are necessary to sustain it".

—*Holden v. Meadows*, 31 W. 284, 294.

9. A testator who believed in "clairvoyants, fortune-tellers and spiritual mediums", also in dreams, in living "without committing sin", had many peculiar mechanical notions, "insisted that the sun revolved around the earth", owned many firearms, believed a former wife unchaste, a child illegitimate, "of most positive character and most intense convictions", was "visionary and illogical", but could be reasoned with, was of "strict integrity in business affairs", and whose "business capacity remained unimpaired", who cut off his children and gave his wife a life estate, and whom a jury in circuit court found of unsound mind,—was held to be "of sound mind" with testamentary capacity, "whether the alleged indicia of insanity be considered separately or collectively". See also *INSANE PERSONS*.

—*Chafin Will Case*, 32 W. 557, 568.

10. Where the will was sustained by the county court, but not by the circuit court, which latter court found the testatrix "of unsound mind and chronically insane", of the type "known as dementia, accompanied by insane delusions", and the supreme court finds "she was excitable, nervous, flighty and hysterical", "suspicious of all, discontented and unhappy", had "frequent fits of crying and laughing without any apparent cause, her conduct oftentimes was strange and unnatural", "easily excited into passion and frenzy", was partially paralyzed several months before and at the time of making the will, became insane and was committed some months after the making of the will, and so died there about six months after commitment, gave her estate to religious charities, and not to her husband, her sole heir, though she had other relatives with whom she was on good terms; it was held upon the evidence, "that the testatrix was laboring under no insane delusions when she executed her will, nor were her mental powers so feeble that she was then wanting in testamentary capacity within the statute". See also *INSANE PERSONS*.

11. On the question of testamentary capacity, *Holden v. Meadows*, 31 W. and the *Chafin Will case*, *supra*, and the rule laid down, "by Judge Davies in *Delafield v. Parish*, 25 N. Y., 29", there quoted, and *Burnham v. Mitchell*, 34 W. 117 (See *INSANE PERSONS*), are followed and approved. •

12. Letters written during the year prior to the making of the will, were held "entitled to considerable weight as bearing upon the question of her mental condition and testamentary capacity prior to, and shortly before, making the will".

—*Will of Blakely*, 48 W. 294, 297.

13. "The law, as laid down by Sir John Nicholl in the great leading case of *Dew v. Clark*, 1 Add., 279; S. C. 3 Add. 79, is that partial insanity may defeat a will if it can be fairly inferred that the instrument is the direct offspring of the delusion.

14. But if the hallucination of the testator is inoperative when he

executes the will—if the instrument is solely the offspring of his sane faculties, untainted and unaffected by his delusion,—it is a valid will.

15. This rule of law is supported by sound reason, and cannot be abrogated without greatly endangering the testamentary right”.

16. The will in this case is sustained, it being held that “the claim that the deceased was of unsound mind, if sustained at all, must be sustained on the ground alone that his belief that his wife was unchaste and his son illegitimate amounted to insane delusion”.

17. “It must be conceded that the belief of deceased in respect to the unchastity of his wife, persisted in as it was without evidence to support it and against all reasonable probabilities of its truth, looks very much like insane delusion. Yet it is not necessarily so.

18. Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who, upon the most trivial, even whimsical grounds, will wrongfully impute the worst motives and conduct to those in whom they ought to confide.

19. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less extent afflicted with it, to justify us in saying that because the deceased was so afflicted he was insane, or the victim of insane delusion”.

20. “The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless there are such) and insane delusion is sometimes quite indistinct and difficult to be defined.

21. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity, to prove it.

22. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way”. (But it appears that some “affirmative proof” of sanity must be made before the “presumption of sanity” arises. See *Will of Silverthorn* 68 W. post.)

—*Will of Cole*, 49 W. 179, 182.

23. Where the will was sustained by the county court, but not by the circuit court, on the testimony, including the fact that the testator “was suddenly seized with a fit and became unconscious” the day before the will was drawn, and, after some conversation, “fell into a severe epileptic fit”, about five minutes after the will was signed, which “passed off, and consciousness returned, but he sank rapidly thereafter”, and died two days later,—it was held, on “the test of testamentary capacity as stated by Judge Davies”, quoted in *Holden v. Meadows*, 31 W., supra, and cases following, that the testator had testamentary capacity.

24. The fact that the testator “became unconscious soon after the execution of the will, is not very significant”.

25. “It is doubtless within the knowledge of almost every person of ordinary intelligence, that the victims of that malady (epilepsy) fre-

quently retain their mental faculties fully to the moment of attack, especially in the earlier stages of the malady”.

26. Where the testator “was entirely competent to make a testamentary disposition” when he gave the scrivener “directions to draw his will”, “the presumption is that he continued competent to do so until the will was executed”.

—*In re Lewis's Will*, 51 W. 101, 104.

27. Where the will was allowed in the county court, and disallowed by the circuit court after a jury had found the testator of unsound mind, and that undue influence was exercised upon him, the supreme court sustains the will on the evidence, though it appears the testator was somewhat eccentric and believed in spiritualism; that he believed in good and bad spirits, was influenced in his personal actions by them, but probably only “where the advice he received corresponded with his own views”; and it is said: “It is difficult to find evidence of insane delusion, or of any peculiar exposure of liability to undue influences, in a faith thus absolutely subordinated to the judgment;” that “one of the most significant”, reasons for disallowance is the reason given in the will “for disinheriting his children”, that they “will take every advantage of his wife”, while it appears the relations between them were friendly, though the wife was a stepmother to the children, and their relations “were, however, naturally somewhat antagonistic”; and,

28. “It is stated in the alleged will that it was executed without the knowledge of the appellant (the wife), and she testifies that she knew nothing of it until after it was executed”; and “there is no other direct testimony on the subject”; nor that the execution was prompted “by his wife or any other person”.

29. It also appears the testator was “of excellent moral character, and that his intellectual powers were of a high order”. “He possessed great self-reliance and firmness, and was not easily swerved from a purpose deliberately formed”.

30. “The subjects of testamentary capacity, insane delusion and undue influence have been fully considered by this court in the cases of Jackman’s Will, 26 W. 104, (cited under UNDUCE INFLUENCE); Holden v. Meadows, 31 W. supra” and the cases following, supra, and “the principles established by those cases”, applied.

—*Will of J. B. Smith*, 52 W. 543, 550.

31. With a person ninety years old, with little or no proof, “we could well understand”, “that his faculties might be so impaired that he could not readily comprehend the nature and effect of contracts, nor remember ordinary business matters which he had transacted,

32. And that he would be more easily influenced by another, and more likely to be imposed upon, than one in the vigor of manhood.

33. All this is so natural and probable that we would not require these facts to be established by that clear proof which is demanded to show mental incapacity in younger persons”.

"A less degree of proof also would satisfy us" that he "might easily have been influenced by one standing in a confidential relation to him".

34. Where H., aged ninety "was induced by the defendant to make a conveyance" to him, which H. could not and did not read, or had explained to him, or understand, "it is most emphatically a case, considering all the circumstances, where the burden was upon the defendant, (a son-in-law) of proving the perfect fairness of that transaction and the capacity of H."

—*Smith v. Smith*, 60 W. 329, 330.

35. The facts show that the testatrix "was laboring under these insane delusions as to the conduct and motives of her daughter and son-in-law, and that these delusions, in all probability, influenced her in disposing of her property" to strangers. "Her affections had become so alienated from her only child, and her sense of right so perverted, that she repeatedly imputed to her daughter the wish to poison her", an "utterly groundless notion." "She carried her dislike to that extent that she did not wish her daughter to see her while alive."

36. "In view of these incontestable facts, we must consider her insane and incapable of making a will, notwithstanding she may have been of a sound mind in other respects." (Cases).

The county court sustained the will; a jury and the circuit court, contra.

37. "In the execution of a will it is essential that the testator shall understand the nature of the act and its effects;

38. Shall be able to comprehend and appreciate the claims which he ought to regard and satisfy;

39. And that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties;

40. That no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which, if his mind had been sound, would not have been made. Cockburn, C. J. in *Banks v. Goodfellow*, L. R. 5 Q. B. 549; etc."

—*Ballantine v. Proudfoot*, 62 W. 216, 220.

41. Where the testatrix told the scrivener that three named children "were all the heirs she had, thus forgetting or ignoring the fact that she then had six living grandchildren (of deceased children), who were also her legal heirs", it is said "it is very doubtful whether she was competent to make a valid testament". *Ballantine, Extr. v. Proudfoot*, supra, cited on testamentary capacity. See also *UNDUE INFLUENCE*.

—*Will of Farnsworth*, 62 W. 474, 477.

42. Where the testator was old and "physically quite infirm", and "softening of the brain had been going on for several years", which "caused serious nervous disturbances", had "nervous prostration" at intervals for several days at a time, but at other times "his mind was reasonably clear", and at the time of making his will, and the elements

of which "were few and simple", and the disposition reasonable, the decisions of the county and circuit courts upholding the will were approved.

43. "This question of onus probandi in such cases does not necessarily arise on this appeal," but Lyon, J., "on his own responsibility," says: "That the statute (sec. 3788) requires affirmative proof to be made of the mental soundness of the testator before the will can be admitted to probate,

44. And that until such affirmative proof is made there is no presumption of sanity;

45. But that, when a prima facie case of sanity is made by the proofs, and some contestant makes an issue as to the sanity of the testator, the presumption of sanity arises, and the burden of proving the testator of unsound mind is upon him who asserts it"; and that this was intended in Will of Cole, 49 W. supra. —*Will of Silverthorn*, 68 W. 372, 377.

46. "In the absence of any testimony tending to show a want of testamentary capacity, slight evidence of such capacity is all that is needed to authorize" the probate of a will.

47. "In a case which does not disclose any facts which tend to show incompetency, slight evidence of the competency of the testator is sufficient to put the contestant to his proofs upon that question."

—*Allen v. Griffin*, 69 W. 529, 537.

48. Where "the only witnesses who testified to what occurred" at the execution of deeds at the fatal illness of the grantor, six days before his decease, including the scrivener, physician and another, (with three others present), established such competency that the court says, "it is conceded that such testimony, standing alone, is sufficient to support the finding" that the grantor "then had sufficient mental capacity to make a valid conveyance of her property," but that the facts of her condition "both bodily and mentally, immediately before and immediately after the execution of the deeds, as well as from the time she was injured until she died," overshadows such testimony, and she was held "mentally incompetent to make a valid conveyance", at the time the deeds were executed. See also *UNDUE INFLUENCE*.

—*Davis v. Dean*, 66 W. 100, 106.

49. "The mere fact that a testator is, at the time of making his will, under guardianship as to his person and property, may not of itself incapacitate him to make a valid will,

50. Provided he is capable, at the time, of comprehending the conditions of his property, his relationship to the natural objects of his bounty, and the disposition actually made of his property by such will;" and it was held, contrary to the verdict of a jury, that he had mental capacity. See also *UNDUE INFLUENCE*.

—*Will of Slinger*, 72 W. 22, 26.

51. The guardianship "records were proper evidence as to the mental condition of G. at the time the guardian was so appointed. It has been so decided by this court. *Burnham v. Mitchell*, 34 W. 117" (see *INSANE PERSONS*).

52. "It is no doubt the general principle that the adjudication cannot relate back to a prior time as evidence of incapacity,

53. And so, too, as to the future also, except by the presumption that it continued. *Semel furibundus semper furibundus praesumetur*.

54. But when it is shown that the mental incapacity and condition has been the same for a considerable time, and was the same at the date of the act to be affected by it as when adjudication was had, the adjudication is none the less competent. This was held in *Terry v. Buffington*, 11 Ga., 342".

55. In this case "where the mental weakness and incapacity of the concomitants of old age", "such evidence is competent to show that the conditions had not changed, but were the same as when the adjudication was had; and the adjudication itself is admissible as the foundation of such an inquiry. (Cases)". (Expressly affirmed in *Small v. Champeny*, 102 W. 61, 66. See *INCOMPETENTS*).

56. "The testimony or declarations of" the ward, within ten months after, "on the inquisition (*de lunatico*) were not too late, or remote to have a legitimate bearing upon his mental condition when he executed the deeds, by the general current of authorities, and were clearly admissible on the trial."

57. In *Robinson v. Hutchinson*, 26 Vt. 47, "declarations about the time and after his will was made were (held) competent as tending to show the condition of" an aged testator's mind, "when he made it, and his liability to undue influence."

58. And "many cases are cited to show that the declarations of the person claimed to have been incompetent to make a will by reason of weakness of mind and imbecility arising from old age, made after the will was executed, were competent evidence. (Pa., Conn., & Mass. cases.)"

—*Giles v. Hodge*, 74 W. 360, 366.

59. Though the testatrix "was racked and tortured with pain which it was extremely difficult to endure, and which had reduced her physical and mental vigor", her mind did not wander, she was not incoherent, and she had no delusions; and though a number of witnesses "expressed opinions unfavorable to her testamentary capacity" on few facts, it was held by the county, circuit and supreme courts, on the evidence, that she was competent, on "the test of testamentary capacity acted on in *Delafield v. Parish*, 25 N. Y. 9" (Cited and as quoted in *Holden v. Meadows*, 31 W. supra) and which "has been adopted in this state, and applied in numerous cases, (*supra*)".

60. As to testimony on testamentary capacity, it is said, that "mere opinion without substantial grounds to justify it, is of comparatively little value." See also *WITNESSES*.

—*McMaster v. Scriven*, 85 W. 162, 168.

61. Where the scrivener, being a subscribing witness and the executor named, presented "his petition for probate, under oath, in which he stated, among other things, that the 'deceased left a will duly made and executed,' as he was informed and verily believed," as the principal witness for contestant, gave "numerous expressions of his opinion to the effect that the testator had not the mental capacity to make a valid will", on facts testified to by him "far more convincing" to the contrary,—it is held that he "is impeached by his own testimony, and that, in view of it, his opinion as to the testator's want of capacity is overwhelmingly disproved by the evidence in the case.

62. Certainly, the trial judge was justified, upon his own admissions, in characterizing his conduct as a 'gross impropriety.'" In re Lewis's Will, 51 W. supra. The will was disallowed by the county court, allowed by circuit court and a jury, and the judgment sustained.

—*Loughney v. Loughney*, 87 W. 92, 101.

63. Where an elderly testator's habits and manner of living during the last few years of his life "were materially different than previously", evidenced especially by association with women, and "people of questionable repute", "such changes are frequently evidence of impaired and enfeebled intellectual faculties", but, here, there is "grave doubt" whether the evidence justified a finding of mental incapacity, "had no undue influence been brought to bear upon him".

64. But such impaired "condition of mind" caused greater susceptibility to influence, and "it is upon this theory that prior and subsequent declarations of the testator are admissible in evidence on the question of undue influence".

65. The finding of the circuit court and jury, disallowing the will on both objections, contrary to the county court's finding, is upheld, citing cases supra, and, especially, Will of Slinger, 72 W. supra.

—*Bryant v. Pierce*, 95 W. 331, 339.

66. Where "there is considerable credible evidence respecting how the testator acted before, at the time of, and after the will was executed, indicating" uninfluenced comprehension,—

67. "A large amount of evidence by non-experts, and some by experts, that the testator was of unsound mind," "might very properly" be rejected, as "such evidence, even when given by experts, is often of the most unsatisfactory character and entitled to little or no weight." *Danials v. Foster*, 26 W., 686 (See EXPERT TESTIMONY).

—*Jones v. Roberts*, 96 W., 427, 430.

68. On the question of mental capacity to execute a deed, "witnesses, apparently intelligent and disinterested, who had known" the deceased grantor, "for a long time, testified that he seemed intelligent and reasonable, and that they did not notice anything wrong with him mentally."

69. This evidence is held to establish capacity though several months before, decedent had become despondent, and "attempted to commit suicide", and about six years thereafter he became insane, and was confined in asylum until he died seven years later.

—*Jones v. Rice*, 99 W. 429, 435.

70. That the testator "was an old man of irascible and violent temper", "frequently suspicious and violent," "did not reason with entire justice to his children or his wife",—"all these things do not show incapacity to make a will", there being family differences and guardianship proceedings having been started.

71. "The test is not whether the testator did the best or the wisest or the theoretically just thing in his will; but, Did he have", the established testamentary qualifications (stated), as per *In re Lewis's Will*, 51 W., supra. See also EXPERT TESTIMONY.

—*In re Butler's Will*, 110 W., 70, 77.

72. Where the deceased lived with the principal beneficiaries named, many years, made a will several hours before his decease, signed by his mark, witnessed by his physician and an attorney who was the scrivener, was sixty-nine years old, "appeared to be a very sick man, suffering much, in constant pain", responded to the names suggested by nods only, spoke but two words as to an executor,—on these and other facts, it was held,

73. That the instrument "did not emanate from his mind, but was made by others and imposed upon him", in his weakened mental condition,—following the rule of *Holden v. Meadows*, 31 W., and other cases, supra, the county and circuit courts having held to the contrary. (Distinguished in *Hanley v. Kraftczyk*, 119 W. post). See also EXECUTION OF WILLS.

—*In re Downing's Will*, 118 W., 581, 587.

74. Where a will was executed twenty-nine years before the trial, and the scrivener, being eighty-five years of age, testified "that his recollection in respect to the will was pretty poor", "that the testator was sick, and said nothing and was an habitual drunkard", that he approved "by bowing his head", that he "knew the business transacted",

75. That the scrivener "got the contents of the will from the testator's wife", she being the principal beneficiary, and gave other slight details, it is said, that while such testimony only, might "bring the case within the ruling of this court in the *Will of Downing*, 118 W. supra,

There is, however, this difference, that in that case there was an absence of the requisite facts as to the execution of the will,

76. Whereas here there is an absence of the memory of such facts by the particular witness named, and yet he testified that the attestation clause correctly states the facts that took place there at the time the will was executed.

77. If that is true, then the instrument" was properly executed, following the rule of presumption in *In re Gillmor's Will*, 117 W. 302 (See EXECUTION OF WILLS). "But it is unnecessary to rest upon such presumption", as here there was favorable corroborating testimony by the two other subscribing witnesses.

—*Hanley v. Kraftczyk*, 119 W. 352, 360.

78. After the decease, the attending physicians' "lips are forever sealed" as to mental capacity, as no one can waive the privilege. See PRIVILEGED COMMUNICATIONS.

—*Will of Hunt*, 122 W. 460, 469.

79. As to testimony of the wife as a party, as to the mental competency of her deceased husband. See HUSBAND AND WIFE.

—*Schultz v. Culbertson*, 125 W. 169, 172.

80. Where the testator was eighty-five years old, "a self-willed, arbitrary an eccentric person, who resented interference", "controlled his financial affairs", was penurious, intemperate, had "prejudices towards those naturally closest to him", had proper comprehension of his property and relatives,—his will largely cutting off an adopted daughter, and giving most of his property to his financial adviser, was disallowed in county court, and allowed in the circuit and supreme courts.

81. Where prejudices and circumstances are "explainable" "as compatible with mental soundness", "whether or not he reasoned and dealt justly under the circumstances with those nearest to him through family relationship does not determine his capacity to make a will".

—*Field v. Pickard*, 126 W. 229, 235.

82. Where a grantor, on his death-bed, conveyed all his property to his sister with whom he had lived, excluding other sisters and brother, a finding of mental competency on the testimony of the scrivener and witnesses was sustained, against the testimony of the two attending physicians as experts, who were not present at the execution, and,

83. Who testified "to the effect that the deceased was in a semi-comatose condition from the morning of the day when the deed was made and executed until death" and "practically unconscious and incapable of having an intelligent comprehension" "of his surroundings and business affairs".

—*Hermann v. Zachow*, 126 W. 441, 445.

84. Where a will was disallowed by the county and circuit courts, a jury also finding unsoundness of mind, and there being no question as to regularity and capacity "up to the time of the signing of the instrument", after which "death followed in a few moments",—the will was sustained on the evidence.

85. One of two subscribing witnesses, being the attending physician, and taking an active part, testified to soundness of mind "when this writing was drawn and signed, but that, in his opinion, the deceased

had not sufficient mental capacity to make a will, and that he took no conscious active part in the attestation of the document.

86. The facts and circumstances, as detailed by him, clearly contradict his opinion statements" as given, and "as indicated in *Winn v. Itzel*, 125 W. 19 (See *UNDUE INFLUENCE*): "Certainly such testimony is thoroughly impeached by the witness himself". *Loughney v. Loughney*, 87 W. supra.

87. All the other evidence (being that of the other subscribing witness, and of a non-related beneficiary), except that of the experts (two on each side), points clearly and directly to" "testamentary capacity, and that he consciously participated in the completed execution of the instrument".
—*Will of Muellenschlader*, 128 W. 364, 372.

88. Where "an attorney who drew the deed and agreement" "was requested by" the (now deceased) grantor "to sign the papers as a witness and did so", "the admission of his evidence was proper" "respecting the mental competency of" the grantor "at the time of the execution of the papers". *McMaster v. Scriven*, 85 W. 162, (See *EXECUTION OF WILLS*); *Will of Coleman*, 111 N. Y. 220.

89. Likewise as to a physician who "signed the deed as a witness. His evidence was therefore competent".

90. Besides, his answers involved no "disclosure of any communications received" as attending physician.

—*Boyle v. Robinson*, 129 W. 567, 579.

91. A will was denied probate in the three courts, "on the ground" of incompetency, and that it "was procured by fraud and undue influence", on evidence "much the same as that given on the guardianship proceeding" begun in 1905, the will being made August 15, 1907, and the decease occurring December 20th, 1907, and guardianship being sustained "just one week prior to the death of the testatrix", in *In re Deleglise*, 134 W. 41 (See *INCOMPETENTS*).

92. "While the adjudication in the guardianship proceeding was in no sense *res adjudicata* in this case,

93. It was doubtless considered by the trial court as quite persuasive in its effect, and rightly so, in as much as there was no claim that the mental condition of the deceased had improved".

—*Deleglise v. Morrissey*, 142 W. 234, 235.

94. "The sound mental condition of the testator" being "shown by very strong evidence", the fact that the will divides property 'between my two brothers, O. and G., or their heirs', when O. was dead at the time, does not "overcome such evidence", as "the language may have been used with knowledge of the death of O. as apt and convenient language respecting the disposition to the heirs of both brothers and the living brother".

—*Evenson v. Rust*, 152 W., 113, 115.

95. Where "a capable county judge" and an "experienced circuit judge" disallowed the will because of incapacity, such holding was reversed because "against the clear preponderance of the evidence",—the evidence of the family and another physician, the two subscribing and another witness, all being present at the making of the will, and that of other witnesses, showing competency, while two other physicians and other witnesses testified to incompetency and mental weakness indicating senile dementia, and the hypothetical questions excluding proponents' evidence. *Blakely Will Case*, 48 W., *Cole Will Case*, 49 W., and *Silverthorn Will Case*, 68 W., all *supra*, are cited as similar cases.

96. In "old-age insanity" "the mind gradually loses its alertness and power of concentration until it is no longer capable of forming an intelligent judgment.

97. When that period arrives, it is probable that there are no lucid intervals, although the person afflicted may be brighter at some periods than at others. (Citations)". p. 79.

98. The pending of "guardianship proceedings" at the time of making the will, resulting in a guardian appointment shortly thereafter, "would ordinarily be quite persuasive", but "has no force here" because guardianship "was sought because of physical and not mental disabilities", and "no guardian should have been appointed on the showing made".

99. Sec. 3979, as to the filing of the petition in register of deeds office, voiding all gifts and transfers after guardian appointed, "we do not construe" "as applying to wills or legacies provided for by the will". p. 82. —*Est. of Bean*, 159 W. 67, 69.

100. "Strong evidence" is required "to nullify" a will "made in accordance with" "natural justice". (As to a will not so made, see *Elliott v. Fisk*, 162 W. 249, *UNDUE INFLUENCE*). See also *PROBATE OF WILLS*. —*Gunderson v. Rogers*, 160 W. 468, 473.

TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD.

TESTAMENTARY INSTRUMENTS.

See WILLS.

TESTAMENTARY TRUSTS.

See TRUSTS.

TESTIMONY.

See EVIDENCE. IMPEACHMENT OF WITNESSES. WITNESSES.

TIME.

See also PUBLICATION.

Computation:

Appeal; judgment entry, 9.
 Days or weeks before, 5.
 Posting of notices, 6.
 Specific instances, 7, 13.
 Statute, publication only, 8.
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Hearing date later, 10.
 Regularity presumed, 10.
 Night and day time, 12.
 Per diem compensation, 14.
 Splitting up of days, 15.
 When, and when not, 14, 15.
 Priority presumption, 1.
 Acts on the same day, 2.
 Statute, publication only, 8.

1. "Prima facie, the presumption of law is that the several acts or steps in the course of a legal proceeding take place in the order necessary to give them legal effect".

2. "But, whenever an inquiry into the priority of acts, on the same day, becomes necessary in order to protect the rights of parties, the ordinary presumption must give way to the facts of the case".

3. "In general, it is true that, in computing time in respect to the service of papers, the issuing of process, the calculation of interest, the running of statutes, and many other like matters, the fractions of a day will not be considered".

—*Knowlton v. Culver*, 2 Pin. 243, 246.

4. Time may be enlarged or extended by parol or written agreement.
 See PAROL.

—*Webster v. Tibbits*, 19 W. 438, 444.

5. "In the absence of any statutory provision governing the computation of time; the authorities are uniform that where an act is required to be done a certain number of days or weeks before a certain other day upon which another act is to be done, the day upon which the first act is to be done must be excluded from the computation, and the whole number of the days or weeks must intervene before the day fixed for doing the second act. (Many cases)."

6. Sec. 1130, for posting of notices for tax sale, 'at least four weeks previous' to the day of sale, "brings the case within the rule laid down by the authorities, and is a clear direction that four full weeks or twenty-eight days must intervene between the day of posting the notices required and the day upon which the sale is to be made,

7. And that a posting of such notices on the sixteenth day of April

is not sufficient for a sale to be made on the fourteenth day of May thereafter", being "one day short of the time required".

8. Sec. 4273, is held not to govern in such notice, as "it relates only to the publication of legal notices, and not to the giving notices in any other way or manner".
—*Ward v. Walters*, 63 W. 39, 44.

9. "In computing the time in which an appeal may be taken, the day the judgment was entered shall be excluded."

—*Bennett v. Keehn*, 67 W. 154.

10. Where the date of hearing is later than the date noticed, regularity is presumed. See RULES OF PRACTICE.

—*Field v. Apple River L. D. Co.*, 67 W. 569, 571.

11. On a tax sale on September 4, 1866, a deed was given September 4, 1869, and held void, the court saying, "The three years did not expire, and no deed on such tax sale could lawfully be issued, before September 5, 1869," nor "until the expiration of three years after the date of the certificate of sale".

—*Whittlesey v. Hoppenyan*, 72 W. 140, 144.

12. As to night and day time, it was held that an instruction as being one hour before sunrise was erroneous, and Blackstone's rule (Vol. 4, page 224) is approved; "if there be daylight or crepusculum enough, begun or left, to discern a man's face withal it is not burglary. But this does not extend to moonlight". So held in *Nicholls v. State*, 68 W. 416, as to burglary; here as to "violation of the game laws".

—*Klieforth v. State*, 88 W. 163, 165.

13. "The 11th day of the month" is "six days before the 17th day", under the statute. Sec. 4971, subd. 24. "Parts of days are to be disregarded. 5 Amer. & Eng. Enc. L., 89."

—*Young v. Krueger*, 92 W. 361, 363.

14. While "under statutes allowing a per diem compensation to officers", it has been held that "a day could not be split up, and that the officer was entitled to a full day's pay if any time was occupied in the service, although the whole day was not consumed (*Smith v. Jefferson*, 10 Colo. 17),"—

15. Yet, it is said that under a statute "for each day he shall be actually engaged", it is "the intention only to allow for the time actually consumed", and "necessitates a splitting up of days and a charge by the hour",—though the question was not here controverted.

—*Hoffman v. Lincoln Co.*, 137 W. 353, 357.

TITLE.

See also DELIVERY. PERSONAL ESTATE. REAL ESTATE. VESTING OF ESTATES.

- Absolute deed as security, 48.
 - Legal title in grantor, 66.
 - Satisfaction clears, 48.
- Administrator:
 - Has title to personalty, 2.
 - Not vindicate realty title, 8.
- Adverse possession:
 - Always strictly construed, 9.
 - Certificate of descent, 74, 76, 77.
 - Deed, grantor to another, 78.
 - Manual delivery, 78.
 - Letter of the statute, 10.
 - Not marketable title, 50.
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 - Heirs omitted, 77.
 - Tax title claimant, 11.
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1. "Color of title" is "that which in appearance is title but which in reality is no title." A tax deed void on its face is "color of title".
—*Edgerton v. Bird*, 6 W., 527, 536.

2. "The legal title to the personalty is vested in the administrator". But the "legal title to the real estate * is held to descend to the heirs, and vest in them on the death of the ancestor, subject to be divested by a sale for the payment of debts".
—*Stark v. Brown*, 12 W. 572, 582.

3. The title to lots runs to the center of the street, subject to the public easement.
—*Ford v. C. & N. W. Ry.*, 14 W. 609, 616.

4. A trustee with the legal estate passes title "although the conveyance is in violation of the trust", while a conveyance by a trustee "not having the legal estate, but acting under a power simply", does not pass title.
—*King v. Whiton*, 15 W. 684, 688.

5. In a contested claim the title may be the claim v. "Estate of M. deceased". See APPEAL. —*McNight v. Estate of McNight*, 20 W. 446.

6. A will devising real estate "originally proved and allowed", or a "duly authenticated" foreign will, duly admitted and allowed, passes title, subject to the payment of debts, expenses of administration or other charge.

7. "The failure to issue letters testamentary or letters of administration in this state does not divest such title; and the issuing thereof is not a condition precedent to rendering the will thus allowed effectual to pass the title".
—*Markwell v. Thorn*, 28 W. 548, 559.

8. The administrator cannot "vindicate the title of devisees to lands devised", especially when clouded after vesting. See EXTRS. AND ADMRS.
—*Flood, Admr. v. Pilgrim*, 32 W. 376, 380.

9. "Evidence of adverse possession is always to be strictly construed, and every presumption is to be made in favor of the true owner."

10. "The party whose title is to be destroyed or remedy barred, may

properly stand on the letter of the statute, and insist upon a strict compliance with its conditions”.

11. “Any actual occupation and use of the premises under which his title (however weak) for any portion of the three years” by the true owner, will bar a tax title claimant from his remedy and “relieve the former owner from the conclusive effect which would otherwise be given to the tax deed”.

—*Wilson v. Henry*, 35 W. 241, 245.

12. The court adopts Judge Story’s construction of a statute of Maine, like ours (Sec. 2294) that: ‘By the probate, when granted, the will, under the section, takes effect by relation back from the death of the testator. It recognizes and vests the title in the devisee from that moment’; and holds that in *Markwell v. Thorn*, 28 W. supra, “the expression is inaccurate” which indicates that the probate passes title. “It should have been said that the probate rendered the will effectual to pass the title”.

—*Bridge v. Ward*, 35 W. 687, 692.

13. “If the plaintiff has an adequate remedy at law (ejectment here), he must necessarily fail in this equitable action” to quiet title.

—*Gray v. Tyler*, 40 W. 579, 580.

14. Where “a plaintiff claims that the judgment upon which the execution issued never became a lien on the property (because a homestead), and he seeks to enjoin the sale because the sheriff’s certificate or deed would be a cloud on his title, there can be no doubt that a court of equity will exert its jurisdiction and grant relief in such a case. (Many cases).”

—*Goodell v. Blumer*, 41 W. 436, 442.

15. “Pending the administration of the estate, the legatee or next of kin has no title”. See PERSONAL ESTATE.

—*Est. of Kirkendall: Cramer’s Appeal*, 43 W. 167, 179.

16. The evidence shows that the claimant’s grantor “did not enter into the possession of the premises, under a claim of title founded upon the (void) judgment of county court upon final settlement of the estate, but that he entered into such possession more than a year before he took the first step in the administration, probably by claiming by descent; and therefore such possession cannot be adverse under the statute (sec. 4211, ten years’ possession), as an entry under such judgment. *Quinn v. Quinn*, 27 W. 168”. See PRESUMPTION OF DEATH.

—*Melia v. Simmons*, 45 W. 334, 338.

17. It is a well settled principle of law, “that prior possession is prima facie evidence of title, to maintain an action to recover the property or its value as against a mere wrong-doer. *Rogan v. Perry*, 6 W. 194, *Armory v. Delamirie*, 1 *Smith’s Lead. Cases*, 584; *Coffin v. Anderson*, 4 *Blackf.* 395”.

—*Wambold v. Vick*, 50 W. 456, 457.

18. The title to personal property of a deceased, can be obtained by the heirs only through administration. See PERSONAL ESTATE.

—*Murphy, by Gdn. Hanrahan*, 50 W. 485, 490.

19. Where the widow as sole devisee, elected, the title to the realty vested in the heirs subject to the right of the executors to sell it for payment of debts. See JURISDICTION.

—*Melms v. Pfister*, 59 W. 186, 192.

20. A void administrator's deed is "presumptive evidence of a valid title in the grantee." See DEEDS.

—*Hoffman v. Wheelock*, 62 W. 434, 438.

21. As to the legal title, of real and personal property and income, given to remaindermen, being in executors as trustees, pending a life estate, coupled with trust duties. See VESTING OF ESTATES.

—*Scott, Exrx. v. West*, 63 W. 529.

22. Mere possession of personal property is sufficient evidence of title to recover against a mere wrong-doer. See MARRIED WOMAN.

—*Cummings v. Friedman*, 65 W. 183, 184.

23. "The will was ineffectual, even as to the real estate, until admitted to probate. *Newman v. Waterman*, 63 W. 616 (cited under PROBATE OF WILLS)."

24. "This court has held 'that where personal property is disposed of by a residuary legacy, as here, it does not vest at once and directly in the legatee, but in the executors, by operation of law, subject to distribution, as in case of intestacy'. *Melms v. Pfister*, 59 W. supra. We have no doubt of the correctness of such holding".

—*Gundry v. Est. of Henry*, 65 W. 559, 564.

25. "It is well settled in this country that the sale of chattels acquired from one who had stolen them passes no title even to an honest purchaser, and the true owner may maintain an action for the property without any previous demand. (Cases).

26. The same is true of chattels sold by one who is not the owner and has no authority to sell. (Many cases)".

27. "Undoubtedly, the civil law annexed" "an implied warranty of title" "on the part of the vendor to every sale of a chattel.

28. The earlier English cases indicated a contrary doctrine. (Case)

29. The later English cases indicate that such warranty may be inferred from the mere fact of sale under certain circumstances".

30. "The general rule in this country undoubtedly is that where there is a sale of chattels in the vendor's possession at the time, at a fair price, there is always an implied warranty of title, unless the facts and circumstances are such as to warrant a different conclusion".

—*Edgerton v. Michels*, 66 W. 124, 131.

31. Mere possession is a sufficient "title as against a wrong-doer. (Cases). —*Field v. Apple River L. D. Co.*, 67 W. 569, 571.

32. The absolute title to a note and mortgage received by an administrator for estate money, which the distributees refused to take, falls to the administrator, after he paid to the distributees the money therefor in lieu thereof. —*Blakely v. Carter*, 70 W. 540.

33. "The rule that one taking a benefit under a will cannot contest the title of some other person to property which has been devised or bequeathed to such other person by the same will,

34. Does not apply to the person who claims property derivatively for some person not taking title thereto under such will". See also *WIDOW*. —*Beem v. Kimberly*, 72 W. 343, 370.

35. Where by the death of the mortgagor, "the legal title to the mortgaged premises descended to" the mortgagee and the "other heirs at law, who thereupon conveyed their respective titles to" the mortgagee, "by such acquisition of the title her mortgage became merged and extinguished.

36. Assuming that the note survived such acquisition of title as a claim against her father's (the mortgagor's) estate, yet, as she (mortgagee and wife of plaintiff) died intestate, the plaintiff could not thereafter acquire title to the same, except through administration of her estate. *Marshall v. Pinkham*, 52 W., 590." See also *HUSBAND AND WIFE*. —*Clark v. Clark*, 76 W., 306, 308.

37. Where a will devised realty to the widow as residuary devisee, and also empowered the widow and daughter, as executrices, to convey the realty, it is held that a deed by the widow, personally, conveyed the testator's interest therein, the court saying:

38. "Under this statute (sec. 2278) and the decisions of this court it is very obvious that the widow, as such residuary devisee, took at once, on the death of the testator, all his right, title, and interest in the land in question, subject of course to the payment of his debts and the specific legacies provided for in the will. (Many cases)".

—*Hiles v. Atlee*, 90 W. 72, 78.

39. When a widow as sole devisee, elects, the fee of the realty descends to the heirs "as though no will had ever been executed". See *WIDOW*.

—*Melms v. Pabst Brewing Co.*, 93 W., 140, 146.

40. "A tax title has nothing to do with the previous title". "It extinguishes the old title and all liens and equities depending upon it. *Lessee of Neiswanger v. Gwynne*, 13 Ohio 74; *Ross v. Doe*, 1 Pet. 664.

41. As a general rule, a title which is open to judicial doubt is not marketable", and what is such doubt depends "much upon the discretion of the court.

42. But in no case will a purchaser be compelled to accept and pay for a title which he can only acquire in possession by litigation and judicial decision, nor where it is evident that his possession must be defended in like manner. He is not bound to buy a law-suit. *Waterman Spec. Perf.* §§ 441 et seq.”

43. “We have concluded that a tax deed, under our statute, fair upon its face, is prima facie a marketable title, which the vendee is bound to accept as such, unless” specifically objected to and “found not free from reasonable doubt”.

—*Gates v. Parmly*, 93 W. 294, 313.

44. In an ejectment action, plaintiff’s “actual possession,” “is sufficient evidence of title to sustain his action, until the defendant has shown a better title,” and recovery was sustained as against a void tax title. *Elofrson v. Lindsay*, 90 W., 206.

—*Elofrson v. Lindsay*, 97 W., 22, 25.

45. While the “title to real estate passes by the will,” the county court has power to make a final order of assignment. See JUDGMENTS.

—*Will of Hess*, 97 W., 244, 249.

46. Twenty years of possession and payment of taxes, the “title depending upon the statutes of limitation”, is held to be “a good marketable title” which a purchaser under a land contract entitled to a clear and indefeasible title, is bound to accept.

—*Nelson v. Jacobs*, 99 W. 547, 461.

47. The judgment of a court of equity, “acts on the whole title”, both present and future interests, vested or contingent, in being and not in being. See TRUST VARIATION.

—*Ruggles v. Tyson*, 104 W. 500, 506.

48. The legal title does not pass by an absolute deed given as security, and a satisfaction clears such title. See MORTGAGES.

—*Cumps v. Kiyo*, 104 W. 656, 659.

49. “The word ‘void’ in sec. 2320, means voidable”, and “title to lands conveyed in fraud of creditors actually passes to the vendee, subject, however, to be divested at the election of any such creditor”.

—*French Lumbering Co. v. Theriault*, 107 W., 627, 644.

50. Where a “good record title” is required, title by adverse possession is held not a compliance, and, “courts uniformly refuse to compel grantees to accept title where resort to parol evidence is necessary to establish it, or where there is a reasonable doubt concerning its validity”. (Many cases).

—*Zunker v. Kuehn*, 113 W., 421, 423.

51. An administrator’s deed, under county court proceedings, sec. 3911, pursuant to land contract given by the decedent, who “supposed

herself to be the owner of the property in fee", and had an "adjudication of that fact by a court of record", though in fact having only a life estate which expired with her decease, is held, "sufficient to sustain the finding of color of title", and to support a recovery for improvements by an unsuccessful contestant in ejectment proceedings, under sec. 3096. *Edgerton v. Bird*, 6 W. supra. —*Dorer v. Hood*, 113 W., 607.

52. A widow is held not to have obtained title to a claim of her husband, by alleging ownership as his sole heir, so as to entitle her to sue therefor;

53. "The only way plaintiff could have become possessed of the cause of action was by a transfer thereof to her in the regular course of administration of her husband's estate".

—*Buttles v. DeBaun*, 116 W., 323, 327.

54. Where a general guardian of a minor, filed a claim against the father's estate, such claim being one owing to the deceased mother, there having been no administration on the mother's estate, and though such minor was the sole heir of the mother, it was held, that the claim should have been dismissed, following *Buttles v. De Baun*, 116 W. supra, and,

55. "That one claiming a cause of action by title derived from the estate of a deceased person must show that such title came from the personal representative of such person in the due course of the administration of such person's estate".

56. As the common law rules prevail here, "lapse of time can no more dispense with proof of the proper transfer in" such case than in that of an individual transfer.

—*McKenney v. Minahan*, 119 W. 651, 658.

57. When title to personalty in the administrator's hands may be passed directly by the circuit court. See SURVIVING PARTNER.

—*Rowell v. Rowell*, 122 W. 1, 9.

58. Where lands, owned by a life tenant and remainderman, were subject to a mortgage, and on foreclosure sale were purchased by the life tenant for the amount of the mortgage and expenses,—the life tenant remaining in possession during her lifetime, but conveying the premises by warranty deed to K., who went into possession and made improvements, it is held,—

59. "Under these circumstances, the law regards this purchase by the life tenant as made for the joint benefit of herself and the tenant in remainder,

60. And precludes her from holding it for her exclusive benefit, if the tenant in remainder will contribute her proper share of the sum paid for the interest thus acquired, which inures to the benefit of both.

61. Whatever amount the life tenant paid above her proportionate

share is secured to her as a creditor, and she becomes subrogated to a lien on the real estate so purchased. (Cases)".

62. In an accounting between the remainderman and the grantee, the latter "should be charged with the income of the estate from the termination of the life estate", less amounts paid for taxes and improvements and preservation of the property, he having "acted innocently" through "mistake as to the true condition of the title", though all the conveyances were of record.

63. And the remainderman given the title, is entitled to such accounting, and he is chargeable "for the sum paid by the life tenant to purchase the outstanding title, less the interest paid thereon".

—*Keller v. Fenske*, 123 W. 435, 440.

64. "A tax deed fair upon its face is, under our statute, a marketable title, and after the three-year statute of limitations has run in its favor there is no reason to question its validity. *Gates v. Parmly*, 93 W. supra".

—*Maxon v. Gates*, 136 W. 270, 298.

65. As to a fraudulent administrator's deed giving color of title under the ten-year statute. See SALE OF REALTY.

—*Steinberg v. Salzman*, 139 W. 118, 122.

66. The legal title in the case of a deed of homestead given to secure indebtedness, "has at all times remained in the" grantor. See also MORTGAGES.

—*White v. Daniell*, 141 W. 273, 275.

67. Title under a will vests at the decease of the testator, subject to rights of creditors.

68. The county court in its final decree "could only determine the" rights in such title as the deceased had. See also JUDGMENTS.

—*Triba v. Lass*, 146 W. 202.

69. The heirs of a widow, who had a life estate in possession for forty years cannot claim title in the fee on her decease intestate, as against the remaindermen heirs of the husband,

70. Under either the ten-year or twenty-year adverse possession statutes, under an erroneous judgment of the county court assigning her the fee, which judgment was vacated shortly after its entry. See also HOMESTEAD.

—*Van Metre v. Swank*, 147 W. 93, 98.

71. As to "a verbal sale void at its inception" making good title by "lapse of time" and "part performance" with possession,—against deed of one having notice of possession, etc. See SALE OF REALTY.

—*Keilly v. Severson*, 149 W. 251, 259.

72. "In determining what is a cloud it is sufficient" "that the defect in the title be at least an apparent cloud, rendering resort to evidence

aliunde the record necessary in order to show its invalidity. *Pier v. Fond du Lac*, 38 W., 470; *Suring v. Rollman*, 145 W., 490".

—*Stack v. Hickey*, 151 W., 347, 350.

73. "It is" "well established that, in the absence of fraud or mistake, the execution and delivery of a deed of real estate with the intention of carrying the title vests the title at once in the grantee named in the deed. *Rogers v. Rogers*, 53 W. 36 (See DELIVERY)".

—*Friedrich v. Huth*, 155 W., 196, 198.

74. It is doubted whether "the certificate (of descent) authorized by" sec. 2276a, "granted ex parte, and by the judge at chambers" "is a 'judgment of a competent court' within the meaning of sec. 4211", as to adverse holding under ten-year claim of title.

75. "A quitclaim deed in this state is equivalent, at least for the purpose of conveying title, to a deed of bargain and sale. *Home Ins. Co. v. Emerson*, 153 W. 1".

76. "The deed, construed with the certificate of heirship, purported to convey the whole title, and must be held to be a written instrument such as is named in sec. 4211 as sufficient on which to base adverse possession".

77. And title on such ten-year adverse possession is upheld, where both the deed and certificate omitted heirs, whose "existence", however, was unknown to the parties thereto, and whose "interest in the premises" was "never acknowledged". —*Bourne v. Wiele*, 159 W. 340, 343.

78. Mere delivery of possession and manual delivery by the owner N. to A. of a former deed from N. to N.'s daughter, now deceased, "cannot logically be held" to give title by adverse possession under 'a written instrument', as 'color of title' under sec. 3096, nor enable A. to recover for permanent improvements on being dispossessed. See also SUBROGATION. —*Tellet v. Albretson*, 160 W. 487, 492.

79. As to title vesting in a donee with custody to be in another as bailee until the decease of the donor. See GIFT.

—*Pirie v. LeSaulnier*, 161 W. 503, 510.

TOMBSTONE.

See MONUMENT.

TORTS.

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Distinguishing features, 7.

Homestead, judgment, 4.

Infants: liability, 1.

Compensatory damages, 3.

Negligence; tender years, 5.

1. Infants are liable in tort for conversion, though there may have been a contract which was voidable.

2. Executors, administrators and trustees "might not be liable in an action of trover for a conversion, for the reason that the legal title to the property was in them". p. 236.

—*Cotton v. Sharpstein*, 14 W. 226, 230.

3. An infant under seven is liable for compensatory damages. See INFANTS.

—*Huchting v. Engel*, 17 W. 230, 232.

4. Homestead is not liable to execution for a judgment in tort. See HOMESTEAD.

—*Smith v. Omans*, 17 W. 395, 396.

5. In an infant of tender years, "negligence cannot be imputed". See INFANTS.

—*Schmidt v. M. & St. P. Ry.*, 23 W. 186, 190.

6. A father is held liable for torts of his young sons, committed with his implied consent. See PARENT AND CHILD.

—*Hoverson v. Noker*, 60 W. 511, 513.

7. As to non liability, and distinguishing features, of a father for torts of his minor son. See PARENT AND CHILD.

—*Kumba v. Gülham*, 103 W., 312, 315.

TRANSACTIONS WITH DECEASED PERSONS.

See also PARTIES.

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1. "The personal transaction or communication of the statute (Sec. 4069), no doubt, means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other".

2. As to testimony by a party as to genuineness, and that he has received by mail a letter purporting to have been written by the deceased in his lifetime to the party, "we must hold that it was admissible." See also PARTIES.

—*Daniels v. Foster*, 26 W. 686, 692.

3. The grantees as parties and heirs were not competent witnesses "to testify that the deceased (grantor) delivered the deed to them", the delivery of which was in issue in a suit by other heirs for cancellation, yet they might testify as to other acts affecting the delivery, as for example, "that the deed was continually in their possession or under their control from the day of its date until they placed it on record".
—*Stewart v. Stewart*, 41 W. 624, 628.

4. On the question of the alteration of a note in which the deceased was a party it was held that, "the questions when and with what ink the witness signed the note, whether he struck out the words 'after due' from the note, and perhaps other questions," "were competent, not naturally calling for any answers in violation of the statute, and were therefore improperly excluded".
—*Page v. Danaher*, 43 W. 221, 226.

5. Admissions of deceased persons, derogatory to the title of a party with whom there is privity of blood or of estate, are admissible in evidence. See ADMISSIONS.
—*Littlefield v. Littlefield*, 51 W. 23, 28.

6. The testimony of defendant as to a settlement made with the deceased agent of the plaintiff is inadmissible under section 4070.

7. And the introduction by defendant of such agent's deposition taken on behalf of plaintiff, does not enable defendant to testify as to the matters in the deposition, under said section, such deposition not being "testimony of the deceased agent" "first read or given in evidence by the opposite party."
—*McIndoe v. Clarke*, 57 W. 165, 168.

8. The husband may testify "that he authorized his wife E. to collect the note for him during the lifetime of" the deceased, against whose estate he is proceeding, "and gave her the note for that purpose".

9. And the wife could testify as such agent "that she collected from the deceased while living, and that he paid her \$10 upon the note for her husband", such payment taking the case out of the operation of the statute of limitations.

—*Engmann v. Est. of Immel*, 59 W. 249, 253.

10. One who "was in possession of the property affected by the action, under an unrecorded deed thereof, executed to him by the defendant", his brother, and "was bound by the judgment in the action, the same as though he had been a party to it", is held to be "a real party in interest", and "incompetent to testify to any transaction or communication had by him personally with" the deceased, under secs. 4069 and 4070.
—*Wright v. Jackson*, 59 W. 569, 577.

11. Where both parties claim title under the same deceased grantor, his grantee "was not a competent witness to remove the latent ambiguity in the language of the deed".
—*Mack v. Bensley*, 63 W. 80, 87.

12. The testimony of a party as to a transaction, so far as it is "an admission against his interest" as to payment made by the deceased, is admissible.

—*Crowe v. Colbeth, Admr.*, 63 W. 643, 645.

13. "There can be no question of the competency of" the evidence of a claimant against a deceased person, as to how long and how much labor he spent on the books of the deceased, in keeping them "from July 1st, 1879, to October 1st, 1881, and in going over and correcting his books for about ten years", and as to the value of the services.

14. "It is no proper objection to this testimony that the law might raise from it the implication of a promise by the deceased in his lifetime to pay what such labor was reasonably worth".

—*Belden v. Scott, Estx.*, 65 W. 425, 426.

15. After testimony given, objection was made "to the testimony as incompetent and irrelevant. It was certainly relevant, and in fact competent. If there was any incompetency, it was in the witness to give the testimony and not to the testimony given," and such objection is held not sufficient to consider the point.

—*Union Nat. Bk. v. Hicks, Admr.*, 67 W. 189, 194.

16. An objection to a question "as incompetent, irrelevant and immaterial", was held "not sufficiently specific to raise the question of the competency of the witness under section 4069", the testimony being "in fact competent", and the incompetency "was in the witness giving testimony of that nature, and not in the testimony given. *Union Nation. Bk. v. Hicks, Admr. Supra*". (Followed in *Wells v. Chase*, 126 W. 202; see OBJECTIONS).

—*McCormick v. Herndon*, 67 W. 648, 652.

17. Evidence by a son, on a claim for board and lodging of his father, against the estate, as to the quality of board, the number of weeks boarded, and the absences, is held proper, and not "transactions with the deceased under the 'ban' of the statute, sec. 4069. These are independent facts, and in no sense transactions with the deceased." *Beldon v. Scott*, 65 W. supra.

—*Prichard v. Prichard*, 69 W. 373, 375.

18. Evidence by claimant, on cross-examination, of an express oral contract with the deceased, was held proper to prove such contract.

See SERVICES.

—*Ellis v. Cary, Admr.*, 74 W. 176, 183.

19. Sec. 4069 "does not exclude the testimony of the agent of the party or person whose testimony is thus excluded.

20. At the common law the testimony of a party to the action was absolutely excluded, but the agent of such party was a competent witness to prove the whole cause of action or the defense, although the opposite party derived his interest in the subject matter of the con-

troversy through a deceased person. Sec. 4069 does not exclude testimony which was admissible at the common law." (Approvingly cited in *Johnson v. Fraternal R. Assn.*, 136 W., 528, 531.)

—*Hanf v. N. W. Masonic Assn.*, 76 W. 450, 453.

21. In an action of ejectment by the heirs of a deceased wife's former husband, the defendant succeeding husband testified to prove an executed oral ante-nuptial support contract with his deceased wife, as consideration for conveyance by her to him of the land in question, and it was held that sec. 4069, did "not exclude such testimony, because in this action the plaintiffs as the 'opposite party, did not derive their title from such deceased person'".

—*Larsen v. Johnson*, 78 W. 300, 305.

22. A proponent and principal beneficiary under a will was held incompetent to testify as to the making and execution. See EXECUTION OF WILLS.

—*Goerke v. Goerke*, 80 W. 516.

23. Where a widow, executrix, claimed property of the deceased as given to her, it is said: "Her own testimony to that effect would not have been admissible; much less, hearsay evidence of her unsworn statements", alleged to have been made prior to her decease.

—*Murray v. Kluck*, 87 W. 566, 571.

24. A party could not testify whether "he ever notified" the other party to a contract, who is now deceased, that the lumber delivered "was not in accordance with the contract", because it called for a personal transaction with a deceased person, it not appearing affirmatively that the notification was by letter.

—*Hazer v. Streich*, 92 W. 505, 510.

25. A party, a payee, was properly allowed to testify "to the effect that K's (now deceased) endorsement was on the note at the time when it was delivered to" such party, the evidence not disclosing that either was present at the endorsement.

26. He was also "permitted to testify that he furnished the money on the credit of" K.;

27. And his co-party, "that he had received a letter, purporting to be from K., and which 'appeared to be signed' by him"; that the letter was read to him by C., the other payee and party;

28. And the party "C. was permitted to identify the signature of K. to the letter, and to testify to its contents" as to raising the money and endorsement,—the letter being lost;

29. "The letter was not a transaction had personally with K., within the intention of sec. 4069", and such testimony was held proper. *Daniels v. Foster*, 26 W. supra.

—*Sawyer v. Choate*, 92 W. 533, 535.

30. As to the parties being "incompetent to testify" as to transactions with a deceased agent, under sec. 4070, it is said:

"This court has held that an objection to the relevancy or materiality or even to the competency of such testimony is insufficient,

31. And that, to be effectual, the objection should be to the competency of the witness to testify as to such transaction or communication. Union Natl. Bank, 67 W. Supra; McCormick v. Herndon, 67 W. supra."

—*Sucke v. Hutchinson*, 97 W. 373, 375.

32. Where the testimony of a transaction with a deceased party was testified to in part by the opposite party, the whole was admitted. See EVIDENCE.

—*McNally v. McAndrew*, 98 W. 62, 65.

33. On the question of a gift and ownership, the donee "was allowed to testify against objection that she did not herself endorse the name of Q. (the deceased donor) upon the backs of the certificates of deposit in controversy, and that she had had the certificates in her possession since" about two months before the decease. Held proper. *Stewart v. Stewart*, 41 W. supra.

—*Murphy v. Quinn*, 99 W. 466, 468.

34. As to opening the door with adverse party examination as to transactions with a deceased agent. See DEPOSITIONS.

—*Maldaner v. Smith*, 102 W. 30, 39.

35. Sec. 4069 is held not to exclude officers of corporations from testifying thereunder. (Changed by subsequent amendment including officers, etc., ch. 197, L. 1907).

—*Will of Bruendl*, 102 W. 45, 49.

36. An heir, being a subscribing witness to a will which did not provide for him, though "he was a party", "was not incompetent under sec. 4069", he being "called by the proponents of the will—the adverse parties,—the only ones who had any right to object to his competency.

37. It is always in the discretion of the adverse party to waive the protection afforded by sec. 4069, either by refraining from objection, or by offering testimony of another witness;

38. And he may equally waive it by calling his opponent and examining him as a witness to personal transactions. *Becker v. Foster*, 64 Ill. App. 192; *Taylor v. Ainsworth*, 49 Nebr. 696".

—*Will of Hoppe*, 102 W. 54, 55.

39. "Unless the witness is a party to the action, or is in fact the real party in interest (*Wright v. Jackson*, 59 W., supra), or unless he is a person through or under whom the party offering his testimony derives his interest or title, his testimony is not barred by the statute," under secs. 4069, 4070.

—*Laack v. Runge*, 104 W., 59, 60.

40. Sec. 4069, "does not forbid testimony of transactions or communications between the deceased and third persons, though in the

witness's (defendant's) presence, if he did not participate therein and they were not affected by his presence. (N. Y. cases)." Likewise "intimated" in cases, *supra*. So held.

—*Wollman v. Ruehle*, 104 W. 603, 607.

41. An insurance company does not "in any sense, sustain its liability from, through, or under" the insured, and the plaintiff beneficiary is not precluded, under sec. 4069, from testifying "to the conversation between her husband and the agent of the defendant" company as to the contract.

—*Chamberlain v. Prudential Ins. Co.*, 109 W., 4, 8.

42. Testimony "merely as to the witness's transactions with third persons",—as that she received no payment from makers of notes, on the sale of her property, negotiated by the deceased, and for which she makes claim against the deceased's estate,—was held admissible.

43. "The fact that counsel may argue" therefrom, "to any imaginary inference that certain acts were done by the deceased (as that he received the money), is not enough to preclude her from testifying as to such transactions".

44. And as to "a note drawn up by a third person in the presence of both plaintiff and her husband (the deceased), the question was asked: 'To whom was the note payable? A. To my husband'. This was merely evidence as to the contents of a written paper, and seems not to be improper, within the rule of *Page v. Danaher*, 43 W. *supra*".

45. While "the rule of the New York decisions was adopted by us in *Wollman v. Ruehle*, 104 W. *supra*", yet, at a transaction and settlement of a note belonging to her, between the deceased and a third party, where the witness' presence "doubtless served to authorize and justify her husband and the debtor in making the adjustment", she "should not have been permitted to testify thereto", though "she says she 'saw without in any way participating'", therein.

46. Testimony that "tended to justify an inference of" delivery of money and a note by plaintiff to the deceased, "and a denial that he ever returned it to her", is held objectionable, under the statute, sec. 4069.

—*Brader v. Brader*, 110 W. 423, 428.

47. In an action by the administrator on a note to the deceased, the defendant maker, in answer to a question, testified that "It was paid", and subsequently testified that she claimed to have paid it to the deceased, personally; held error under sec. 4069. (Cases *supra*.)

—*Milwaukee Trust Co. v. Warren*, 112 W., 505, 506.

48. While a party present "may testify to a transaction between the deceased and a third person (cases)", "such evidence is permitted only upon the ground that the transaction is strictly personal between the deceased and the third person";

49. But "the rule does not apply where the party testifying partici-

pated in the transaction by words or acts or by presently influencing the communication or transactions. *Brader v. Brader*, 110 W., *supra*”.

—*Morgan v. Henry*, 115 W., 27, 30.

50. “Self-serving declarations” of the deceased are inadmissible though the adverse party opens the door. See ADMISSIONS.

—*Pym v. Pym*, 118 W. 662, 670.

51. Where the plaintiffs called the defendants at the trial and cross-examined them as adverse parties under sec. 4068, as to the consideration of a mortgage and deed received by the latter from the intestate, they “opened the door for the admission of the testimony of the defendants offered” in making their defense as to such consideration and the agreement with reference to such transactions, under sec. 4069.

—*Drinkwine v. Gruelle*, 120 W., 628, 632.

52. Under the rule of *Wollman v. Ruehle*, 104 W. *supra*, quoted, it is held, that where the “third persons” are also parties, then “the record does not justify the assumption that the witnesses, who were adverse parties to the proceedings, did not participate in the transactions or communications sought to be established by them, or that they were not affected by their presence”, and this evidence was held properly rejected.

53. “The person named as executor in a proposed will, who appears as proponent in a contested proceeding, with no other interest in the estate of the deceased, has no beneficial interest in, nor sustains any liability under, the subject of the controversy, though he is a nominal party to the proceeding”.

54. Under the amendment of ch. 181, L. 1901, inserting the qualification “in his own behalf or interest”, in sec. 4069, it is held that such executor named “was a competent witness in the proceeding for the probate of the will” “to testify to personal transactions or communications with the deceased”. —*Anderson v. Laugen*, 122 W. 57, 62.

55. Where an adverse party is “first called and examined” at the trial under sec. 4068, as to transactions with a deceased person, this “opened the door, under sec. 4069,” to such adverse party to testify in his own behalf as to such transactions.

—*Currie v. Michie*, 123 W. 120, 127.

56. As to testimony of wife as a party, concerning transactions of her deceased husband. See HUSBAND AND WIFE.

—*Schultz v. Culbertson*, 125 W. 169, 172.

57. Performance of services and their value, “did not involve a transaction personally with the deceased,” and claimant could therefore testify thereto. See also SERVICES.

—*In re Happel-Bossi*, 133 W., 119, 123.

58. In a suit by a trustee on a note of \$200, for which a second note had been given while the first was supposed to be lost, "evidence of the defendant that he went into V.'s (deceased) store with \$400 in money and came out with the second note and but \$200 in money was doubtless inadmissible.

59. If the evidence did not tend to prove that defendant paid V. the amount due on the note and that V. surrendered the note upon such payment it was immaterial;

60. If it did tend to prove these facts then it was evidence of a transaction had by the defendant personally with a deceased person through whom the plaintiff derived his title to the cause of action, and such evidence is excluded by sec. 4069", as, "settled by the case of *Brader v. Brader*, 110 W. supra". —*Jackman v. Inman*, 134 W. 297, 299.

61. Where plaintiff calls defendants as adverse witnesses, and the "examination covered in general terms all the property (of deceased) that came into the defendants' possession, and referred to transactions between them and the decedent's involving the receipt and payment of moneys",

62. The defendants in their own behalf, should have been allowed to "give the details of such communications and transactions covering the negotiations", though they "were not specifically covered by the plaintiff's evidence". See also DISCOVERY.

—*Eisentraut v. Cornelius*, 134 W. 532, 541.

63. "In any action, before the plaintiff has given, or has been permitted to give, his testimony with reference to a transaction or communication by him had with such deceased person as is described in sec. 4069, if the defendant examine witnesses concerning the same transaction (whether the defendant's witnesses so examined are competent or not),

64. The plaintiff has by force of this statute his disqualification or his incompetency as to that particular transaction removed and he may testify concerning it.

65. It would be quite unjust and contrary to the provisions of sec. 4069, to permit the plaintiff in rebuttal of the defendant's defense to produce witnesses to such transaction or communication, and then deny the defendant's right to testify concerning the same transaction on sur-rebuttal.

66. The defendant was first made competent by the act of the plaintiff in introducing witnesses upon this subject in rebuttal,

67. And the rule of the order of proof, being a mere rule of convenience, must yield to the rule of the statute".

—*Anderson v. Anderson*, 136 W. 328, 331.

68. Where the defendant testified that a statement written on the second note referred to the lost note, and that deceased's receipt produced "referred to interest on the note sued on", (see same case, 134

W. supra), it was held to be "within the prohibition of sec. 4069" and "erroneously admitted", "the obvious purpose and effect of it" being to show payment of the note sued on. (Cases, supra).

69. "The decedent during his lifetime would have been a competent witness to refute defendant's statements he thus makes".

—*Jackman v. Inman*, 137 W. 30, 31.

70. Where plaintiff's son executed an instrument for him at his "parol direction", and the son dying,—“the plaintiff's evidence was properly admissible”, as to the transaction, “in view of his testimony that defendant was in his room and presence when the agreement was finally concluded and the instrument was signed”.

—*Mariner v. Wiens*, 137 W. 637, 639.

71. Where the scrivener and executor—named was also a trustee of a corporate beneficiary, and “was competent respecting the transaction he testified to till after the commencement of the litigation”, and was “rendered incompetent before the trial by a statute (ch. 197, L. 1907, amending sec. 4069 as to corporate officers) passed in the meantime”, it is held,—

72. “He could thereafter restore his competency by surrendering that which interfered therewith, as he did”, by resigning as corporate trustee.

73. “The statute deals with the condition when a witness is offered”. “So he was a competent witness respecting what occurred between himself and the testatrix”, as to the making of the will and conversations leading up thereto.

—*Will of McNaughton*, 138 W. 179, 188.

74. On the question of delivery as to a deed from the father, Julius, now deceased, to a daughter, Jennie, the testimony of a son Frank, an adverse party, “to the effect that he saw the deed in the possession of his father”, is held “incompetent under sec. 4069”, he having “obtained the information concerning which he gave evidence in a transaction with Julius, in which the deed in question was shown to Frank by Julius for the purpose of examination”.

—*Chase v. Woodruff*, 138 W. 641, 646.

75. Where the party's testimony as to transactions “was in the form of a deposition taken before” the adverse party's death, “the statute (sec. 4069) is still applicable and the testimony inadmissible. (Many citations)”.

—*Boyd v. Gore*, 143 W. 531, 534.

76. The question as “to the competency of the executor” “to testify to declarations of” his testate, negating his intent to make a gift of a note claimed by claimant,—is not determined, as “the judgment below must be reversed on other grounds”, and “the members of this court are not in accord upon this question”. See also GIFTS.

—*Will of Klehr*, 147 W. 653, 656.

77. Where the adverse party examined witnesses as to other communications, but not as to those on certain specific material dates, it was held "no error in excluding the testimony of" the other party as to such dates. See also GIFTS.
—*Hilton v. Rahr*, 161 W. 619, 624.

78. "Testimony of" claimant "in relation to the (personal) services performed by her for the deceased" was held "admissible under sec. 4069", there being no "proper objection". "But even if proper objection were made, we think the evidence was admissible. Est. of Kessler, 87 W. 660 (See SERVICES)".

—*Gardner v. Young's Est.*, 163 W. 241, 246.

79. "When the door is once opened for one to testify to a communication or transaction had by him personally with a deceased person, the witness may testify, not only to the facts of such communication or transaction, first brought out, but to all 'matters to which' the testimony in the opening 'relates'. Such is the plain meaning of the statute".

—*Johnson v. Bank of Wis.*, 163 W. 369, 374.

TRANSFER TAX.

See INHERITANCE TAX.

TRIAL.

See also RULES OF PRACTICE.

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1. "Motions for a new trial are mainly addressed to the sound discretion of the trial court and will not be interfered with except where 'there has been a gross abuse' of this discretion.

—*Cook v. Helms*, 5 W. 107, 108.

2. "After the cause was submitted to the court", and before decision, on a motion with affidavits as to newly discovered evidence, it is said: "A court of equity should exercise its discretion liberally to enable the parties to place before it all the evidence within their reach material to the issue. Especially should the court do so where, as in this case, the evidence is conflicting and mostly circumstantial".

—*Stewart v. Stewart*, 41 W. 624, 629.

3. It is "the better practice, in cases tried by a referee or by the court without a jury, to take the evidence offered by either party, although objected to by the adverse party, and although the referee or judge might be of the opinion that the evidence offered was inadmissible;

4. And that such judge or referee should not refuse to take the evidence offered, except in cases clear of doubt."

5. "When the referee or trial judge offers to receive evidence which in his opinion, is inadmissible, the party refusing to give the evidence waives any right to insist upon the erroneous opinion of the referee or judge as a ground for reversal of a judgment against him."

6. The judge, in court trials, "should, in every case where there is any reasonable doubt upon the question of the admissibility of the evidence, receives the same subject to the objections of the opposite party, although the referee or judge may entertain the opinion that the evidence is not admissible.

—*Holendyke v. Newton*, 50 W. 635, 637.

7. "After the case was closed", "the matter of re-opening the case for further proof rested in the sound discretion of the circuit court. It was not a matter of strict right".

—*Riha v. Pelnar*, 86 W. 408, 415.

8. "The conduct of the trial is in the sound discretion of the trial court", and in the absence of "abuse of discretion", the ruling was sustained as to "allowing the case to be opened after it was formally closed, and allowing the introduction of further evidence".

—*Winn v. Itzel*, 125 W. 19, 29.

9. "The trial in circuit court is a trial de novo" on appeal from county court, and evidence must be presented to items of an executor's account, specifically objected to. See ACCOUNTS OF EXTRS. & ADMRS.

—*Fitch v. Huntington*, 125 W. 204, 209.

10. "A motion for new trial on the ground of newly-discovered evidence", "predicated on an affidavit of one of contestant's witnesses that, after giving her testimony, she was offered a thousand dollars if she would reverse it", there being "nothing but suspicion" to connect proponent therewith, was denied, as "such testimony would be wholly inadmissible if a new trial were granted".

—*Mueller v. Pew*, 127 W. 288, 292.

11. "Where an heir at law is present in the county court at the time the will is admitted to probate and makes no objection to the same, and subsequently appeals therefrom to the circuit court,

12. He is" not "estopped from contesting such probate in the circuit court by reason of his consent given in the county court" and "was entitled to a trial de novo in the circuit court". See also *APPEAL*.

—*Bovee v. Johnson*, 130 W. 447, 450.

13. "The admission of" "evidence subject to objection cannot be endorsed as good practice", where "it was perfectly plain when the evidence was offered that it was objectionable", "and there was no suggestion that it could become competent through circumstances not then disclosed.

14. The reception of clearly incompetent evidence is a practice which leads to confusion in the trial, casts the burden of meeting such incompetent evidence upon the opposite party, and is liable to entail useless expense of money and waste of time in fruitless inquiry".

—*Hagan v. McDermott*, 134 W. 490, 496.

15. "The case comes to the circuit court for a trial de novo of all questions relating to the dealings of the executors with the trust funds, and none of those dealings can be barred out because omitted in the county court".

—*Estate of Wells*, 156 W. 294, 312.

16. As to trial by jury being proper in an action for breach of a devise contract on lost writings, and jury trial in will cases. See *LEGACIES. JURY*.

—*Dilger v. Est. of McQuade*, 158 W. 328, 331.

TRIAL BY REFEREE.

See *REFERENCE*.

TRUST COMPANIES.

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TRUST CONTRAVENTION OR ASSIGNMENT.

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1. The statute of limitation does not apply to a trustee where he continues to act "with the consent, and at the request of the cestui que trusts and all persons interested".

—*Sheldon v. Sheldon*, 3 W. 699, 707.

2. As a general rule trustees "cannot purchase the trust property", and when they are so permitted, "such a transaction is always scrutinized in a court of equity with a watchful and jealous eye, and will not be sustained to the disadvantage of the cestui que trust, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee. 1 Story Eq. Jur. 321".

—*Puzey v. Senier*, 9 W. 370, 376.

3. An administrator is not a "trustee of the heir" as to real estate not necessary for debts.

4. An administrator may be held as trustee for heirs of real estate purchased with estate funds, where the money is not accounted for; otherwise, if the fund is accounted for and report approved.

—*Barker v. Barker*, 14 W. 131, 146.

5. An executor as trustee will be required by "order from the county court", to carry out the trust for the support of "the mother of the deceased" and the circuit court will not interfere.

—*Batchelder v. Batchelder*, 20 W. 452, 454.

6. Trustees cannot buy or benefit in the sale of trust property. See TRUSTS.

—*In re Taylor Orphan Asylum*, 36 W. 534, 552.

7. Where an attorney is counselor and has fiduciary relations with the testator and executors, and purchases trust property, it is held, "the law seems to be well settled, that in such cases the attorney will become the trustee of the property so improperly purchased, at the option of the parties interested, and may be charged as fully with the administration of the trust, and be held as responsible for his dealings with the property, by the cestui que trust and be called upon to account, as the original trustee, even where the sale to the attorney 'was fairly made, and for what at the time was considered by all the parties a fair price'. James, ex parte, 8 Vesey, 337." See also ATTORNEY AND CLIENT.

—*O'Dell v. Rogers*, 44 W. 136, 179.

8. "We take the rule to be now very generally settled in this country, as it is well stated by Walworth, Ch, in *Torrey v. Bank of Orleans*, 9 Paige, 649 (cited in *Taylor Orphan Asylum*, 36 W. 534, under TRUSTS),

9. Or, as it was stated by Paine J., in this court: 'The rule is well settled that trustees are not permitted to purchase the trust property; not because they might not, in many instances, make fair and honest

disposition of it to themselves, but because the probability is so great that they would frequently do otherwise, without danger of detection, that the law considers it better policy to prohibit such purchases entirely, than to assume them to be valid except where they can be proved to be fraudulent'. *Gillett v. Gillett*, 9 W. 194''.

10. "A trustee is not barred from ever becoming a purchaser of what has once been part of the trust estate.

11. When the title of the trust estate has passed by valid sale, in which the trustee has no interest, and all the interest of the cestui que trust in it has ceased, the trustee becomes a stranger to the property, and may purchase it like any other stranger''.

12. "But where the trustee's sale to a stranger is colorable only, and made in whole or in part for the use of the trustee, or upon any understanding, express or implied, between the trustee and the purchaser, for any future interest of the trustee in the purchase or in the trust property, purchased, a court of equity will deal with the trustee as a direct purchaser from himself, and will avoid his purchase at the suit of his cestui que trust."

13. "And where the trustee, having ostensibly conveyed to a stranger, suddenly becomes interested with his own grantee, a court of equity will regard the transaction with great jealousy and avoid it in favor of the cestui que trust, upon slight evidence of collusion in the trustee's sale, between the trustee and the purchaser;"

14. "A multo fortiori, when the trustee becomes interested in the purchase while the sale remains in fieri"; as in this case where the "conveyance of the corporate property by the corporation was to the two directors and the superintendent", under "an agreement to sell to the superintendent alone, made before the directors had entered into any engagement to join him in the purchase", the contract being executory.

15. "Conceding the validity of the superintendent's purchase, their (the two directors') duty to the corporation precluded them from participating in it. And the conveyance to them is voidable at the suits of their cestui que trusts."

16. "Agents may be quasi trustees to bring them within the broad rule applicable to trustees generally, that they cannot become purchasers from their principals.

17. But an agent generally comes within this rule, only when his agency is so connected with the sale as to make it his duty to obtain the best terms for his principal; when he cannot be agent to sell and principal to buy". —*Cook v. Berlin W. M. Co.*, 43 W. 433, 439.

18. "The law, is very clear, that 'the office and duties of a trustee, being matters of confidence, cannot be delegated by him to another, unless an express authority for that purpose be conferred on him by the instrument creating the trust'. *Hill on Trustees*, 175; *Perry on Trusts*, 287, 294.

19. This principle is elementary, and has only one exception, and that is when the trustee delegates the trust to another with the consent of the cestui-que-trust and all other parties interested in the trust”.

—*Seely v. Hills*, 49 W. 473, 485.

20. “Undoubtedly the general rule is that trustees are liable only for good faith and common prudence, and that if a loss happens to a trust fund, in relation to which they have exhibited this care and prudence, they may be allowed for the loss in their accounts”.

21. But where an administrator deposits a trust fund in a bank, in his own name, not as trustee, and takes such a certificate of deposit, and the bank afterwards fails, the loss is that of the administrator individually, though he told the bank it was a trust fund, and though he had no other deposit in the bank at the time.

22. “The deposit, put an end to the identity of the funds deposited, and the certificate was simply an agreement, taken in exchange for the money, to repay a like amount in currency upon the conditions named. Beyond question the certificate was negotiable. *Klauber v. Biggerstaff*, 47 W. 551.”

23. “The making of the deposit and taking the certificate to himself individually was therefore not only an extinguishment of the identity of the money, but an appropriation of it, in law, to his own personal use”.

—*Williams v. Williams*, 55 W. 300, 304.

24. “The doctrine was settled in *Wilcox v. Bates*, 45 W. 138, that ‘trustees in possession are in general chargeable with actual receipts only, except upon proof of gross negligence or of fraud in lessening or concealing receipts;

25. And a mere attempt by them to ignore the trust and deal with the property as their own, is not such a fraud as will charge them beyond actual receipts; nor does it tend to prove, but rather repel, negligence in the administration of the estate”.

—*Hoile v. Bailey*, 58 W. 434, 457.

26. Executors with duties as trustees, without being named as such, or estate given to them as such, are held to perform the duties as such. See also VESTING OF ESTATES.

27. Converting money into real estate, “could not properly be done even by a trustee, much less by a mere executor, without special authority. (Cases)”.

28. “Where no directions are given as to the manner in which the fund shall be invested, prior to final appropriation in satisfaction of the trust, it is left to the discretion of the trustee. (Citation).

29. A joint trustee of such discretionary trust is held to a more stringent liability for the acts of his co-trustee than in the case of a directory trust in which the directions have been followed”.

—*Scott v. West*, 63 W. 529, 557.

30. "Manifestly, it is the duty of the executors to administer the estate according to the provisions of the will, notwithstanding the duties thus imposed include such as are usually performed by trustees. *Scott v. West*, 53 W. supra". See also CHARITABLE TRUSTS.

—*Webster v. Morris*, 66 W. 366, 399.

31. Executor becomes a trustee for widow's personalty, after election. See ADMINISTRATION.

—*Beem v. Kimberly*, 72 W. 343, 368.

32. A trustee without direction "made a loan to a manufacturing company upon its note and the personal security of two endorsers", the company and endorsers being financially responsible at the time, but a loss on the trust funds at about one-half thereafter occurred. "While there is no evidence that the trustee did not act in good faith in making the loan, doubtless deeming it entirely safe and amply secured, yet he cannot be protected against the loss.

33. We are disposed, on this subject, to follow the English rule which has been adopted in some of our sister states, and hold that the trustee cannot invest trust funds in personal securities, and that it is not an exercise of sound discretion to so invest them.

34. Says Parker, V. C., in *Ackerman v. Emott*, 4 Barb., 626, 636: "It is a well-settled rule of the English court of chancery that the trustee can only protect himself against risk by investing the trust fund in real estate or governmental securities". (Followed in *Pabst v. Goodrich*, 133 W. 43 (see TRUST FUNDS), and made statutory and extended by sec. 2100b in 1903, and subsequently amended.)

35. "We are disposed to hold that the trustee should not be protected against loss in investing trust funds unless he loans on real estate security (extended by sec. 2100b) or invests in some other security approved by the court to which he is accountable for the manner he executes his trust".

36. "We do not enter upon a discussion of the doctrine which makes an investment on private or personal security at the risk of the trustee, because the law is elementary".

—*Simmons v. Oliver*, 74 W. 633, 635-7.

37. In a suit against a trustee "the beneficiaries are indispensable parties". See PARTIES.

—*Biron v. Scott, Trustee*, 80 W. 206, 213.

38. An executor named as such only but given also trust duties, is assumed to be named also as trustee as a distinct office. See CONSTRUCTION OF WILLS.

—*Sawtelle v. Ripley*, 85 W. 72, 75.

39. As to execution and construction of a "power joined to the trust", to pay out "as it shall seem to him proper". See POWER.

—*Osborne v. Gordon*, 86 W. 92, 95.

40. In *O'Dell v. Rogers*, 44 W. supra, it is held, "that the active attorney of the executor of an estate cannot buy from the executor, property of the estate, and that persons who united with the attorney in the purchase, with full knowledge of the facts affecting his disability, are also chargeable with him as trustee of the property bought".

41. But as to a former agent of the trustee in the sale as a purchaser of trust property, it is said: "There is no principle which prevents an agent from abandoning his agency with the knowledge and consent of his principal, and then purchasing of the former principal at arm's length and upon an equal footing". So held.

42. "The law is that a party injured by the fraudulent sale of property made by his trustee has a choice of remedies. He may affirm the sale and recover the price, or he may disaffirm the sale and recover back the property. But he cannot do both,—they are inconsistent remedies".

43. A fraudulent purchaser of trust property, where the sale is "set aside as fraudulent and void", not "charged merely with constructive fraud, but found and amply proven to have been an active participant in the actual and intended fraud", "cannot, under well-established principles, be credited with improvements voluntarily made on the trust property. The decisions of this court are to this effect. *Waterman v. Dutton*, 6 W. 265; *Thompson v. Thompson*, 16 W. 91; *Witt v. Trustees*, 55 W. 376; (other cases)". So held as to many thousands of dollars in building, grading, filling, water pipes, sewers, etc.

44. "It seems questionable whether a trustee to sell lands could himself be allowed for these improvements. 2 *Perry Trusts*, sec. 526, and cases cited."

45. Taxes paid, commissions to real estate agents, and abstracts on lots sold for which proceeds were recovered, were held properly credited to such fraudulent purchaser, as the trustee himself "would have been entitled to credit for such expenses" had he made the sales.

—*Hawley v. Tesch*, 88 W. 213, 238.

46. An executor as such may hold the estate and be compensated, as such, though performing the duties of trustee until qualifying as such. See ADMINISTRATION.

—*Schinz v. Schinz*, 90 W. 236, 246.

47. "That a corporation may be authorized to act as trustee is very well settled (citations)", and the law may properly exempt it from giving bond, as it "gives security by depositing securities with the state treasurer".

—*Roane Iron Co. v. Wis. Trust Co.*, 99 W. 273, 275.

48. While the trustee denied the trust, but incurred attorneys' fees and litigation expenses, "acting from a regard to the interests of the trust estate," and of which the cestui que trusts received the benefit, such expenses are credited to such trustee out of trust funds.

49. But, "certainly the defendant, while denying the trust, and

claiming all the property as her own, was in no position to charge" for her services or those of her agents and attorneys.

—*Fuller v. Abbe*, 105 W. 235, 238.

50. "All trustees possess implied power to use the usual and ordinary means for the conduct of the business intrusted to their charge," including "ample power to employ attorneys".

—*Vilas v. Bundy*, 106 W. 168, 182.

51. As to "the power of one of several joint trustees or executors, the underlying and general principle is that the trust is imposed on all jointly;

52. That all together constitute but one collective person for the purpose of executing it;

53. And, as a corollary, that the act of any of them, less than all, is not the completed act of that collective person and is ineffectual. 1 Perry, Trusts, 411.

54. The application of this principle to its full extent is not universal. (Citations); *Weir v. Mosher*, 19 W., 311, 316 (See EXTRS. & ADMRS.)

55. In the main, however, any substantial affirmative act—such, for illustration, as the conveyance of property—requires the joint action of all in order to have any validity."

56. But as to negative acts, or of omission, courts have "recognized the necessity that one trustee may invoke the aid of courts for protection of the trust estate, although his co-trustee refused to join with him."

57. "It seems certain, therefore, both on reason and authority, that one joint trustee is not without power to invoke the aid of courts for protection or recovery of the estate, when, in his judgment, neglect to do so would be a breach of duty."

58. He must "excuse the non-joinder of his co-trustee", and make him a defendant; he may be denied "his expenses if he litigates not in good faith."

59. An appeal by one only of two trustees,—the other and all interested parties in being, being satisfied with the circuit court judgment,—was held justifiable and proper, there being possible interests of persons not in being, involved. See also TRUST VARIATIONS.

—*In re Luscombe's Will*, 109 W., 186, 195.

60. Where executors and trustees were given the estate, real and personal, of about \$1,250,000, of the late Governor Ludington, by will, for private beneficiaries as set forth, the widow receiving a comparatively small interest therein, which provision was, shortly after the decease, at the instance of and by contract with such executors and the heirs and the widow, somewhat enlarged but still less than one-half of her legal rights, and she having released and conveyed to such trustees

all of her other interest in the estate, without having been advised of her legal rights by such trustees or otherwise, and without having elected or formed an intent to elect within the year to take under the law, and final settlement having been duly had and the estate transferred to the trustees,—

61. And about six years thereafter, but only about two years after suspecting that she had not received her legal rights, the widow commenced suit in equity against the trustees and heirs to rescind such contract for fraud and “to recover compensation for the loss which she suffered by not insisting, at the proper time, upon her legal rights”, —she is, on the facts, found entitled to recover, and it is held;

62. “That the executors and trustees were the trustees of the property for” the widow as to her legal rights as well as “for the particular uses and purposes expressed in the will”, and by reason of “the relation of trust and confidence” existing, they were also trustees independently of the will.

63. “That there is no duty resting upon the executor” “to inform such widow of her legal rights”, affirmatively, “but that she is presumed to know the law”, and it is for her to discover and assert her rights;

64. That the election statute, sec. 2172, “should be given the same force and effect as any other statute of limitations”, and as set forth in *Eingartner v. Illinois S. Co.*, 100 W. 373 (See LIMITATIONS OF ACTIONS), regardless of hardship “unless circumstances exist precluding its being insisted upon under the doctrine of equitable estoppel”;

65. But when the executors and trustees for themselves and the heirs “undertook to induce” the widow “to bargain away to them her property, of which they were the trustees”, for their and the heirs’ benefit, they “were bound to make to her the fullest and amplest disclosure” to her advantage,

66. On the “principle that a trustee cannot bind his cestui que trust irrevocably by a contract made with him to his disadvantage, especially where there is any reasonable ground to say that the contracting parties were not on an equality in the transaction”;

67. Such “transactions of a contract nature, between a trustee and his cestui que trust”, are “presumptively fraudulent and void at the election of the latter”;

68. And as to the trustee there is “no difference between disability to deal” for the benefit of himself as the representative of others, and “for the benefit of himself absolutely”;

69. “The fact that such false impression was a mistake of law does not militate against appellant’s (the widow’s) right to relief in equity”;

70. While the six-year statute of limitation applied, it only “commenced to run against appellant from the time she obtained knowledge of the fraud or might have obtained such knowledge by the exercise of reasonable diligence”;

71. In equity “it is sufficient in an action for rescission to show by

the complaint a willingness to do equity, to submit to a complete rescission, so far as practicable, and to make the defendant good for what was received from him in such manner as the court may direct. *Thackrah v. Haas*, 119 U. S. 499”;

72. The “heirs must make restitution of all moneys distributed to them” so far as necessary, and the widow restore and account for all she has received, in an accounting giving her her legal rights as if she had duly elected.

73. “In such accounting the trustees should be allowed their reasonable expenses and charges for caring for the property upon substantially the same basis as if they had administered the same for appellant as trustees of an express trust”.

—*Ludington v. Patton*, 111 W. 208, 229, 261.

74. The county court’s power to sell realty in the hands of trustees, “is strictly limited by sec. 4030”. See SALE OF REALTY.

—*Bloor v. Smith*, 112 W., 340, 346.

75. Executors named, are held to have estate vested in them as trustees, pending suspension of alienation and of vesting in devisees for twenty-one years. See CONSTRUCTION OF WILLS.

—*Will of Kopmeier*, 113 W. 233, 238.

76. Where an executor was erroneously continued as such as trustee, held jurisdictional for the appointment of admr. de bonis non. See ADMR. DE BONIS NON.

—*Barney v. Babcock’s Est.*, 115 W. 409, 414.

77. Where an executor, also named as testamentary trustee, continues as executor a dozen years, without accounting during such time, or having filed a final account, then on petition of beneficiaries for a final accounting and for the appointment of another as trustee, though there was a further delay of several years thereafter, and several orders were entered and a final accounting finally had separately, it was held that a trustee was subsequently properly appointed based upon such petition.

78. “His duties and functions as executor did not, in law, cease until his final account as such had been filed and allowed. See *Barney v. Babcock’s Est.*, 115 W. supra.

79. The county court had ample jurisdiction to settle and allow his account, and such settlement and allowance are binding upon the sureties on his bond.

80. His duties as executor continue until he qualified as testamentary trustee, and, as it does not appear that he had so qualified, he held the money in his hands as executor until his final account was settled. *Schinz v. Schinz*, 90 W. supra”. See also SURETIES.

—*Wallber, Judge, v. Wilmanns*, 116 W. 246, 249.

81. As to title vesting in trustees, though they must qualify by giving bond before acting. See TRUSTS.

—*McWilliams v. Gough*, 116 W. 576, 580.

82. A trustee appointed, on resignation of the one named in the will, by force of the statute succeeds to the title. See TRUSTS.

—*Holmes v. Walter*, 118 W., 409, 429.

83. Where, under the will, in case of vacancy, trustees are to be appointed by the county court or judge "subject to the approval of the parties interested", and such parties fail to consult or agree, and the court appointed a trustee suggested by each of two parties, one being objectionable to one of the parties, though his character for integrity and business capacity was above reproach", such appointment being also on appeal approved by the circuit court, such judgment was reversed, and it is held:

84. The "purpose is not only to secure competent men of integrity, but also those who will co-operate in a friendly and harmonious manner";

85. "Upon questions of this description there is no substantial distinction between the 'demonstrated intention' of the testator and an 'express declaration' of such intention", and the "ascertainable intention must be enforced". (Citations)

86. Neither party "can dictate such appointment, nor contumaciously refuse to agree". "The county court has a certain discretion to be exercised" "but not arbitrarily and contrary to the expressed wish of the testator".

—*Cole v. Watertown*, 119 W. 133, 138.

87. As to the elements and characteristics of a trust, and that "no person can be both trustee and cestui que trust at the same time". See TRUSTS.

—*Danforth v. Oshkosh*, 119 W. 262, 276.

88. Various matters and manner of accounting by the trustees to the widow, under the mandate of *Ludington v. Patton*, 111 W. *supra*, reviewed and determined. See also ADVANCEMENTS. INSURANCE.

—*Ludington v. Patton*, 121 W. 649, 655.

89. A sale by a "fiduciary" to himself of trust property, is voidable, though without wrongful intent, and the trustee must respond with the property, or its value, and with profits realized. See SURVIVING PARTNER.

—*Rowell v. Rowell*, 122 W. 1, 13.

90. "In the broad sense of the word a trustee is one 'in whom some estate, interest, or power in or affecting property is vested for the benefit of another'. Hill, Trustees, 41.

91. In this sense the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees, and agents, and all persons vested with the title or control of property and charged with

fiduciary duties in relation thereto for the benefit of another. *Ib. Lewin, Trusts, 490*".

92. "Executors, administrators, and guardians are frequently called trustees, and held to the responsibilities and duties of trustees by the courts. (Many cases).

93. It is well settled that beneficiaries of trust property, who are sui juris and whose rights are vested, may deal with and convey their equitable interests in the trust property,

94. And the trustee will be required to convey the legal estate in accordance therewith if such action be not contrary to the terms of the trust. (Citation)

95. In the case of an administrator the beneficiaries of the trust are the creditors of the estate and the heirs at law of the intestate." See also SETTLEMENT. —*McKeigue v. C. & N. W. R. Co.*, 130 W. 543, 546.

96. Where the will "expressly provides that the property 'shall be put on interest by someone appointed by the county judge', etc.", such "appointee" is to "act as trustee in the complete execution of the will", and "in legal effect, is the appointee of the testator. *Wolbert v. Beard*, 128 W. 391 (See VESTING OF ESTATES)." See also EQUITABLE CONVERSION. —*Benner v. Mauer*, 133 W. 325, 331.

97. An administrator with will annexed, under license granted to pay debts, and with knowledge and approval of the county court, sold realty at private sale after failure of public sale, to R. for \$600, he conveying it immediately to the administrator, who in thus "making this sale to himself acted in entire good faith and paid full value".

98. On confirmation he took possession, "greatly improved the same", and ten years later in 1901 sold it for \$1600. Appellant heir knew of the possession, of the improvements, of the last sale, "and at no time made any objection or claimed any rights" therein,

99. Until on a final accounting of the administrator in 1909, he claimed rents and profits, and the \$1,000 excess of the last sale over the first. Heir held not entitled to recover, but merely because found that the administrator "made no profit on the transaction"

100. "The administrator was the trustee of an express trust. Neither under the common law nor under the statute could he make a valid and binding sale of the trust property to himself. In *re Taylor Orphan Asylum*, 36 W. supra; sec. 3914.

101. Neither good faith nor the payment of an ample consideration will avail to support the sale in such a case where the trustee acts both for himself and his cestui que trust. *Shaw v. Crandon S. Bank*, 145 W. 639.

102. The sale is, however, not absolutely void, but voidable at the election of the cestui que trust. *Melms v. Pabst B. Co.*, 93 W. 153 (See SALE OF REALTY).

103. "Appellant is barred from attacking the sale by" sec. 3918, because action not "commenced within five years next after the sale.

104. That fact, however, does not prevent a recovery of any profits which the trustee may have made from his dealing with the trust property.

105. The cestui que trust may elect between two courses: he may disaffirm the sale and recover the property sold;

106. Or he may affirm the sale, hold the trustee to his purchase, and require the trustee to account for his profits made in the transaction. In re Taylor Orphan Asylum, supra; 28 Cyc. 1027, subd. b."

107. As to laches, "to cut off the right to such an accounting",—"there can be no such bar as between the trustee of an express trust and a cestui que trust,

108. Unless there has been an unequivocal denial or repudiation of the trust. *Fawcett v. Fawcett*, 85 W. 332 (See IMPLIED TRUSTS); *Boyd v. Mut. F. Asso.*, 116 W. 155". —*McCleary v. Root*, 147 W. 60, 63.

109. "The evidence of B." that his co-trustee C. "authorized him to" manage the trust property, and the fact that C. did not take "any active part in the management", is held to prove B.'s authority to waive stipulations in a lease as to not subletting, and also to bind M. a successor to trustee. —*Katz v. Miller*, 148 W. 63, 69.

110. Where an administrator with will annexed continued to act as trustee without appointment and without final judgment on the administration having been entered, "was diligent in the performance of his trust", paid the rents to which the widow was entitled, "and in such amounts as she required",

111. And he "received five per cent on the balances remaining in his hands" and charged himself therewith, "it is clear that compound interest should not have been allowed" against him. (Cases).

112. And it is held that such administrator, after the "filing of his final account as administrator", and for the performance of duties "acting in the capacity of trustee or agent for" the widow, "that compensation should be paid him out of the funds (rents) which he was handling for her", and not out of the estate of the testator;

113. And that he should receive "for his services \$1.50 per day and commissions upon the amount of the personal estate collected and accounted for by him as provided by sec. 2939". See also RENTS AND PROFITS. —*Est. of Hemphill*, 157 W. 331, 338.

114. A devisee of land subject to a legacy lien is "not a trustee of an express trust". See also LEGACIES.

—*Nolan v. First Natl. Bank*, 161 W. 22, 25.

115. Where the will nominated P. and P. as executors and also as trustees, and they qualified only as executors, and their account as such

having been duly approved by decree which also "directed the executors to administer the trust fund as prescribed in the will", and they having so done for many years and then defaulted and died, their estates and their sureties as executors are held liable for such default.

116. "A testamentary trustee, under the provisions of sec. 4025, in order to qualify as such trustee is required to give bond to the county judge having jurisdiction of the probate of the will,

117. And the title to the trust estate cannot vest in the testamentary trustee until the proper bond required by the statute had been given and filed. (Cases, *supra*)".

118. "So in the instant case, in default of the executors qualifying as testamentary trustees they could not assume to perform any duties as trustees and they held the estate as executors,

119. And, as stated, if the court by decree formally attempted to assign it to them as testamentary trustees", "such action of the court did not operate to change the title to the property from them as executors to that of testamentary trustees, because they had not qualified as trustees". But "the county court did not" "undertake" so to do.

—*Karel v. Pereles*, 161 W. 598, 602.

TRUST FUNDS.

See also ACCOUNTS OF EXTRS. & ADMRS. ACCOUNTS OF GUARDIANS. MARSHALLING ASSETS. TRUSTEES. TRUSTS.

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1. An administrator's deposit of estate funds in his own name, not as trustee, is his personal loss, if any. Rules fully stated. See TRUSTEES.

—*Williams v. Williams*, 55 W. 300, 308.

2. Without approval of the court, a trustee is protected only by "investing the trust fund in real estate or governmental securities," regardless of "good faith", following the English rule. (Since extended by sec. 2100b). See TRUSTEES. —*Simmons v. Oliver*, 74 W. 633, 637.

3. A deposit of trust money by a guardian, "without any ear marks or indicia to distinguish it as the money" of the trust fund, its loss, if any, is his personal loss. "It is not a question of good faith". See GUARDIAN AND WARD.

—*Booth v. Wilkinson Gdn.*, 78 W. 652, 655.

4. The instant case overrules three previous decisions, and follows "the more recent rule in England" set forth In re Hallett's Estate 13 Ch. Div. 696, as to trust funds in a bank, "that 'if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it';"

5. "That 'if a person who holds money as a trustee or in a fiduciary character pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner * * * the drawer must be taken to have drawn out his own money in preference to the trust money'".

6. "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust'. Id. 719".

7. But "the owner of the property or money intrusted is" not "entitled to a preference over other creditors of an insolvent estate out of the property or assets to which no part of the trust fund or the proceeds thereof is traceable. (Cases)". So held here. (Approvingly discussed, and quoted in part in *Boyle v. N. W. Natl. Bk.*, 125 W. 498, 507). —*Nonotuck Silk Co. v. Flanders*, 87 W. 237, 241.

8. On neglect of a guardian to invest his ward's funds, he was held chargeable with simple interest, except for "six months after their receipt".

9. In case of such failure "from fraud or wilful breach of duty, the guardian will be charged with compound interest". See ACCOUNTS OF GUARDIANS. —*Taylor v. Hill*, 87 W. 669, 671.

10. "Since the decision of this court in the case of *Nonotuck Silk Co. v. Flanders*, 87 W. supra, and *In re Plankington Bank*, 87 W. 385, it must be regarded as settled, in this state at least, that, in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace.

it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent;

11. That when the trust fund has been dissipated", so "that it cannot be traced or identified", it is not given "a preference over the other creditors of the insolvent estate". Also "reaffirmed and applied" in *Thuemmler v. Barth*, 89 W. 381.

—*Burnham v. Barth*, 89 W. 362, 366.

12. "It is well settled that a trustee who deposits the trust funds in a bank, if he would protect himself from loss by failure of the bank, must make the deposit as of trust funds, and not as his own".

13. "It must be expressed in terms unequivocal, and not to be misunderstood, 'that they are the funds of the specific trust to which they belong'. The credit must be to him as trustee." *Williams v. Williams*, 55 W. supra.

14. "It is not enough to inform the bank that the money is trust funds, even though he acts as entire good faith. *Booth v. Wilkinson*, 78 W. supra".

15. "The letters 'Guar.', which follow the defendant's name in the certificate (of deposit), are not recognized abbreviations, and cannot be the legal equivalent of the word guardian. And, even with that aid, it would come short of showing that the deposit was made in his office as guardian of the plaintiff". Guardian held personally.

—*O'Connor v. Decker*, 95 W. 202, 204.

16. Where B. deposited his own, his wife's, and his employer's funds, to his own credit, and checked out for the various parties, "as the law presumes innocence instead of wrong", "all checks drawn for the benefit of the defendants (employers) would naturally be supposed to have been drawn on funds belonging to the defendants, and all checks drawn for the benefit of the plaintiff (the widow) would naturally be supposed to have been drawn on funds belonging to the plaintiff." *Nonoctuck S. Co. v. Flanders*, 87 W., supra, approvingly cited.

—*Bromley v. C. C. C. & St. L. R. Co.*, 103 W., 562, 569.

17. Where the widow and another, guardians of an infant, sold his realty in New Hampshire under license in 1866, and invested and reinvested the proceeds of such realty, and also the infant's personalty (all obtained from his father's estate and all subject to the widow's life estate), in the widow's name; and where the widow just prior to her decease in 1890, transferred such proceeds and realty to her daughter S. "she then having knowledge of the plaintiff's (such former infant) rights therein"; and where S. on her decease in 1897, by will gave most of such property to others, and plaintiff "had no knowledge nor information as to" his interests in the premises "until after the death of his sister" S.; it is held,—

18. That the real estate so taken in the widow's name, purchased

with proceeds of the ward's realty and personalty, "thereby became impressed with a trust in favor of" such ward. *Gunn v. Blair*, 9 W. 352;

19. And such realty "so purchased with such remainder of the (ward's) personal estate became impressed with a trust in favor of the plaintiff";

20. That on the facts, it cannot be held "that the plaintiff's right of action is barred by the statutes of limitation";

21. That the legatees and devisees "would necessarily take under the will of S. subject to such trust";

22. And that "the controversy relates to real estate or the proceeds" thereof, sought by plaintiff to be "charged with a trust in his favor, and to have the title to the same adjudged to be vested in him", which "could not be done in county court, and hence the plaintiff had no complete remedy in that court",—and "the circuit court may properly take jurisdiction. *Hawley v. Tesch*, 72 W. 299 (See CONCURRENT JURISDICTION); (other cases)". —*Hill v. True*, 104 W. 294, 298.

23. As to investments and security, in a loan by the guardian to herself personally, not being a protected investment. See ACCOUNTS OF GUARDIANS. —*Hutson v. Jenson*, 110 W., 26, 40.

24. As to liability of executors and trustees to debtor of cestui que trust, and to court's action as to trust funds and income. See CREDITORS' ACTIONS. —*Williams v. Smith*, 117 W., 142, 144.

25. *Simmons v. Oliver*, 74 W. supra, as to investment of trust funds, approvingly discussed and quoted, and it is held that under the subsequent statute, ch. 317, L. 1903 (Sec. 2100b), as then existing, trustees "may also invest in the securities specified in the act, if the court will approve and so direct.

26. This clearly implies that no other investment of trust funds comes within the protection of the law". (Subsequent amendments to sec. 2100b, especially by ch. 536, L. 1915, allow many additional investments, and it seems, now, without the court's approval,—that protective feature being eliminated).

27. Sec. 1791h (now apparently sec. 2024-77k, subds. 10, 11, 13) it is held does not, in their trustee investments, except trust companies from the provisions of sec. 2100b.

28. Where "the will grants to the trustee 'full power and authority in their discretion to invest'," it is held "that they should not be restricted to the conditions and limitations imposed by law for the investment of trust funds"; (but see also *Pabst v. Goodrich*, 133 W. post),

29. And that "such securities as a prudent and provident person would purchase as good and safe investments," were satisfactory.

30. Where securities are purchased at a premium, as "between the

life tenant and the remaindermen", "the amount advanced out of the capital of the fund for the payment of premiums should be made good, to prevent a loss when the securities mature".

31. "As stated," "in *New England T. Co. v. Eaton*, 140 Mass. 532: 'There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman,

32. Than the interest which can be received from the bond which sells above par, and is payable at the termination of a fixed time; deducting from such interest, as it becomes due, such sums as will at maturity pay the premium.'" (Approvingly quoted in *Est. of Wells*, 156 W. post).
—*In re Allis's Est.*, 123 W. 223, 229.

33. A trustee who delegates the investment of his trust funds to his attorney or other person, "will be held personally responsible for any loss that may result". *Lewin, Trusts*, Vol. 1, p. 252. See also ACCOUNTS OF GUARDIANS.

—*Abrams v. U. S. Fidelity & G. Co.*, 127 W. 579, 584.

34. Where "the executors and trustees under the will are given power and authority to manage and control the property 'according to their judgment and discretion,'" and 'full authority to invest the trust properties in such manner as they shall deem best, with no responsibility for losses, provided they act honestly and in good faith',—it is held:

35. "The authority given to invest the property in manner 'as they shall deem best' must be held to vest in them a reasonable and not an arbitrary discretion,

36. And to imply a duty to execute the trust in accordance with existing laws governing trustees in the execution of their trust. (Many cases)".

37. "The trustees are bound to act in good faith and exercise a sound judgment and prudent discretion in making an investment.

38. They are bound to look to the interests of the remainderman as well as those of the life tenant, and place the trust estate in no hazardous position. (Citations.)".

39. "The general rule" is "to the effect that executors have no power to invest trust funds beyond the jurisdiction of the court in the absence of express authority to do so". (Cases).

40. "The general rule is against the right of the trustee to make foreign investments under power to invest quite similar to the power in the will under consideration."

41. And it is held, as to investment in a corporation in Germany, owned by the cestui que trust's family, which the trustees were willing to make, "that the trustees had no power to make the proposed investment", "in a foreign land."

42. *In re Allis's Est.*, 123 W., supra, is distinguished, in "that in

that case the investment was of the kind contemplated in the will, and therefore was not restricted to the conditions and limitations imposed by law for the investment of trust funds." See also CONSTRUCTION OF WILLS.

—*Pabst v. Goodrich*, 133 W., 43, 72.

43. "When moneys belonging to other persons are received and mingled in a general fund with moneys belonging to the depositary and then such depositary or trustee pays out generally from such fund for his own purposes,

44. There is a presumption of law that such payments are made from the moneys in said fund belonging to him and do not constitute wrongful misappropriation of the moneys of the cestui que trust, which he has no right to pay out in that way, but that they remain on deposit.

45. Of course this presumption is possible of complete effect only so long as the fund is large enough to contain all the moneys of the cestui que trust and some of the moneys of the trustee". *Bromley v. C. C. etc.*, 103 W. supra; *Boyle v. N. W. Nat. Bank*, 125 W. 498.

—*Emigh v. Earling*, 134 W. 565, 573.

46. Where stock in the Pabst B. Co. was held in trust under a trust deed and will, of which E. is entitled to the income, the judgment of the circuit court that "dividend stock and proceeds thereof" "wholly based on net income of the corporate business accumulated subsequently to the death of" the grantor, be paid to E. as income, was sustained. (*Timlin, Siebecker and Kerwin, JJ. dissent.*) *McLouth v. Hunt*, 154 N. Y., 179. Contra: *Gibbons v. Mahon*, 136 U. S., 549.

47. "The fact that the dividend stock in this case was in the form of preferred stock cannot make any difference so long as the transaction was in good faith with no intent to take advantage of the owner in remainder." —*Soehnlein v. Soehnlein*, 146 W. 330, 335, 351.

48. "The rule is well settled that where a trustee, or a person charged with the duty of investing a fund for the purpose of accumulations",

49. "Fails to show, when properly called upon to account, what the actual gains have been, the usual gains with annual rests will be charged him. (Citations)".

50. "The rule applicable to such a situation",—there being "no question of any other breach of trust than the mere refusal to account for accumulations",—"is thus stated in 1 Perry on Trusts;

51. "The burden is on the trustee to show that he made no profits, or received no benefit from the money;

52. "And if he refuses to account or to show the amounts of profits he received, the court will give compound interest". Sec. 471".

—*Hazelton v. N. Y. L. Ins. Co.*, 148 W. 19, 20.

53. Where an assessment on the capital stock of a national bank was made to cover a defalcation of its president, it is held, that "it was the

capital of the bank—the corpus of the estate—that sustained the loss”, and that the trustee properly so charged it. “The remainderman sustained a loss of” “capital and the life tenant” “of income” on such capital loss.

54. Such loss therefore is not to be reimbursed “out of the earnings before dividends declared on the stock held by the trustee could be paid to the life tenant”. p. 375.

55. “Any dividend derived from a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings belongs to the remainderman and not to the life tenant. It represents corpus, not income. (Many cases).

56. To this rule there is a well known exception in the case of a corporation engaged in buying and selling real estate at a profit”.

57. A corporation, organized by directors of a bank, which merely took over from the bank realty for the “specific purpose of holding and disposing of the same at the earliest opportunity and to the best advantage”, it is held “was not such a trading corporation in real estate as” comes within such exception. p. 378.

58. A fifty per cent dividend, proceeds of a portion of such realty, it is held “belong to the corpus and not to the income” in the hands of the trustee.

59. A large stock dividend declared by the National Surety Co. out of its surplus, is held to go to the life tenant “as the undisputed proof shows it has been earned since” “the death of the testator”.

60. A large dividend by the bank “paid out of a fund denominated undivided profits, is not conclusive between the life tenant and remainderman”.

61. Such dividend, with consent “used to purchase a trust company which became an ancillary institution” to the bank, and “in fact paid out of earnings accruing since the commencement of the trust estate”, it is held “belongs to the life tenant”.

62. If earned before the trust estate begun it belongs “to the remainderman; and if partly earned since and partly before the trust estate vested, then in part to each. *Soehnlein v. Soehnlein*, 146 W. *supra*”. See also COMPENSATION OF ADMR., ETC. VESTING OF ESTATES.

—*Miller v. Payne*, 150 W. 354, 375.

63. On the settlement of a final account as executors, covering also “their transactions as trustees”, during a number of years, under the will construed in *Stephenson v. Norris*, 128 W. 242 (See CONSTRUCTION OF WILLS), it is held:

64. “Where a testator establishes a trust in property for the benefit of a life tenant with remainder over to another, and the property is of a wasting nature, such as mining stock or land stock, the dividends on which represent in part a practical diminution of corporate assets,

65. In the absence of a clear expression of the testator’s intention to

the contrary the life tenant will be entitled to receive only the current rate of interest on the value of the trust property,

66. And the remainder of the dividends will become a part of the principal of the trust fund, to be invested anew by the trustee. (Citations)."

67. In *Wells v. Green B. & M. C. Co.*, 90 W. 442, "it was said: 'There is a distinction between the capital and the capital stock of a corporation.

68. The capital of a corporation is the property or means which the corporation owns, and it may vary in amount,

69. While the capital stock is fixed, and represents the interest of the stock-holders and is their property'".

70. Where executors are given full "control over the property", and a division of such dividends may result "that the corpus has been actually increased", and there being good faith, their division is nevertheless allowed to stand.

71. The trial court's division of executors' and trustees' fees and expenses, that ten per cent thereof as executors' share for duties relating "purely to the administration of the estate" "should be charged to the corpus",

72. And that ninety per cent "related to management and care of the trust property and should be charged against the income",—is sustained.

73. "As to the value of the services and the proportionate amount thereof chargeable against the two funds the court was entitled to exercise its own judgment and was not bound by the testimony of witnesses."

74. Where trustees invest "funds in securities at a premium", the rule of *In re Allis' Est.*, 123 W. supra, is approved and followed;

And "even though the securities may appreciate in value, so that they would sell for a larger sum than would be necessary to restore to the corpus of the estate that which was taken from the estate to purchase them, still the rule is not changed".

75. It is not decided "whether there is any logical difference in the rules of law which should apply to securities held by the deceased at a premium and to securities purchased by the executors at a premium". Under the will here, the rule is applied "to both classes of securities".

76. Though the executors as such, and individually, together owned a majority of the corporate stock, it was held error for the trial court to compel the executors "to account to the life beneficiaries as if dividends had actually been declared", where the earnings were not "annually" distributed "but added" "to the surplus account".

77. "Courts will not interfere with the discretion of corporate directors and compel the declaration of a dividend in the absence of fraud, bad faith, or wilful abuse of discretion. *Morey v. Fish Bros. W. Co.*, 108 W. 520, 529". See also COMPENSATION OF ADMR. ETC.

—*Estate of Wells*, 156 W. 294, 304.

78. Where trustees held property of which the "income and increase" belonged to a life beneficiary who died,—in an accounting between his executor and the remainderman it is held:

79. "The surplus of a corporation not declared as a dividend cannot be treated as income until it is declared as a dividend, for the obvious reason that what is surplus one year may be swept away by losses the next year. It is a fluctuating quantity.

80. Surplus and undivided profits of a corporation, existing at the time of the death of the testator who is a stockholder, go into the corpus of the trust estate".

81. The division "of profits before, and those made after, testator's death", may "be agreed upon and settled between the interested parties" who "were competent to contract on this subject". Miller v. Payne, 150 W. supra.

82. "The unearned increment so called, or the increase in value of the property constituting the corpus of the trust estate, and the insurance received as indemnity against loss of part of that corpus, all belong to the latter", though the insurance received exceed the amount expended for restoring the property.

83. "An extra dividend of twenty per cent. on the stock" "was clearly a cash dividend and belonged to the income notwithstanding the trustees" "applied it to the purchase of additional shares of stock in the same bank". (Cases).

84. Items "received for sale of rights" "to subscribe to a proportion of shares in an increase of capitalization", "belong to the corpus" "in the absence of evidence", though "ordinarily" it "should be divided between corpus and income".

85. "Where the trustees have a power of sale and re-investment the corpus of the trust estate at any given time consists of (1) the identical property which was put into the corpus by the creator of the trust and still remains on hand,

86. Plus (2), to balance any money which originally went into the corpus, a like amount of money or property of value equal to such original amount of money,

87. Plus (3), if any of the property which originally went to make the corpus has been sold, money in amount, or property in value, equal to that part of the original corpus sold plus the net amount of natural or unearned increment up to that time actually realized upon the property sold which was originally part of the corpus".

88. "Profits realized on purchases by the trustees and resales of the same property by them should, at the next succeeding income payment day, be divided by placing to corpus whatever is necessary to keep it up to the foregoing figure, thus making good losses of corpus. All profits upon such resales not necessary for this purpose should be paid out as income".

89. While dividends not declared until after the death of the life

beneficiary are "not apportionable" and belong to the next taker entitled to the income,

90. Yet in the case of "ordinary loans on securities, the circuit court properly allowed" "the interest accrued up to the time of the death of the beneficiary".
—*Will of Barron*, 163 W. 275, 278.

91. Where a will directed the investment of the estate property 'into first class interest-bearing real-estate mortgage securities', it is held that the creator of the trust "intended to require mortgages running to the trustees, or held by them for the sole benefit of the trust fund";

92. And where the trustees invested "trust funds in bonds secured, with a large issue of such evidences of indebtedness, by a trust deed", and "in a mere evidence of right by one to participate with others in an indebtedness secured by a real estate mortgage",—such investments "were wholly unwarranted", whether "amply secured" or not.

93. "A trust must be executed according to the plan of its creator, and" "the language of the trust, if not perfectly plain, must be so construed, if practicable, as to carry out the creator's intend as evidenced by all the circumstances characterizing the trust."

94. An "interlocutory" judgment against the trustees for the amount of such investment for "the damage for breach of trust", with the right to hold such securities until such liability is paid, was upheld.

—*Will of Mendel*, 164 W. 136, 142.

TRUSTS.

See also CHARITABLE TRUSTS. CONSTRUCTION OF WILLS. IMPLIED TRUSTS. PERPETUITIES. POWER. PRECATORY TRUSTS. TRUSTEES. TRUST FUNDS. TRUST VARIATION. VESTING OF ESTATES, ETC.

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1. In case of a deed made absolute, without any mistake or fraud, "mere refusal to perform the trust, is not such a fraud as will justify the admission of parol evidence, and the enforcement of the trust", alleged and considered by the court to have undoubtedly been intended. See also PAROL.

—*Rasdall v. Rasdall*, 9 W. 379, 393.

2. "By the statute 'Of Uses and Trusts' passive trusts are abolished, but active trusts are not".

3. "By passive trusts, as here used, we mean those which are expressed or created by the words of some deed or other instrument in writing, and not those trusts arising or resulting by implication of law, which, in most instances, still continue to exist, and which may, in the broadest sense, be denominated passive".

4. "Every express passive trust is abolished, and the deed or instrument by which it is created, or attempted to be, takes effect as a conveyance directly to the cestui que trust, in whom the legal title vests, and the trustee acquires no estate or interest whatsoever".

5. "A conveyance of land from A to B, to the use of or in trust for C, the trustee having no active duties to perform, constitutes a passive trust, and the trustee takes no title, but the same vests immediately and absolutely in the cestui que trust to the extent of the estate granted".

6. "Active trusts, of whatever kind, provided they be such as were

lawful before the passage of the statute, are not abolished by it, nor intended to be."

7. "Subdivision five" of section 2081 as to active trusts, "is not found in the statute of New York". "The addition of that subdivision to the four which precede it, and which are found in the statute of New York, establishes, as it was undoubtedly intended to do, a policy in this state upon the subject of active trusts entirely different from that which prevails in the state of New York. It shows very clearly that no active trusts were intended to be affected or abolished by any provision of the statute".

8. "Upon full consideration, we are satisfied that such is the true construction of the statute", that any active trust "may still be created when, in the language of subdivision five, 'it is fully expressed and clearly defined upon the face of the instrument creating it'." Dixon, C. J.
—*Goodrich v. Milwaukee*, 24 W. 422, 429.

9. The title vests immediately in the cestui que trust, where a conveyance is made to the trustee of a passive trust. See *HOMESTEAD*.

—*Riehl v. Bingenheimer*, 28 W. 84, 88.

10. A devise of land, followed by the clause "And it is also understood that the said E. P. (devisee) is to pay or cause to be paid unto my said son O. P., within one year after my decease, the sum of \$200.", "creates a charge upon the lands devised".

11. Such lands are held in trust by the devisee to the extent of the portion unpaid, "and interest thereon from the time the same became payable by the terms of the will". The circuit court has jurisdiction to "enforce the execution of such trust".

12. (Distinguished in *Merton v. O'Brien*, 117 W. post, the court saying that the question whether this "was an express trust" under sec. 2081, "was not presented or decided in the case; nor was" "the statute of limitations involved". But, defendant was "a trustee toward plaintiff, by reason of the fact that he was executor of the will".)

—*Powers v. Powers*, 28 W. 659, 661.

13. In a conveyance containing a passive trust to H "in trust for the use and benefit of ———, heirs at law of C, deceased, for whom the said H is legal guardian, party of the second part", the identity of the parties was properly shown by extrinsic evidence.

14. "It is well settled that any description of parties in an instrument of this kind is sufficient, from which the court and jury, aided by a knowledge of surrounding facts and circumstances, are able to say with reasonable certainty that some and what particular persons were intended".

—*Sydnor v. Palmer*, 29 W. 226, 241.

15. An oral promise by a residuary legatee to pay certain sums as bequests, the testator, therefore, not making a valid change in his will,

is enforceable as a trust either by the county court or a court of equity. See JURISDICTION. PRAYER FOR RELIEF.

16. The court does not determine the method, but indicates that it might "be in the form of an independent order or decree of the county court", or it might "take the form of a judgment modifying to that extent the previous order admitting the written will to probate", saying "it is probable that a judgment in either form will be sufficient, though the latter may be thought, in some respects, preferable".

—*Brook v. Chappell*, 34 W. 405, 411.

17. Where an administrator's deed to A. was invalid, and B. fraudulently obtained a conveyance from the heir, ostensibly for "ratifying and confirming the title of" A.'s grantee, held "that conveyances thus obtained are not declared void, but are held to pass the legal estate to the grantee, but subject, in equity, to a trust in favor of him for whom the grantor professed to act, co-extensive with his profession or representation in that behalf".

—*Lombard v. Cowham*, 34 W. 486, 491.

18. The rule as to sales by trustees to themselves is "now very generally settled in this country, as it is well stated by Walworth, Ch., in *Torrey v. Bank of Orleans*, 9 Paige, 649: 'It is a settled principle of equity, that no person who is placed in a situation of trust or confidence to the subject of the sale, can be a purchaser of the property on his own account'.

19. The principle is not confined to a particular class of persons, such as guardians, trustees or solicitors, but is a rule of universal application to all persons coming within its principles, which is, that no party can be permitted to purchase an interest, where he has a duty to perform that is inconsistent with the character of purchaser'."

20. Where a trust property was offered for sale by an executor and directors of a charitable trust, and their attorney was directed to and did bid off the property for \$20,000.00, and within ten months he resold for \$40,000.00, such executor and directors sharing in the profits, it was held that the trust must receive the benefits of the advance and resale.

—*In re Taylor Orphan Asylum*, 36 W. 534, 552.

21. The statutes of perpetuity and uses and trusts, "are expressly limited to realty". See CHARITABLE TRUSTS.

—*Dodge v. Williams*, 46 W. 70, 95.

22. Under our statutes and the decisions, including the rule in *Rasdale Admr. v. Rasdale*, 9 W. supra, "as applied to alleged parol trusts", a deed absolute on its face cannot be shown by parol to be a trust.

—*Pavey v. Am. Ins. Co.*, 56 W. 221, 224.

23. Though the statute (sec. 2302) provides that an express trust in lands must be in writing, "this does not prevent the execution by the trustee of a parol trust".

24. "Such a trust is not an absolute nullity. It is simply void at the election of the trustee. He may execute it or not, as he chooses, and the courts will not interfere to compel him to execute it or to restrain him from so doing". (Followed in *Schumacher v. Draeger*, 137 W. post).
—*Karr v. Washburn*, 56 W. 303, 307.

25. "It is not necessary that technical language should be used to create a trust". See also PRECATORY TRUSTS.

—*Knox, Extr. v. Knox*, 59 W. 172, 178.

26. Personal trust construed, as to insane widow. See WIDOW.

—*Van Steenwyck v. Washburn*, 59 W. 483.

27. A conveyance of realty and a bill of sale of personalty, construed as one trust agreement for support and for heirs, and as void as to creditors. See BOND FOR MAINTENANCE.

—*Severin v. Rueckerick*, 62 W. 1, 5.

28. The title to estate, is held to be in executors, as trustees, where such duties are imposed on them, without being named as such, pending the life of the trust, such title being not otherwise given in the will. See VESTING OF ESTATES.

—*Scott v. West*, 63 W. 529, 558.

29. As to a devise for life with power of sale for necessary support, and remainder over of balance to others. It is indicated and in effect determined that under the statutes (secs. 2107, 2108, 2112) "that such a power is unaccompanied by any trust", and that the "power is absolute". See LIFE ESTATE.

—*Larsen v. Johnson*, 78 W. 300, 309.

30. Certificate of deposit of ward's funds in name of guardian personally, on failure of the bank, is the loss of a guardian personally, though good faith exists. The rule stated. See GUARDIAN AND WARD.

—*Booth v. Wilkinson*, 78 W., 652, 654.

31. A parol trust in lands is not "absolutely void, but, at most, voidable at the election of the" trustee. See PAROL.

—*Begole v. Hazzard*, 81 W., 274, 277.

32. Where a "declaration of trust has not left the identity of the beneficiaries in doubt" and the testimony indicates a deliberate error as to the name of beneficiary, a construction of "Eliza, (daughter)" to mean "Louise", a granddaughter, "may certainly be indulged to prevent disinheritance. *Baker v. Est. of McLeod*, 79 W., 543, 544 (Cited under VESTING OF ESTATES)."

—*Hannig v. Mueller*, 82 W., 235, 242.

33. Under a testatrix's will disposing also of her husband's estate, his electing to take under the will, binds also his estate to be placed in trust for the purposes of the will. See CONSTRUCTION OF WILLS.

—*Allen v. Boomer*, 82 W., 364, 372.

34. As to express and resulting trusts being out of the statutes of limitation. See IMPLIED TRUSTS.

—*Fawcett v. Fawcett*, 85 W. 332, 337.

35. Trust income from personalty is held assignable by the cestui que trust, and,

36. The statutes of uses and trusts, are not applicable to personalty. See TRUST VARIATION.

—*Lamberton v. Pereles*, 87 W. 449, 459.

37. A deed "purported to convey to" trustees "the legal title of the property in question in trust to hold such title and thereafter make conveyance thereof upon various contingencies as directed in the body of the instrument.

38. The supposed trust was a passive or dry trust only,—a mere holding of the naked legal title. It was not an express trust, as defined" by sec. 2081, and hence was one abolished by sec. 2071.

39. "So far, however, as the grants in the deed would have been valid if they had been made direct to the beneficiaries, so far the law executes the attempted trusts, and passes legal estates to the beneficiaries 'of the same quality and duration, and subject to the same conditions' as their beneficial interests. Secs. 2073, 2075. The deed is therefore to be treated as if no trustees were named, and as if the grants were in direct terms to the beneficiaries".

40. "The trust deed reserved a life estate in C. (the grantor); then granted a life estate to V., his daughter, who was then, and is now, in being; and then attempted to grant a contingent remainder to the heirs of the body of V. yet to be born or such of them as she should appoint by will".

41. "The contingent remainder in V.'s children", (and of course the life estates), is held valid as not suspending "the absolute power of alienation", "for a longer period than during the continuance of two lives in being at the creation of the estate. sec. 2039."

42. The grantor having provided in his will, for like provision if the deed be for any reason ineffective, the result is assumed apparently (without reference thereto) to be of like effect. See also PERPETUITIES.

—*Tyson v. Tyson*, 96 W. 59, 66-8.

43. A devise to trustees, to be conveyed to the issue, if any, of the cestui que trust, on his decease, is held not to have vested in the latter, and to be a valid trust. See CONSTRUCTION OF WILLS.

—*Webber v. Webber*, 108 W., 626, 629.

44. The technical words "in trust", in a will construed, in part, in the popular sense, to include the widow; technically excluded. See CONSTRUCTION OF WILLS. —*Davies v. Davies*, 109 W., 129, 132.

45. "The statutory prohibition against creation or proof of an express trust in land by parol is not to be evaded except in a clear case of the inducement of a conveyance omitting to declare such a trust by such conduct and promises and under such circumstances of trust and confidence that fraud in so doing is apparent. (Cases supra)".

—*Duncan v. Duncan*, 111 W., 75, 77.

46. A trust deed to a trustee "to have and retain the possession of the lands during the whole continuance of the trust", for the benefit of the grantor's wife and son, to be conveyed to the issue of the latter, if any, and if none, then as the grantor might direct by will or otherwise as set forth in detail,

47. And where the "trustee was expressly given the 'power of actual disposition', and also the power of actual 'management' and control", created "in a double sense an active trust" under sec. 2074, and "an 'express trust', within the meaning of the statute (subd. 1-3, 5, sec. 2081)." (Cases)

48. In an action construing such trust, and a judgment directing the trustee to quit-claim the lands to such son, prior to the birth of issue, the trustee "represented, and had the legal right to represent, such issue of F. (son) as might subsequently be born, including the plaintiffs", and they "are bound by the judgment". (Many cases).

—*Perkins v. Burlington L. & I. Co.*, 112 W., 509, 519.

49. A trust to sell lands, where the general trust failed under sec. 2081, upheld. See POWER. —*McLenegan v. Yeiser*, 115 W. 304, 309.

50. As to the running of and effect of the statute of limitations against various kinds of trusts. See LIMITATIONS OF ACTIONS.

—*Buttles v. DeBaun*, 116 Wis. 323, 326.

51. Where a will devised lands to "executors and trustees, with directions to" apply the income to the support of M. "during his life, and upon his death to sell the same" "and to pay the proceeds thereof" to five children equally, or to the heirs of any child that might die, and the land was "in form assigned to the trustees", no order being "made requiring a bond", and they executed the trust except as to the sale, and plaintiff obtained quit claim deeds of the land from such children, part before and part after the decease of M., it is held:

52. "That, by the doctrine of equitable conversion", the will "in effect bequeathed personal property only", and "the trust is plainly not within the statute of uses and trusts";

53. "There is no law, statutory or otherwise, limiting the power of a person to create a trust in personal property",

54. And "since the will must be considered as bequeathing personal property, if for no other reason, there can be no question but that the title to such property and the whole thereof vested in fact as well as in form in the executors and trustees.

55. There was no way by which it could pass from them to the beneficiaries under the will or their assigns by mere operation of law, and no way by which they could convey the title or any part thereof", and "their deeds did not vest title in appellant.

56. At best such deeds only give appellant an equitable right to stand for his grantors in the distribution of the trust fund under the terms of the will. 2 Jarman, Wills, 163".

57. While all the beneficiaries "were entitled by election to take the property in specie, to take land instead of money", yet such election was ineffective as to a part, the heirs of a deceased child being entitled to such share attempted to be conveyed.

58. While under sec. 4025, there is a "mandatory requirement of a bond", the amount thereof as to the sureties only being discretionary, and no bond having been given or ordered,

59. Yet, "the title to the property in question vested in the" trustees "as executors and trustees, it having been directly willed to them, regardless of their failure to qualify as trustees", though,

60. "Obviously, (therefore) before a testamentary trustee has any active duties to perform, he must accept the trust in the manner contemplated by the statute, namely, by giving a bond as required by section 4025".
—*McWilliams v. Gough*, 116 W. 576, 580.

61. "A mere devisee of land, subject to the payment of a legacy charged thereon, is" not "a trustee for the legatee, of such a nature that the statute of limitations will not run in his favor," as in the case "of an express trust." See LIMITATION OF ACTIONS.

—*Merton v. O'Brien*, 117 W., 437, 444.

62. A will gave to the widow "in trust for herself and my children, all of my estates, both real and personal, with full power to continue my business if for the best interest of my estate." There was no further provision. "Such property consisted mainly of a brewery in operation". All the parties claimed "that the will did not create a valid trust", but the widow plaintiff claimed "she took the whole title", and the children that the full title vested "in the mother and children in equal proportions". Held, that "a decree establishing the legal title" in the "trustee for the appellant (widow) and the children of the testator for the purpose mentioned in his will," is valid;

63. That no "judicial construction is permissible", as "the true rule is that construction never begins until uncertainty of sense is pretty clearly apparent. In this case there is no such uncertainty".

64. There is but "the one theory that the testator intended to vest the legal title to the property in the trustee with the fullest discretionary authority over the same, as regards how best to devote it to the purpose of the trust", the wife and children to "share equally in the benefits of the trust".

65. It is not a passive trust "to operate and vest the title to the property involved in the intended beneficiary discharged of the trust", under sec. 2075, and this statute "never concerns active trusts, whether they are valid or invalid.

66. If an attempt is made by will to create such a trust (active), which fails for want of certainty, the property, instead of vesting in the beneficiary as if the trust were passive in character, will fall into the residuum of the estate and go under the residuary clause of the will, if there be one, otherwise it will go as intestate property. (Citations)."

67. "The statute, subd. 5, sec. 2081, is substantially an enactment of the common law as regards when equity will enforce a trust", which "is when the object or purpose and the person are pointed out with fullness and definiteness. All else may properly be left to administrative discretion. (Cases)".

68. "The mere fact that no limitation to the existence of the trust is stated is not an element of indefiniteness under the statute since the power of alienation is not unduly suspended. The trustee is empowered to sell the property at any time".

69. "If the trust were necessarily perpetual as to the converted fund, that would not offend against any law. *Becker v. Chester*, 115 W. 90 (See PERPETUITIES).

70. Again, since the will contains no prohibition, expressed or implied, against terminating the trust, and all parties that can be interested are in esse, when all are sui juris they can by uniting cause its termination, subject to the restraints contained in sec. 2089 and 2091. (Citations).

71. The mere fact that the trust is in terms perpetual does not affect it. That feature is not objectionable so long as it does not offend against the prohibition against suspending the absolute power of alienation. *Perry Trusts*, 23".

72. Held, an active valid trust. The widow having resigned as trustee, and W. having been duly appointed and qualified, "that operated, by the force of the statute, to vest in him the legal title to the trust property." —*Holmes v. Walter*, 118 W. 409, 413.

73. "The most important" "elements of a trust" "is a severance of the legal title with power of control over the property from the beneficial interest therein.

74. If the donee of the legal title is to control and manage the property entirely for his own benefit, there is no trust. 1 *Perry Trusts* (4th Ed.) 13.

75. 'A trust exists where the legal interest is in one person and the equitable interest in another'. *Wallace v. Wainwright*, 87 Pa. St. 263.

76. The trusts authorized by our statute must be 'for the beneficial interest of any person or persons'—of course, other than the trustee. Subd. 5, sec. 2081. Mr. Perry says, *ubi supra*;

77. 'But no person can be both trustee and cestui que trust at the same time, for no person can sue a subpoena against himself. Therefore, if an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate'."

78. "If the use limited is distinctly and purely a corporate one, the corporation itself holds the beneficial or equitable right, which therefore merges in the legal title, if that also be held by it". (Cases). See also CHARITABLE TRUSTS.
—*Danforth v. Oshkosh*, 119 W. 262, 276.

79. As to "vesting of the legal title" in devisees, "with a power in trust in the executor as trustee", the trustee appointed on request in will. See VESTING OF ESTATES, ETC. PRECATORY TRUSTS.
—*Wolbert v. Beard*, 128 W. 391, 396.

80. "A parol trust" providing for a life estate in M. and remainder in O., "attempted to be annexed" "to the absolute deed of conveyance" of realty, "was probably void and unenforceable in its inception", under secs. 2302, and 2304.

81. "But that did not render the deed absolutely void, nor voidable at the suit of an heir at law of the grantor, who had no other interest in the land and was not a beneficiary under the invalid trust,

82. Because, notwithstanding the trust was not evidenced in writing as required by law, the trustee D., might observe its terms and execute the trust itself or execute a declaration of trust in writing thereafter. *Karr v. Washburn*, 56 W. supra.

83. When D. verified and filed her answer", acknowledging and offering to carry out the trust, "she executed in writing a declaration of trust binding upon her and available to the beneficiaries of that trust. (Many cases)".

84. There being "no active duties" "imposed upon the trustee", under "sec. 2073 as interpreted in *Sullivan v. Bruhling*, 66 W. 472", its "effect" "was to vest an absolute legal estate in M. for life, with remainder to O." See also ESCROW.

—*Schumacher v. Draeger*, 137 W. 618, 624.

85. A devise of 'the income to be derived from the rentals of' realty, for life to the father, and upon his decease to sisters and brother, and the survivor of them, for life, and after the death of the last survivor the realty 'to be sold and monies derived therefrom divided' among their children and others,—there being "no devise in trust of the" realty or

income, "except as might be inferred from" the "appointment of an executrix" with the ordinary compounding power,—is held:

86. Not to create a trust, and "void as contravening the law against perpetuities",—by each of the three courts. SECS. 2038, 2039.

87. "While it is true that equity will not suffer a trust to lapse for want of a trustee, still the omission of any devise in trust is to be considered with reference to sec. 2081. Uses and trusts, except as authorized and modified in ch. 96, stats., are abolished."

88. While "a trust may be created to receive rents and profits of land and apply them to the use of any person" during life or other manner, as "prescribed in ch. 95, Stats.", when "fully expressed and clearly defined", yet there is "nothing in the will" bringing any trust within these provisions, and the devise "is rather governed by sec. 2060", as "to future estates in land".

89. "Even by considering that" the devise "creates a trust", it "could not be saved", because of "the rule of secs. 2089 and 2091", as to alienation.

90. While "ordinarily a trust does not offend against the" perpetuity statutes where there is "a power of sale", yet where there is none, as here, and "the trust term exceeds the period permitted by statute", it is "unlawful".
—*Will of Adelman*, 138 W. 120, 123.

91. As to distinction between a private and a public trust, as to certainty, etc. See CHARITABLE TRUSTS.

—*Will of Kavanaugh*, 143 W. 90, 98.

92. "No particular form of words is necessary to create a trust. A trust may be created without the use of the words 'trust' or 'trustee'.

93. And, on the other hand, the use of the words 'trust' or 'trustee' do not necessarily show an intention to create or declare a trust.

94. The intention to create a trust must be clear, and the writing employed must be reasonably certain in its material terms;

95. 'And this requisite of certainty includes the subject matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed.

96. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail.' 3. Pomeroy, Eq. Jur. (3d Ed.) sec. 1009.

97. The general rule has often been stated by this and other courts as shown by the numerous cases cited. *Holmes v. Walter*, 118 W. supra; (many cases)". See also LIFE ESTATES.

—*Otjen v. Frohbach*, 148 W. 301, 308.

98. As to trustees having implied power to lease for ninety-nine years, with court's advice. See TRUST VARIATION.

—*Upham v. Plankinton*, 152 W., 275, 291.

99. "Trusts in personalty may be created by parol and are not affected by the statute of uses and trusts. (Citations)". See also HUSBAND AND WIFE.
—*Friedrich v. Huth*, 155 W. 196, 200.

100. Where a trust was created, the income to be paid to a daughter-in-law, and 'upon the death, or in the event of' her 'remarriage', 'to pay, assign, transfer and set over unto' 'grand children the entire fund and estate',—such trust was terminated upon such remarriage, though the grandchildren were still minors. —*Will of Rose*, 156 W. 570, 572.

101. An instrument of transfer in trust of the grantor's personalty and realty, with deed in escrow to be delivered at her decease, the income to be paid to the grantor during life, and at her decease the corpus to be distributed as provided, and the acceptance by joint execution, of the trustees, is held a valid active trust, not testamentary, and entitling the trustees to the property and bank deposits of the grantor before and after her decease. Sec. 2081, subd. 5.

102. "It is well established that a trust may be created by an instrument in writing subscribed by the creators of the trust, if the intention is clear to create a trust for the purposes authorized in the law".

—*Pietsch v. M. & I. Bank*, 164 W. 368, 372.

TRUST TERMINATION.

See TRUST VARIATION.

TRUST VARIATION.

See also DESCENT AND DISTRIBUTION. FUTURE CONTINGENT ESTATES. POWER. PROBATE OF WILLS. TRUSTS.

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1. "It is as much the duty of courts to uphold and enforce" a testator's "will after death, as to uphold and enforce his contracts made during life." See also *WILLS*. —*Dodge v. Williams*, 46 W. 70, 90.

2. Where the county and circuit courts terminated a testamentary trust, for the support during life of a beneficiary, before her decease, and on her release under seal of all claim thereon, presented with the petition of the remaindermen, the trustee appointed by the testatrix only resisting, the supreme court declines to determine whether "the county court, in the exercise of its equitable powers, may lawfully terminate" such trust; or,

3. Whether "it may do so without the consent and against the protest of the trustee".

4. If the county court can "terminate the trust on proper proceedings," (1) the cestui que trust must be "a party to the proceeding"; (2) the court must "investigate the circumstances under which the release was executed", and her "capacity" and the "judicious" quality of the cestui que trust in her act; and (3) "require security for the protection of" such beneficiary "should she hereafter become indigent". (This case appears to be not cited, until in *Will of Rice*, 150., post, where the tendency not to terminate, and limitations, are approvingly discussed, on p. 452). —*Sumner v. Newton, Trustee*, 64 W. 210, 215.

5. Where a cestui que trust made a written assignment to his wife of his income of personal property held in trust, it was held, in his suit subsequently brought to compel the trustees to pay such income to him, "that the income arising from the personal property so held in trust was assignable", and that such assignment was valid, "the founder of the trust" having imposed no condition or restriction, and there being "no restraints upon such alienation, statutory or otherwise".

6. In New York, from which our statute of Uses and Trusts is taken, the decisions are to the contrary, but there "the statutes respecting real estate" are "also applicable to personal property", while "in this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property". (Approvingly cited in *Mangan v. Shea*, 158 W. post.) —*Lamberton v. Pereles*, 87 W. 449, 459.

7. An agreement, of a city as remainderman in a trust estate, to apply principal for repairs and improvements "was ultra vires and totally so", and invalid, the will, providing that repairs should come from the income.

8. "There is no power in the trustees to change the plain scheme of

the will, no power in the court to authorize any such change, and no power in the city of W. to vary it in any manner". See also *POWER*.

—*Mulberger v. Beurhaus*, 102 W. 1, 9.

9. In an action in equity for the sale in part of trust realty, created by a trust deed, including vested and contingent interests, "upon the ground of a necessity so to do in order to prevent a threatened destruction of such estates by tax and other liens thereon", infants in being properly represented by guardian ad litem, and such sale being in contravention of the trust, it is said;

10. "As to whether the judgment acts on the whole title, it is considered that the owners in being of the real estate, for all purposes of litigation affecting the jurisdiction of the court to deal with the whole title, stand not only for themselves, but for all that may come after them.

11. The rule is universal, and, generally speaking, persons in being having only contingent interests are deemed to be represented by the owners of the precedent estate of inheritance, for the purposes of litigation.

12. The owner of the life estate here, and the owners of the estate in remainder, all being parties, the judgment of the court and its execution will act upon the whole title to the property, binding all persons having vested or contingent interests therein, present or future". (Many citations).

13. While the wishes of the grantor, to have the remainder to those in being, or possibly to be born, go "to them in specie", "must be carried out so far as possible", yet, "it is not doubted but that the powers of a court of equity are ample to prevent the destruction of the estate in remainder under the circumstances of this case.

14. Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstance not foreseen by him and provided for, the court may intervene but only for the purpose of preserving, and so far as necessary to preserve, the property. If it cannot be preserved in the form intended, it may be preserved in its equivalent.

15. It is not the interests of those in remainder, as such interests may appear to the court, that are to be considered and conserved, but their interests as the creator of the estate in remainder provided for them.

16. So the fact, if it be a fact, that it would be for the best interests of the infant owners of the estate in remainder to allow them an immediate benefit therefrom to maintain and educate them, does not warrant a disturbance of the scheme intended to postpone such benefit to a later time.

17. It is the necessity that something shall be done to guard against the danger that the title in the remainder may be prevented from reaching the defendants in possession at all, which calls into activity the equity powers of the court".

18. So held, and part of the trust property authorized to be sold, to pay necessary taxes, liens, and mortgages, for conservation of the estate,

but the provision of the circuit court enabling infant remaindermen to obtain a present benefit therefrom, is reversed. (Approvingly cited in *Upham v. Plankinton*, 152 W. post.). See also *POWER*.

—*Ruggles v. Tyson*, 104 W. 500, 506.

19. A will giving a son R. the income only of estate given to trustees, and in case of a judgment against R., "obtained for the purpose" of reaching such income, the payment thereof shall cease, and the trust to terminate and in default of issue the principal thereof to go to the widow and daughter of S. and M.—

20. "Was admitted to probate by stipulation of all parties except the executors, after an extended contest, a part of which stipulation consisted in a conveyance to R. by" S. and M. of whatever residuum might come to them of such principal;

21. Before final settlement, a small judgment was so obtained by default against R., (found to be bona fide, with no exception to such finding), and final judgment was entered, finding such trust termination without issue, and a valid assignment of such trust residuum to R., and the principal thereof directed to be paid to him of such share thus devised to S. and M.

22. On appeal by one of two trustees, such judgment was sustained; the gift of S. and M. to R. "can no more be said to thwart the will than if the widow had chosen to give him, by assignment, a part of her" own property, or they had "presented R. with their checks for the amount".

In re Luscombe's Will, 109 W., 186, 198.

23. A decree having been entered for the sale of trust property in contravention of the trust, to preserve the estate, pursuant to *Ruggles v. Tyson*, 104 W., supra, the proceeds being insufficient,—the trustee on subsequent application "to meet the changed situation," and based on authorization of such application contained in the original decree "at the foot of the decree", was empowered to sell additional realty for the purposes deemed necessary. Held proper.

—*Ruggles v. Tyson*, 114 W., 301, 303.

24. While "the conduct of executors" upon a creditors' bill 'proceeding cannot "be controlled by a court other than that from which they derive their authority",

25. "A court of equity, acting upon the debtor personally", can compel him to effectually transfer his beneficial interest in trust property. See *CREDITORS' ACTIONS*.

—*Williams v. Smith*, 117 W. 142, 144.

26. The will containing no prohibition, the beneficiaries of a perpetual trust can terminate it, subject to secs. 2089-91. See *TRUSTS*.

—*Holmes v. Walter*, 118 W., 409, 413.

27. "The rights of an owner of property to control its use and management during his life and after his death, within certain limitations

imposed by law, are among the most sacred, and entitled to the most careful protection at the hands of courts, without scrutiny as to the quality of his reasons in making such choice.

28. Among these rights is that of preserving specific real estate as such within a limited time after his death". (Approvingly quoted in *Upham v. Plankinton*, 152 W. post).

29. "Why he did so we need not inquire. It was his right, and it is the duty of courts to enforce that choice, unless, indeed, it is so completely thwarted by other rules of law as to accomplish no possible purpose". While the children, being vested of the realty in remainder (*Patton v. Ludington*, 103 W. 629; See VESTING OF ESTATES), "doubtless" "can sell and transfer their vested rights to the remainder", yet, as under sec. 2089, they cannot dispose of their "rents and profits" in the lands, the court cannot hold "the continuance of the trust futile",

30. As "there remains (but) the single act of enforcing performance by the lessees (for a long term) of their duties to pay rent and taxes", as to "mark it as an active trust", "imposed upon the trustees". Secs. 2074, 2081, subd. 3.

31. And, though all the "beneficiaries consenting to and requesting such termination, and the trustee" agreeing to its advantages, "but leaving it to the court to say whether he could lawfully consent to such termination", the court refused "to interfere".

—*Patton v. Patrick*, 123 W. 218, 221.

32. A beneficiary, *sui juris*, with rights vested, "may deal with and convey" his interest, and the trustees "be required to" recognize it, if "not contrary to the terms of the trust". See also TRUSTEES.

—*McKeigue v. C. & N. W. R. Co.*, 130 W. 543, 546.

33. In an action brought to terminate trusts, though "the legatees and trustees seem willing that the trust be terminated and provision made by the court for the disposition of the property held in trust",—it is held that there is "no authority or discretion" so to do, because it "would be a clear disregard of the intention of the testator".

34. Whether or not the "residuary legacy" vested at the testator's death, "if it appears from the will that the intention of the testator was that the trustee should execute the trust founded, courts have no power to frustrate that intention and devise a different method of execution". (Many cases).

35. "Aside from the fact that the duration of the trust by the terms of the will extends many years into the future, the execution of it, under the terms and contingencies named, is especially imposed upon the trustee".

36. "It is true that in a proper case a trust may be terminated before the expiration of the time limited in the instrument creating it when all parties are before the court, and there is no prohibition, express or implied, against such termination (*Holmes v. Walter*, 118 W. supra),

37. Or when the trustees have performed all their duties and distributed the fund as directed (2 Perry, Trusts, 5th Ed. 920). But we have no such case here". —*Bussell v. Wright*, 133, W. 445, 450.

38. The stipulation of parties to disallow a will, held inoperative and properly disregarded. See PROBATE OF WILLS.

—*Will of Dardis*, 135 W., 457, 461.

39. As to lack of power and jurisdiction to substitute the agreement of the parties for the will of decedent. Cases, supra, approvingly discussed. See PROBATE OF WILLS.

—*Will of Rice*, 150 W. 401.

40. Stipulation for distribution of residue after widow's election, different than the will provided, held inoperative. See DESCENT AND DISTRIBUTION.

—*Will of Reynolds*, 151 W., 375, 384.

41. "Every person of mature years and sound mind has a right to make his own will, conformable to statutory regulations designed to safeguard that right and not violating any written or any unwritten law, and to have that will carried out according to his intent. Will of Rice, 150 W. supra".

42. Courts may and should discover and enforce the valid intent of the testator. "Neither courts nor beneficiaries nor legislatures are competent to violate such intent and substitute their discretion for that of the testator. Will of Rice, supra; Bussell v. Wright, 133 W. supra".

43. "Established unwritten and written rules for construction" "can only legitimately aid when aid is necessary to understand the purpose intended to be embodied." "They cannot control or vary the intent or properly prevent its execution. (Cases).

44. If a person creates a valid trust in property by a will or otherwise, and, expressly, or by necessary implication, provides that his creation shall not be changed by beneficiaries, trustees, or otherwise, it must be carried out according to the purpose of the creator. Holmes v. Walter, 118 W. supra; (other cases, supra)".

45. To effectuate intention of a trust, where "the necessities thereof clearly require it", "equity power may" "authorize trust property" "to be administered as an equivalent and take the same course as to distribution and enjoyment. Ruggles v. Tyson, 104 W. supra; Bloor v. Smith, 112 W. 340 (See SALE OF REALTY); In re Kingston's Est., 130 W. 560 (See FUTURE CONTINGENT ESTATES)."

46. And in such case, and that the trust "shall not be allowed to be lost,"—"equity may bar remaindermen in esse and possibility" and "change the title, absolutely, to the entirety", where clearly necessary, "but cannot extinguish the rights of person in the equivalent", (Cases, supra).

47. But, "it is considered that" ch. 300, L. 1899, secs. 3519c et seq., "was designed to deal with real-estate interests in the absence, not in

violation, of an existing scheme under a valid trust", and "it cannot be regarded as affording authority for disturbing the trust created" here.

48. In proceedings under such statutes, and a parallel equity action, each authorizing the trustees to execute ninety-nine year leases, the order under such proceeding was reversed and the proceeding dismissed, while the judgment in equity, including future contingent interests, was sustained.

49. Where, in case of future contingent interests, "broad power of 'control' was 'committed' to the trustees", and "there was no restriction upon leasing", and "there was no express restriction upon power to sell, though there was such by implication", and no express but "implied power to lease",—it is held, "the trustees, by permission of the court, may make" ninety-nine year leases of realty.

50. "They cannot be made in violation of the trust but can be made in the reasonable execution of it".

51. "The power to lease is not restricted to the creation of leaseholds, terminable with the trust power, unless so restricted, expressly or by necessary implication, from the language of the trust. (Many citations)".

—*Upham v. Plankinton*, 152 W. 275, 283.

52. On a complaint in equity, on demurrer, where M. on a loan obtained on a mortgage from S. on his interest in realty of a deceased sister K., which the parties supposed S. owned, and where later it appeared K. left a will giving the property to trustees for investment, the income and in case of 'great need' part of the corpus, to be paid to S.,—it is held:

53. That M. "secured no rights under the mortgage by way of a lien on the real estate owned by S.", and "obviously the mortgage cannot be made the basis of any relief".

54. That "the corpus of the trust will be treated as one of personalty", and "that a cestui que trust, entitled to the absolute payment of the income of personal property held in trust for him, may sell and transfer his right to such income unless prevented from doing so by the conditions of the trust. (Cases, supra)".

55. That if the needs of S. at the time of the loan, in equity justified its making, "then the court can compel a transfer of so much of the income as will be required to pay the debt".

56. "The rights of courts to direct the application of the beneficial interest of a cestui que trust in proper cases is recognized in sec. 2091".

57. That this action in equity "to award parties adequate and complete relief", and being primarily "against the debtor personally", is in harmony with *Williams v. Smith*, 117 W. supra. *Lamberton v. Pereles*, 87 W. supra; (other cases).

—*Mangan v. Shea*, 158 W. 619, 623.

UNCONSTITUTIONAL.

See CONSTITUTION.

UNDERTAKING.

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UNDUE INFLUENCE.

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1. "The burden of showing that undue influence, within the meaning of the law, was exercised over the testator when he executed the will, is upon the contestant.

2. It cannot be presumed from conjecture or suspicion, without reasonable and satisfactory proof of facts which establish the contrivance and undue influence".

3. The authorities "generally agree in saying that the influence must be such as in some degree to destroy the free agency of the testator, and constrain him to do what is really against his will, so as to virtually render the testamentary act the will of another rather than his own.

4. But the influence of a wife or child, if exerted in a fair and reasonable manner, is not unlawful; and in order to be 'undue', it must be exerted mala fide, to produce a result which the party, as a reasonable person, was bound to know was unreasonable and unjust".

—*In re Jackman Will*, 26 W. 104, 111.

5. Ex parte negotiations and transfer, without consideration, in an attorney's office, where the weaker (grantor) sister was unrepresented by attorney, and acted without her husband's knowledge, in transferring parental estate to a sister, after a decision in court against such grantee, was held "equivalent to undue influence—adequate ground for avoiding a conveyance so executed." See also ATTORNEY AND CLIENT.

—*Watkins v. Brant*, 46 W. 419, 429.

6. "There was not a particle of proof that either" the beneficiary or the scrivener, his special friend, "ever dictated, counseled, advised or directly influenced the testator to make such a disposition of his property; but even if they had done so, unless such influence in some degree destroyed the free agency of the testator, it would not be undue influence".

7. "The testator was old and feeble, but his testamentary capacity was abundantly proved". The principal beneficiary, a son, "had for a long time lived with the testator, and had much to do with the management of his property, and had great influence with him".

8. A citation from the Jackman will case, 26 W. supra, is quoted with approval: "It is not enough that the testator is dissuaded by solicitations or argument from disposing of his property as he had previously intended; he may yield to persuasions of affection or attachment, and allow their sway to be exerted over his mind; and in neither of these cases would the law regard the influence as undue.

9. To amount to this, it must be equivalent to moral coercion; it must constrain the subject to do what is against his will, but which, from fear, the desire of peace, or some other feeling, he is unable to resist; and when this is so, the act which is the result of that influence is vitiated." *Gilbert v. Gilbert*, 22 Ala., 529.

—*Will of Patrick Carroll*, 50 W. 437, 442.

10. "Mere importunity of the husband", to save him from possible but not yet threatened prosecution, is held, not "sufficient to avoid the conveyance of the wife procured by such importunity, in the absence of duress, (not idle), coercion, oppression or fraud".

—*Lefebvre v. Dutruit*, 51 W. 326, 333.

11. Undue influence was found by the circuit court and a jury on the facts, in the case of an eccentric believer in spiritualism, and reversed by the appellate court. See TESTAMENTARY CAPACITY.

—*Will of J. B. Smith*, 52 W. 543, 551.

12. "It is not unlawful to influence a weakminded person to do that which is just and for the best good of such person. Such influence is not undue,—in other words, is not fraudulent,—and does not necessarily vitiate the act produced by it".

—*Dailey, by Gdn. v. Kastell*, 56 W. 444, 453.

13. A less degree of proof is required as to a person ninety years old. See TESTAMENTARY CAPACITY.

14. "It is a familiar doctrine that a court of equity scans with great jealousy a transaction where there are any grounds for holding that influence has been acquired and abused, or where confidence has been reposed and betrayed. *Smith v. Kay*, 7 H. L. Cas. 750, 759".

—*Smith v. Smith*, 60 W. 329, 330.

15. A will was set aside because of undue influence exercised by a son by acts of brutality for a series of years on a weak woman, and the son being intoxicated at such times of violence, "is no palliation whatever."

—*Will of Farnsworth*, 62 W. 474, 478.

16. "The proponent of a will is not called upon to show affirmatively that there was no undue influence used to procure the making of the will.

17. Undue influence is a defense, and the evidence of it must regularly come from the contestant. *Tyler v. Gardiner*, 35 N. Y. 559", and other cases including *Boyse v. Rossborough*, 6 H. L. Cas. 2, in which "The Lord Chancellor says:

18. 'One point, however, is beyond dispute, and that is that when once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent; the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed.' " (Approvingly quoted in *McMaster v. Scriven*, 85 W. post).

19. It "was clearly an erroneous conclusion" to hold "that undue influence was established, without any proof of the fact", because "there were some circumstances attending the execution of the will of Mrs. A. which are consistent with the hypothesis of undue influence".

20. Where the husband procured the drawing of the instrument, gave the directions to the scrivener who wrote the will at his office, and afterward went with the will and the husband to the house and room where the wife was ill, and the will being short and giving the bulk of the property to the husband, with a slight provision to an absent minor grandson, her only heir, and the scrivener having read the will to her so that she understood and assented to it, "and having executed it, after hearing it so read, it ought to stand as her will, unless it can be shown affirmatively that undue influence was used by the husband to bring about its execution". —*Armstrong v. Armstrong*, 63 W. 162, 169.

21. Where an aged woman, a few days before her death, resulting from a painful accident, conveyed the bulk of her property to one who stood in the relation to her of an adopted son whom she trusted, thus disinheriting her daughter and grandchildren, with whom she was friendly, and where the circumstances suggest an effort to keep those most interested in ignorance of the proposed conveyance, and the court

says, "we do not say that fraud and undue influence were proved affirmatively, but only that the circumstances suggest them,"—

22. It is held that the burden of proof "to show such fraud or undue influence" is not upon the plaintiff heirs, but that "the law casts upon the grantee the burden of showing that the conveyances are untainted with undue influence or other fraud, but were the intelligent and deliberate act of the grantor.

23. This rule is to protect the weak and unsuspecting from the cunning and fraud of those who stand in confidential relations to them, and has its foundation in good morals and sound public policy.

24. The grantee has failed to satisfy the requirements of the rule, and the presumption of injustice, fraud, and wrong stands against the conveyances, which he must remove before the court is authorized to say that they are valid. This he has not done, and for that reason, also, his deeds must be cancelled and held for naught.

25. The rule of law above stated is quite elementary, and has often been applied in similar cases both here and in England." Cases cited by counsel, and *Worrall v. Bailey*, 3 Est. Rep. 263; *Greenfield's Est.*, 14 Pa. St., 489; *Miskey's Appeal*, 3 Pennypacker, 409; *Turner v. Collins*, L. R. 7 Ch. App., 329; *Gaudy v. Macauley*, L. R. 31 Ch. Div. 1. (But see also, *Winn v. Itzel*, 125 W. post, where the rule here given is explained and in effect disapproved). —*Davis v. Dean*, 66 W. 100, 110.

26. "It is well settled that where the party to be benefited by the will has a controlling influence or agency, or is particularly active in procuring the execution of the will, it is universally regarded as a very suspicious circumstance, requiring the fullest explanation. (Citations).

27. Especially is this so where such active agent occupies a confidential relation to such testator; as in the case of attorney and client, physician and patient, priest and parishioner, or other relationship calculated to inspire confidence and trust in such testator".

28. "This court has held that 'undue influence, in such case, is such an influence that the instrument is not properly an expression of the will of the testator in regard to this disposition of his property, but rather an expression of the will of another person.' In *re Jackman*, 26 W. supra.

29. Manifestly, it is a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices, or other species of circumvention. From the very nature of such influence, the evidence, generally, is wholly or almost wholly circumstantial.

30. The questions to be considered are not confined to the conduct of the favored legatee and his friends, constituting the alleged undue influence, but extend to the susceptibility of the testator to the peculiar influences brought to bear upon him, and his capacity to discover and resist such approaches and importunities.

31. The previous relations, friendships, and intercourse between the

testator and the several parties concerned, and the physical and mental conditions of the testator, therefore, as well as the circumstances under which the will was executed, are important to be considered”.

32. In this case the testator was about seventy, had been an habitual drunkard for many years, was under guardianship, lived with his brother, the beneficiary, a saloonkeeper, who kept him supplied with liquor freely, had been drinking the day the will was signed, and the verdict of the jury finding undue influence was sustained. See also **TESTAMENTARY CAPACITY**.
—*Will of Slinger*, 72 W. 22, 26.

33. The quotations of *In re Jackman Will*, 26 W., and *Armstrong v. Armstrong*, 63 W., supra., are approvingly set forth;

Though the residuary beneficiaries, a nephew and niece get one-half, and “would have taken no part of the estate”, and lived with and took care of the testatrix during her last illness, she having died a week after the making of the will,—there is nothing whatever to show that they have exercised any influence or originated or knew the provisions of the will until after its execution, but the nephew employed the scrivener for the testatrix; held,—

34. That they did not stand “in any fiduciary relation to the testatrix, within the meaning of the rule invoked by the appellants, which would impose upon them the burden of showing an absence of fraud or undue influence.” See also **TESTAMENTARY CAPACITY**.

—*McMaster v. Scriven*, 85 W. 162, 170.

35. As to weakened mentality, shown in change of habits of living, and deceased’s declarations, affecting undue influence. See **TESTAMENTARY CAPACITY**.

—*Bryant v. Pierce*, 95 W. 331, 339.

36. “Where a voluntary conveyance is made by an aged person of his entire property, without consideration, to one who stands in a position of trust and confidence to him, under circumstances of secrecy,

37. The burden of proof is upon the grantee to show that the conveyance was untainted with undue influence or fraud”. *Davis v. Dean*, 66 W. supra; *Cole v. Getzinger*, 96 W. 559.

—*Doyle v. Welch*, 100 W. 24, 27.

38. A deed by the father of all his realty to his third wife, through her son-in-law as trustee, is, on the suit of the heirs at law, set aside on the ground that “while their standing in court may not be as meritorious as creditors’ would have been, yet they are entitled to protection against the undue influence and secret fraud proved.”

39. Following cases supra, and others cited including *Sears v. Shafer*, 6 N. Y. 268, and *Woodbury v. Woodbury*, 141 Mass. 329, it is held in effect, that the relations between the deceased and such third wife, who was not the mother of the children, heirs at law, on the evidence, were those of trust and confidence, and “such as to raise the suspicion or

presumption that the deeds were procured by undue influence", and in effect placing upon the widow the burden of removing such presumption.

—*Disch v. Timm*, 101 W. 179, 189.

40. "The true rule is", in fraud and undue influence, that "the burden of proof is on the party alleging fraud to establish it by a preponderance of evidence to the satisfaction of the jury;

41. But proof of circumstances which, in law, satisfactorily suggest fraud does the work, and then the burden of proof is upon the party against whom fraud is alleged to meet the prima facie case thus made by affirmatively and satisfactorily explaining such circumstances and establishing his innocence.

42. The facts from which fraud and undue influence are prima facie inferable are mentioned in numerous cases in this court, the following being among the most significant; *Smith v. Smith*, 60 W. supra; *Davis v. Dean*, 66 W. supra; *Cole v. Getzinger*, 96 W. supra; *Disch v. Timm*, 101 W. supra; *Doyle v. Welch*, 100 W. supra".

—*Small v. Champeny*, 102 W. 61, 68.

43. Where the testator, a week before his decease, gave a large estate to his second wife, cutting off his children and grand children who were in other states, and he being old and weak mentally and easily influenced, the will being procured by his wife, it was held "either procured by undue influence", or by "bold fraud". *Disch v. Timm*, 101 W. supra.

44. (In *Fox v. Martin*, 104 W. post, it is said of this case that "the testator was seventy-three years of age, so weak mentally as to be easily influenced by his wife, who practically dictated the will".)

—*Baker v. Baker*, 102 W. 226, 232.

45. On the evidence, the mother having simply a power to devise her husband's estate, and she being old, feeble and helpless from two strokes of paralysis, "at times became intoxicated", and at times was "sensible and at others incoherent",—cut off most of her children who had no knowledge of the will, made a son with whom she lived, a principal beneficiary, who "evidently had the disposition and the opportunity" "to unduly influence her, and there being relations of trust and confidence,—her will was disallowed. *Disch v. Timm*, 101 W. supra.

In re Derse's Will, 103 W. 108, 112.

46. A will of a testator, seventy-six years old, who was peculiar, eccentric, illiterate, ignorant, suspicious, but temperate, of vigorous mind, whose heirs were full and half brothers and sisters, and nephews and nieces and who gave all of a large estate to a half brother, was held to have testamentary capacity and not to have been unduly influenced either by the beneficiary, or by a friend who aided in the matter of the will.

47. "The only object in making a will is to make a different disposition of property than that provided by statute.

48. The right to dispose of property by will includes the right to disinherit brothers and sisters and nephews and nieces.

49. The testator was not obliged to give any reason or explanation why he favored one relative over the others.

50. If the will is the result of his free and voluntary act, then no relative has any ground for complaint.

51. If it was procured by fraud or undue influence, then the burden of proving it was on the contestants."

52. No relatives being in the city or state at the time, this is not a case where "the circumstances are such as to raise a presumption of fraud or undue influence. *Disch v. Timm*, 101 W. supra."

—*Cutler v. Cutler*, 103 W. 258, 264.

53. A will allowed by the county court, and disallowed by a jury in the circuit court, on the facts, the testator being middle aged, "a man who did not have confidential relations with anyone", who "was exceptionally a self-willed man"; disposed of his property to brothers and sisters as well as to his children, but "exactly in accordance with the bent of the testator's mind," though made at the home of the brother-in-law, a principal beneficiary, and in secret,—is held not to have been procured by undue influence.

54. "The adjudications referring to the making of a will in secret as a badge of fraud have no application to situations where the circumstances are not such as to suggest need of protection for the testator in order that he may express his will instead of the will of some other person."

55. It is only in cases where there is a subject "susceptible to undue influence", and "a disposition on the part of the favored person to exercise" it, that "the secrecy of the transaction was said to be a significant circumstance, evidentiary of fraud". *Davis v. Dean*, 66 W. supra; *Disch v. Timm*, 101 W. supra. —*Fox v. Martin*, 104 W. 581, 592.

56. Where the objection is that "the testator's wife, who was in her last sickness when the will was drawn, and who died three days afterwards, had a controlling influence in making the will; and in fact dictated the terms of the will," unequally distributing the property among the children of both, the will is nevertheless upheld, as "presumptively, she was controlled by motives of natural affection and propriety, as well as himself," and he having had three years thereafter in which to change it, if he desired. *Cutler v. Cutler*, 103 W. supra.

—*Deck v. Deck*, 106 W. 470, 472.

57. "Upon such an issue there are two facts to be proven by the contestant: first, that the undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator.

58. Upon the latter question evidence of the statements of the testator, made either before the will was made or after, and which tend to throw light on the condition of his mind, is admissible, upon very familiar principles; but as to the first question, the evidence of such statements is plainly merely hearsay.

59. Upon this question it is said in 2 Jones, Ev. § 493: Such declarations 'are admissible only for the purpose of proving the condition of the testator. They afford no substantive proof of fraud, duress or undue influence, and are admissible for no such purpose'." (Quoted and followed in *Duncan v. Metcalf*, 154 W. post.)

60. "It is not the law that, whenever a deed or a will is made by a party in favor of one child to the prejudice of others, a presumption of fraud arises from that fact alone, even if the parent be living with such favored child".

61. "In order to raise the presumption of undue influence, which throws the burden of proof on the beneficiary, there must be shown a subject unquestionably susceptible to undue influence, either as the result of old age, mental weakness, or both;

62. Also some clear evidence of opportunity, and a disposition on the part of the beneficiary, to exercise such influence". (Cases supra.) (Approvingly quoted in *Boardman v. Lorentzen*, 155 W. post.).

—*Loennecker's Will*, 112 W., 461, 465.

63. Paying large fees to attorney, physician, and large sums to heirs and relatives, by the donee is held no evidence of undue influence exercised in the making of a large gift. See *GIFT*.

—*Citizen's L. & T. Co. v. Holmes*, 116 W., 220, 234.

64. Where the widow, a few days before her death, conveyed all her estate to a daughter, who had cared for her about fifteen years, "at the request of the other children", the case is held distinguished "from both the facts and the reasons which controlled those (supra) in which a presumption of undue influence has been indulged as to take it fully out of their doctrine", "and, in the absence of any direct proof of such conduct on her part", the conveyance is upheld.

65. On the facts, the conveyance was held not "inequitable", and "as to the law", "the highest equity which courts can consider is the right of an individual to dispose of his property as he chooses.

66. The hope of inheritance which any child may indulge during a parent's life bears no comparison in the eye of the law with the right of disposal by the parent.

67. If" the mother, "of her free will, gave this property to the defendant, there is no duty of equity or conscience to thwart that will. The only question for the court, therefore, was whether the deed was the product of her own volition."

68. While "the word 'opportunity'" and "the word 'secrecy'", have been given prominence in upholding the rule of presumption of undue

influence, yet they have "usually been applied to active efforts by the beneficiary" to further such conditions.

69. "The rule of presumption of undue influence and resulting invalidity of conveyances to those in confidential relations, which, within proper limitations, is salutary, will become a reproach to the law if it serve to defeat free and intentional gifts under such circumstances as ordinarily accompany them". —*Vance v. Davis*, 118 W., 548, 550.

70. On the facts, in the case of an old man, in a "weakened mental and physical condition" it is held that he had testamentary capacity, and that "so long as the will truly expresses the wishes of the testator, there is no ground for claiming that it was procured by undue influence".

71. "The mere fact that knowledge of the contents of the will was confined to the subscribing witnesses is no evidence that it was procured by undue influence. *Vance v. Davis*, 118 W. supra".

72. "This court has defined 'undue influence in such a case' as 'such an influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person' (In re Jackman's Will, 26 W. supra);

73. And that 'motives of natural affection and gratitude on the part of the testator', even when accompanied by 'solicitations or arguments which appeal to such motives, do not constitute undue influence' (Id.; *Deck v. Deck*, 106 W. supra).

74. 'To establish undue influence sufficient to invalidate a will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do'. *Wingrove v. Wingrove*, L. R. 11, Prob. Div. 81'. See also LOST WILL. —*Gavitt v. Moulton*, 119 W. 35, 46.

75. Following cases, supra, quoting from In re Jackman's Will, 26 W. supra, and saying that "influence or importunity, to be undue, must destroy, or at least impair or prevent, free agency", the circuit court judgment setting aside a mortgage and deed to a son-in-law, for support, etc., on the ground of undue influence, is,

76. Reversed, on the facts, where the "findings seem to rest largely upon the existence of ill feeling and opportunity to stimulate ill feeling". "Judgments in such cases, are not to rest upon mere suspicion and assumption". —*Drinkwine v. Gruelle*, 120 W. 628, 633.

77. On the facts, where the testator's children were not parentally helpful, were cut off in the will, which gave the property to a niece and her husband who had provided care and support, a finding of no undue influence was sustained.

78. "To sustain this contention it must appear that there was such influence exercised as to amount to moral coercion,

79. Which resulted in destroying the testator's free will and inde-

pendent action, and constrained him to act against his will and independent wishes in disposing of his property." (Approvingly quoted in *Duncan v. Metcalf*, 154 W. post.)

—*Anderson v. Laugen*, 122 W. 57, 63.

80. The plaintiff, an attorney, a trustee under a trust deed, "brought this action in his own proper person for the purpose of obtaining direction from the court as to his duties as trustee", especially as to a subsequent deed "purporting to have been executed by an old and feeble woman (the grantor of the trust deed) upon her death bed, in favor of her companion",—found to be "obtained by fraud and undue influence", by the trial court, and reversed on the facts;

81. The scrivener, being attorney and notary, "was allowed to falsify his own official certificate" that the grantor A. "acknowledged that she signed, sealed, and delivered the instrument as her free and voluntary act",—and while "such testimony is thoroughly impeached by the witness himself," and the act is "a 'gross impropriety', as was said by the court in *Loughney v. Loughney*, 87 W. 92 (See TESTAMENTARY CAPACITY)",

82. Yet "we are inclined to hold the testimony admissible", but it "should receive little weight" "in the absence of a satisfactory explanation by the officer showing that the official certificate, though mistaken, was honestly made at the time". *Wilson v. South*, P. C. 70 Ill. 46.

83. Discussing *Davis v. Dean*, 66 W., and other cases, *supra*, it is held that "parties who charge fraud (and undue influence) must prove fraud", and that "they still have the burden of proof"; that it is "incumbent on the plaintiff (charging fraud) to make his case in the first instance, and to present all the proof which he had and wished to present tending to prove fraud, whether circumstantial or direct".

84. (So approvingly explained in *Ball v. Boston*, 153 W. post,—which is said in *Murphy v. Est. of Skinner*, 160 W. 554, see PROMISSORY NOTES, ETC.—to express "the view of the entire court", and that "the words 'burden of proof' as used in the prior cases are not of course to be understood in their exact technical sense". "Strictly there is no shifting of this burden but when the plaintiff has made his proofs (complete) and the defendant takes up the case, he takes the laboring oar and has for the time being the 'burden' of the controversy, and in this sense the words are used".)

85. As to what proof "will raise the inference of fraud", *Loennecker's Will*, 112 W. *supra*, is approvingly quoted, "it being understood that 'opportunity' here does not mean mere physical propinquity or possibility of personal contact, but the fact that interviews or personal transactions between the parties were had, followed by the accomplishment of the desired end, as suggested in *Vance v. Davis*, 118 W. *supra*".

—*Winn v. Itzel*, 125 W. 19, 25-33.

86. Where a will "was made when no one was present beside the principal beneficiary and his clerks and servants, who had no claim upon his bounty", no direct influence being shown, it was, on the facts, upheld.

87. "The question is not what would have been theoretically the most just or reasonable way for him to have bequeathed his property,"

88. But was 'he * impelled * by undue influence to make a different will from what he would have made if he had been left entirely alone and free to act according to his own judgment and discretion'? Underhill Wills, 180." See also TESTAMENTARY CAPACITY.

—*Field v. Pickard*, 126 W. 229, 236.

89. Where, on the evidence, the decedent in his lifetime, "freely and voluntarily" disposed of his property, it was held: "The fact that the property of decedent was not equally divided by him among all his children raises no presumption of undue influence, even though the parent was living with the favored child. Loennecker's Will, 112 supra".

90. Evidence as to "the general disposition of" a child "with regard to being active, exerting influence", was held immaterial.

—*Meyer v. Arends*, 126 W. 603, 609.

91. "Of course, the declarations made by deceased tending to show the exertion of undue influence over him by his wife (the proponent) were inadmissible and, even being admitted (upon mental condition), were not evidence of the facts so narrated by him. Loennecker's Will, 112 W. supra".

92. "The transactions attending the giving of directions to the scrivener and the execution of the will, all in the absence of the proponent, strongly refute that coercion and duress destroying the testator's freedom of will and action which is necessary to support the charge of undue influence.

93. It is not sufficient that testator's reason is convinced by persuasion or argument, if it be by his own will and intention that he carries that decision into effect. In re Jackman, 26 W.; Deck v. Deck, 106 W. supra."

—*Mueller v. Pew*, 127 W. 288, 291.

94. Where a nonrelated beneficiary T., was a partner of the decedent, "and as such a confidential relation existed between them", and "he had in his possession the several certificates of deposit and the bank-book of the deceased", and visited him "frequently during his sickness, and did so four times on the day of his death" when the will was drawn, and was there at the time, at the decedent's request, and there is no showing as to why he was given a legacy, or "that the act of making a will was considered or spoken of by them, or that T. had an opportunity before his last visit", it is held,—

95. That T. "was not called upon to explain and show that this

bequest was a free and voluntary one by the deceased'', to relieve him from a finding of undue influence. *Small v. Champeny*, 102 W. supra. See also TESTAMENTARY CAPACITY.

—*Will of Muellenschlader*, 128 W. 364, 373.

96. As to burden of proof not being on defendant to rebut undue influence, "*Winn v. Itzel*, 125 W. supra, referring to *Davis v. Dean*, 66 W. supra'', is quoted and followed.

—*Boyle v. Robinson*, 129 W. 567, 577.

97. Undue influence as to a conveyance from father to son is sustained, following *Vance v. Davis*, 118 W. and *Winn v. Itzel*, 125 W. supra, and the established "rule of law that in case of a conveyance by an aged person, susceptible to undue influence, of entire property, without consideration, to one in a position of trust and confidence, under suspicious circumstances which satisfactorily suggest the wrong, accompanied by proof of opportunity and disposition on the part of the beneficiary to exert influence,

98. There arises a presumption that the conveyance was so induced, unless the grantee can negative that fact by direct proof''.

—*Quinn v. Quinn*, 130 W. 548, 551.

99. Where "the testatrix throughout the fourteen years of her life after the death of her husband actively managed her property and displayed unusual mental vigor up to the time of her death" at "eighty-six years of age", and "had a clear comprehensive understanding of" her property and the relations of her beneficiaries, it is held, on the evidence,—

100. That, upon deciding to make a will which was drawn but not signed, when a daughter A. and her husband, living with testatrix, protested against its provisions as "not in accord with the promise and arrangements made by her" as to care and attention,—the testatrix concluded not to sign the will, but to make a will giving all the realty to such daughter;

101. And that as to a will so made three days later the "testatrix acted freely and voluntarily in making this last will", "and without compulsion and according to her own judgment and discretion". Will sustained in county, circuit and supreme court.

—*McNaughton v. McGregor*, 133 W. 494, 499.

102. Undue influence as quoted in *Anderson v. Laugen*, 122 W. supra, set forth and applied.

—*Evenson v. Rust*, 152 W. 113, 115.

103. Where a testator, who was past seventy, physically impaired, a considerable drinker, estranged from his children by a former wife, made his will in favor of his wife, during his last sickness, about a month before his death, while under his wife's supervision, she having

been his housekeeper and then married to him about a year only,—on the facts, the will was refused probate by the county and circuit courts, and was allowed probate by the supreme court.

104. The quotation from and principles of *Vance v. Davis*, 118 W. supra, and other cases, as to testator's right 'to dispose of his property as he chooses', are stated, re-stated, and approved.

105. The "burden of proof" is, "upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence", as set forth in *Winn v. Itzel*, 125 W. supra.

106. Undue influence is a wrong which "sounds in fraud" (cases, supra), and "he who alleges fraud must establish it,—not by a mere preponderance of, but by clear and satisfactory evidence".

107. "The general characteristics of undue influence are strikingly presented in *Will of Slinger*, 72 W. supra".

108. "Undue influence is the very antithesis of right influence. It exists only where there is practical destruction of voluntary volition,—at least, is moral coercion for an ulterior purpose. *Anderson v. Laugen*, 122 W. supra.

109. This species of wrongful influence should never be confused with influence through affection or disposition to favor a member of one's own family produced by legitimate feelings of esteem or gratitude". (Cases).
—*Ball v. Boston*, 153 W. 27, 32.

110. Following *Ball v. Boston*, 153 W., and other cases, supra, the county court is sustained, the circuit court reversed, and the will sustained,—undue influence which "sounds in fraud and requires that it be shown by clear and satisfactory evidence," not being so proved.

111. "Declarations of the testator" that he "was importuned" are "not competent to prove that undue influence was in fact exerted". *Loennecker's Will*, 112 W., supra.

112. Evidence of "his declaration" "that he wanted Mrs. A. (beneficiary and alleged influencer) to have the privilege of living on this property because she had worked for and helped him accumulate it,"

113. Is assumed as properly admissible, and "tends to show that his state of mind was in harmony with the declared wishes in the will".
—*Duncan v. Metcalf*, 154 W., 39, 44.

114. Where an old man conveyed property in consideration of his support, and thereafter adhered thereto, the circuit court's finding of undue influence is reversed, and it is stated that it "is all wrong" "that upon a prima facie showing being made" of undue influence, "there is a shifting of the burden of proof",

115. And the rulings as to undue influence are approvingly cited, quoted, and upheld, from the following cases, supra: *Small v. Champeny*, 102 W.; *Vance v. Davis*, 118 W.; *Winn v. Itzel*, 125 W.; *Ball v. Boston*, 153 W.; *Loennecker's Will*, 112 W.

—*Boardman v. Lorentzen*, 155 W. 566, 571.

116. Where the will was allowed by the (Dane) county court, and testamentary incapacity and undue influence found by a jury, and "the circuit court adopted" such findings, and one half of a small estate was given to the widow, and the rest except \$100 to a daughter, given to the son O., two other daughters receiving nothing, and the testator being old and weak, and the son being "alone with him about the time the will was made" "a week before" the decease,—it is held that only a "subject" and an "opportunity" as to undue influence were shown, and that the will be allowed.

117. "A case of undue influence is made out where it is shown (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.

118. As the law now is, these facts must be shown by clear and satisfactory evidence. *Ball v. Boston*, 153 W.; *Duncan v. Metcalf*, 154 W.; *Boardman v. Lorentzen*, 155 W.; *supra*".

—*Skrinsrud v. Schwenn*, 158 W. 142, 145.

119. "While it is true that" the four elements of undue influence as stated in *Skrinsrud v. Schwenn*, 158 W. *supra*, "must be established by clear and satisfactory evidence before the court is justified in setting aside a will,

120. Yet the clear establishment of three of these essential elements may with slight additional evidence as to the fourth compel the inference of its existence.

121. This is especially true where the will is not what may be termed a natural one, such as relationship usually dictates.

122. In *Gunderson v. Rogers*, 160 W. 468 (See PROBATE OF WILLS), it was said that strong evidence of lack of testamentary capacity or of undue influence was required to nullify a will made according to the dictates of natural justice.

123. Where it is not so made less proof may suffice, for legitimate inferences of infirmity may be drawn from its departure from natural justice". "In this respect" "the case differs from the *Ball Case*," 153 W. *supra*.

124. Where the county court found only testamentary incapacity, and the circuit only undue influence, the latter's finding is "affirmed because we cannot say it is clearly erroneous", though "the proof is quite meagre" on "disposition to exercise undue influence", the property going to strangers as against an aged father as the heir.

—*Elliott v. Fisk*, 162 W. 249, 253.

UNLAWFUL CONTRACTS.

See also SUNDAY.

- Agreement not to prosecute, 11.
- Duress; execution and payment, 17.
- Equal footing when made, 12.
- No duress; no recovery, 16.
- Not recover money back, 12.
- Between immediate parties, 14.
- Corporate stock under par, 34.
- Illegal, both parties, 35.
- No rescission or restoration, 36.
- Duress, species of fraud, 28.
- Contracts, void, not voidable, 28.
- Reasonably adequate cause, 29.
- Act not voluntary, 30.
- Executory:
 - Rescission and recovery, 2.
 - Conditions fully stated, 10.
 - Moral turpitude, 10.
 - Law favors rescission, 15.
 - Wholly unexecuted, 3.
- Embezzled funds by agent, 25.
- Receive security therefor, 25.
- False representation as to, 13.
- Recovery for the fraud, 13.
- General rules of law, 4.
- Exceptions, as to recovery, 8.
- Advantage of fiduciary relations, 9.
- Protect weak, necessitous, 8.
- General rules, etc.—continued
 - Kinds of contracts void, 4.
 - Malum se or prohibitum, 6.
 - Prohibited by statute, 4, 7.
 - Recovery denied, 5.
- Grain delivery in future, 19.
- Actual view to delivery, 21.
- Bona fide intention, 19.
- Doctrine rigidly enforced, 26.
- Notwithstanding statute, 31.
- Made to cover gambling, 20.
- Pretended; not purge, 24.
- Transactions gaining, import, 21.
- Whole security void, 22, 23.
- Illegal, without fraud, 27.
- Law not aid, enforcing, 1, 35.
- Between immediate parties, 14.
- Malum se or prohibitum, 6.
- Nor recover money, 15.
- Except executory contract, 2, 15.
- Weak and necessitous, 8.
- Fiduciary relation, 9.
- Prevent competitive bidding, 32.
- Third person injured, 32.
- Usury defense personal, 18.
- Violates public morals or policy, 33.

1. "The law will not aid in enforcing an unlawful contract, nor give damages for a breach of it. Neither will it assist a party in recovering back money which he has expended in the unlawful execution of such contract".

2. "It is only where the contract is executory that a rescission and a recovery are allowed."

3. "It is only when the contract is wholly unexecuted, and by way of anticipating and preventing the wrong, that the party can rescind".

—*Miller v. Larson*, 19 W. 463, 466.

4. "The general rule of law is, that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void;"

5. "And that, if a party claiming a right to recover a debt is obliged to place his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation for his right to recovery".

6. "It is quite immaterial whether such illegal contract be malum in se or only malum prohibitum. In either case the maxim, ex turpi causa non oritur actio, is applicable".

7. "And a contract in violation of a statute is void although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibitive, and its invalidity follows as a legal consequence. (Many cases)".

8. There are, however, exceptions to the rule "of non recovery on illegal contracts, to protect weak or necessitous men from being overreached, defrauded or oppressed". Recovery in such cases is allowed on the principle that "he is the oppressed party and not equally guilty with the other".

9. "Actions have been sustained by wards against guardians, and by clients against attorneys, to set aside executed illegal contracts, where the guardians or attorneys had taken advantage of the fiduciary relation to impose upon and mislead their wards or clients". See also CONSIDERATION.

—*Melchoir v. McCarty*, 31 W. 252, 254.

10. "We think the rule may fairly be deduced from" the cases, "that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received."

—*N. W. U. Packet Co. v. Shaw*, 37 W. 655, 661.

11. An agreement not to prosecute for a crime is "unquestionably illegal and void, in that it interferes directly with the course of public justice, and was therefore against sound public policy."

12. Yet, "if the parties to the illegal agreement stood on an equal footing when they made it—if there was no duress or other circumstance which placed the plaintiff in the attitude of a sufferer rather than a wrongdoer,—the law will not assist the plaintiff (father) to recover back the money which he has voluntarily paid in execution of it. *Miller v. Larson*, 19 W. supra."

—*Schultz v. Culbertson*, 46 W. 313, 314.

13. Where B. obtained \$3,000.00 from A. to pay for the latter to C. on an illegal contract, and paid to C. only \$1,000.00 according to the real agreement, it was held that A. could recover from B. the balance of \$2,000.00 as "the gravamen of this action is the fraud practiced by the defendant in obtaining the \$2,000.00 from the plaintiff by" false representation.

14. "The maxim, *In pari delicto melior est conditio possidentis*, has application only as between the immediate parties to an illegal contract, and does not govern where the action is brought by one of such parties to recover money received by a third party in respect to his illegal contract. (Citations.)"

15. "The law will not lend its aid to enforce an illegal contract while it remains executory, or disturb it after it is fully executed (citation); but it will in all cases favor its rescission and abandonment before its execution." See also FRAUD. —*Kiewert v. Rindskopf*, 46 W. 481, 484.

16. At the former appeal (46 W. supra) "as there was no proof whatever in the case that the plaintiff or his son was subjected to any menace or threat after the note was given, or which tended to show that the note was paid under duress", more than a year after the note was given, the judgment for recovery by plaintiff was reversed.

17. On this trial the circuit court properly "charged that there could be no recovery unless the evidence satisfied the jury, not only that the plaintiff was induced by threats to make the note, but that, when he paid it, the duress still existed, and he was laboring then under the apprehension that the defendant would arrest and imprison his son if he did not pay it;" and "the jury must have found that both the execution of the note and its payment were procured by compulsion and threats", and the judgment for plaintiff is upheld.

—*Schultz v. Culbertson*, 49 W. 122, 123.

18. The defense of usury is to an extent "personal to the borrower and those in privity with him". See SURETIES.

—*Hamilton v. Prouty*, 50 W. 592, 597.

19. "Contracts in writing for the sale and delivery of grain at a future day, for a price certain, made with a bona fide intention to deliver the grain and pay the price, are valid in law;

20. But when such contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, they come within the statute of gaming, and are void in law.

21. To uphold such a contract it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as an evasion of the statutes of gaming, or as a cover for a gambling transaction.

22. In the present case it sufficiently appears that at least some of the transactions between the parties which enter into the consideration of the note and mortgage in suit, were mere gaming transactions of this character, were void in themselves, and taint the whole security which is, therefore, absolutely void". —*Barnard v. Backhaus*, 52 W. 593, 597.

23. "It may be proper to say here, once for all, that we are satisfied as to the correctness of the decision in *Barnard v. Backhaus*, 52 W. supra, as applicable to the facts of that case, and do not believe that it requires any vindication, support, or revision".

24. It is held "that a compromise of any pretended differences, in

respect to clearly illegal contracts and transactions, cannot purge them and produce a valid claim". *Melchoir v. McCarty*, 31 W. supra.

—*Everingham v. Meighan*, 55 W. 354, 362.

25. "We know of no law which prevents a party, whose funds have been embezzled by his agent, from demanding and receiving from such agent payment of the funds so embezzled, or from taking security for the payment of such money".

—*Johnston H. Co. v. McLean*, 57 W. 258, 262.

26. "The doctrine of" the decisions in *Barnard v. Backhaus*, 52 W. and *Everingham v. Meighan*, 55 W., supra, "will be rigidly enforced in all cases fairly coming within its scope and meaning".

—*Lowry v. Dillman*, 59 W. 197, 198.

27. Illegal contracts, without fraud, will not be disturbed. See *SUNDAY*.

—*Cohn v. Heimbauch*, 86 W. 176, 180.

28. "Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void. *City Nat. Bank v. Kusworm*, 91 W., 166."

29. "It was", in *Wolff v. Bluhm*, 95 W., 257, "said that in order to constitute duress 'the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition.'"

30. "The will of the person making the contract must be overcome so that the act is not his voluntary act," as "found in the present case." See also *PROMISSORY NOTES*.

—*Mack v. Prang*, 104 W., 1, 5.

31. The rule of *Barnard v. Backhaus*, 52 W., supra, is adhered to, notwithstanding the subsequent statute, sec. 2319a.

—*Bartlett v. Collins*, 109 W., 477, 483.

32. "Contracts to prevent competitive bidding at judicial sales whereby a fraud on any third person is worked are invalid because against public policy", though "there are doubtless cases where agreements between bidders are valid because no third person is injured thereby". (Citations).

33. "A cause of action does not arise out of a contract which violates public morals or public policy. *Milwaukee M. & B. Asso. v. Niezerowski*, 95 W. 129".

—*Schmitt v. Franke*, 160 W. 347, 351.

34. "A sale by a corporation of its corporate stock" "for less than par value, being prohibited by law and in violation of the public policy of the state, is void". Sec. 1753; *Clarke v. Lincoln L. Co.*, 59 W. 655.

35. And "the purchaser and seller are participants in an illegal transaction and, so, notwithstanding the illegality, judicial remedies are not available to the former to recover back the money paid".

36. Nor is such purchaser entitled "to judicial aid to secure a rescission" and restoration.

—*Thronson v. Universal Mfg. Co.*, 164 W. 44, 48.

USAGE.

Admitted without pleading, 12.

Exception to parol rule, 4.

General trade custom, 17.

Bound though ignorant, 18.

Ignorance not relieve, 20.

Presumed in contract, 18.

Interest usage proof, 5.

Allowed legal rate, 5.

Local custom different, 21.

Meaning of word or term, 12.

At time and place, 13.

Contract accordingly, 14.

Proof of such meaning, 15.

Not to change contract, 9, 19.

Custom supposed considered, 11, 18.

Showing real contract, 10, 19.

Parties presumed to know, 1.

Pay for services, 8.

Percentage of purchase money, 7.

"Place of contract", 16.

Principle of admission, 3.

Proof, clear and explicit, 1, 6.

Ancient, uniform, notorious, 1, 2.

Vary agent's instructions, 2.

"Workmanlike manner", 16.

1. Usage "is not readily adopted by courts, and the proof * must be clear and explicit, and the usage so well established, uniform, and so notorious that the parties must be presumed to know it, and to have contracted in reference to it." —*Power v Kane*, 5 W. 265, 268.

2. "The soundness and correctness of the rule which permits a usage or custom * to qualify or vary the instructions of an agent", is doubted, and "the evidence of such a custom should be clear and satisfactory" as being "ancient, uniform, notorious, and reasonable".

—*Hall v. Storrs*, 7 W. 253, 260.

3. "The principle upon which proof of usage is admitted is, that it serves to explain and ascertain the intent of the parties upon some point as to which their contract is silent, and as to which there existed a usage, so long continued and well known and settled and uniformly acted upon, as to raise a fair presumption that it was known to both contracting parties, that they contracted with reference to and in conformity with it, and hence the silence or omission of any express provision in the contract itself".

4. It constitutes "an exception to the general rule" that a complete contract "shall not receive additions from parol evidence".

5. A usage to pay interest at ten per cent. was held to allow interest

at the legal rate of seven per cent., "that being the highest rate at which an oral promise of payment is valid; and the rate implied by law in the absence of any special agreement for a different one".

—*Lamb v. Klaus*, 30 W. 94, 97.

6. "The rule as to the nature and quantum of evidence necessary to establish a custom is well stated in the language of the court above quoted (from *Power v. Kane*, 5 W. supra), and we are not disposed to change it."

7. "As was said by Justice Smith in the case of *Power v. Kane*, supra, speaking of the custom that the price was a percentage of the purchase money, 'the amount of compensation is not at all to be regulated by the amount of labor, time and skill employed, but wholly upon the amount of the purchase money, no matter at how much or little cost of the former the purchase might be effected.'"

—*Hinton v. Coleman*, 45 W. 165, 169.

8. Evidence of custom to pay for services, is not relevant on the issue whether they "were gratuitously rendered". See SERVICES.

—*Kelly v. Houghton*, 59 W. 400, 401.

9. "The object of proving a general custom is not to contradict or change the contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made;

10. And this evidence of a general custom, when it does not contradict or change the express terms of the written contract, is admitted for the purpose of showing what the real contract between the parties was. The proof of such custom (a general one) is always admitted without pleading it. (Many cases).

11. And when it is clearly proven, the parties are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract. (Cases)."

—*Hewitt v. J. W. Lumber Co.*, 77 W., 548, 556.

12. On reference to *Hewitt v. J. Week Lumber Co.*, 77 W. supra, it is said: "There is a difference between evidence of usage to establish a custom for the purpose of annexing that as an incident to a contract, and the same kind of proof to show the meaning of some word or term used in a contract.

13. In the latter situation the meaning of the term as understood at the time and place of the contract governs, whether both of the parties knew of such meaning or not.

14. They are presumed to contract with reference to the meaning of words and terms used by them, as such words and terms are understood at the place of their contract;

15. Therefore, proof of such meaning is all that is required to enable

the court to determine just what the language of the contract was intended to express". *Walker v. Syms*, (Mich.) 76 N. W. Rep. 320.

16. "The expression 'place of the contract'," is the place of making when not otherwise indicated, and "the usage at such place", governs the interpretation, and "the term 'workmanlike manner' referred to the customary way of cutting timber in" that vicinity, and the evidence "as to the method of doing such work elsewhere could not be considered as forming any part of the" contract.

—*Shores Lumber Co. v. Stitt*, 102 W. 450, 455.

17. A trade custom that was general—as the uniform place of delivery of seed in a city—the contract being silent thereof, "unless it was shown that both parties intended to exclude it, or that the plaintiff was ignorant thereof to the knowledge of the defendant, should have controlled as to the manner and place of delivery".

18. "Where the custom is general, it will be presumed to have entered into the contract, and one may be bound thereby although ignorant, unless the other party is shown to have knowledge of his ignorance. (Cases)".

—*Gehl v. Milwaukee Produce Co.*, 105 W. 573, 580.

19. "Where there is an express agreement," "custom cannot be proved to vary the terms of the agreement if they are definite and unambiguous, but only to explain and make definite that which the contract leaves ambiguous and unexpressed."

—*Mowatt v. Wilkinson*, 110 W., 176, 179.

20. "It is not the law that ignorance of the general trade custom relieves a party from the effect of it."

21. "The rules of law applicable to a general custom should not be confounded with those applicable to a local custom. *John O'Brien L. Co. v. Wilkinson*, 123 W. 272."

—*Ross v. Northrop, K. & Co.*, 156 W. 327, 337.

USES AND TRUSTS.

See TRUSTS.

VACATING FRAUDULENT ORDERS.

See FRAUDULENT ORDERS.

VACATING JUDGMENTS.

See also FRAUDULENT ORDERS. JUDGMENTS. MISTAKE.

- Affirmed judgment, not, 44.
- After term and after year:
 - Amend: not to wipe out, 68.
 - Correct mistake in entry, 65.
 - No power to set whole aside, 68.
 - Correcting clerical error, 68.
 - Not entry of new judgment, 67.
 - Only correcting old entry, 67.
 - Not modify or amend, 66.
 - Even as intended, 66.
- After the term:
 - Actions at law or equity, 6.
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 - Clerk's entry same day, 61.
 - Common law rules govern, 1, 52.
 - When not mistake, statute, 1.
 - Delay in entry, immaterial, 64.
 - Errors and irregularities, 5.
 - Court never acted, 5.
 - Errors of law or fact, 62.
 - Leading case; correctly stated, 15, 16.
 - Affirmance of rules, 22.
 - Mistake ratified, 4.
 - No power except by sec. 2832, 28, 68.
 - However meritorious, 28.
 - Nor finding as basis, 52.
 - Merely because of error, 52.
 - Not a premature judgment, 24.
 - Not at a subsequent term, 2.
 - Not mere error of court, 18.
 - Record presumes acted, 2.
 - Where mind of court acted, 2.
 - Not error by itself, 27.
 - Only surprise statute, 27.
 - Not, if court's mind acted, 38.
 - Not, if jurisdiction had, 37.
 - Not prevent irregular errors, 3.
 - Instances stated, 3.
 - Only by appeal or writ, 40.
 - Or mistake, etc., statute, 40.
 - Order oral; same rules, 54.
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 - Supreme court, included, 22.
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 - Whether by parties consent?, 53.
- At same term:
 - Control over its own orders, 35.
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 - Power on court's motion, 9, 33.
- County court:
 - Practice and procedure, 69.
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 - Enforce fraudulent judgment, 60.
 - Infant's rights detailed, 57.
 - Irregularity submission, 11.
 - Waiver, jurisdictional defect, 11.
 - Parties only have right, 19.
 - Except when nominal only, 20.
 - Real, but not nominal, 21.
 - Premature judgment, 23, 24.
 - If unjust or inequitable, 36.
 - Irregular not void, 23, 24.
 - Prevent inequitable use of, 60.
 - Probate court:
 - Administrator's sale, 10.
 - Not after five years, 10.
 - Third parties interested, 10.
 - Founded upon fraud, 42.
 - With negligent ignorance, 43.
 - Powers; fraud, mistake, etc., 14.
 - Revoking oral widow allowance, 31.
 - Abuse of discretion, 31.
 - Probate of will; fraud, 12.
 - Can the county court? 12.
 - Equity not set aside, 12, 13.
 - Powerless as to court's error, 2, 18, 23.
 - Rule of practice, 41.
 - Default judgment, 41.
 - Technical irregularity, 7.
 - Prompt, after knowledge, 7.
 - Waiver, by other, step, 8.
 - Unavoidable absence of attorney, 34.
 - Error to refuse vacation, 34.
 - Within a year, sec. 2832:
 - Abuse of discretion; refusal, 45.
 - More than year after entry, 45.
 - Neglect of guardian ad litem, 45.
 - Within a year of knowledge, 45.
 - Actual notice sufficient, 25.
 - After notice of same, 59.
 - Attorney ceases to be such, 55.
 - Four years; in such case, 56.
 - Notice as to party then, 55.
 - Year to so run, 55.
 - Cannot act arbitrarily, 46.
 - Indicate some injustice, 48.
 - Mistake, surprise, inadvertence, 17.
 - Not surprise at rulings, 28, 63.
 - Order within a year, 25, 26, 59.
 - Not only application, 26.
 - Some legitimate ground, 47.

1. The order vacating, not being within the statute for relief within a year after notice on account of mistake, inadvertence, etc., the court holds that it "must test the correctness of this order by the principles of the common law," there being a short notice.

2. "It is well established by the rules of the common law, that a court has no power to review or reverse its own judgment of the previous term; that is, as to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of the judgment, it is precluded from again acting at a subsequent term, and changing its opinions or altering its decisions". *Bank of U. S. v. Moss*, 6 How. 31.

3. "But this rule does not prevent a court from setting aside, at a subsequent term, its own judgment for those errors for which at common law, the same court, on a writ of error coram nobis, would reverse it; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant died before the verdict or interlocutory judgment, or where there is error in the process or through default of the clerks; for such errors are not the errors of the judges, and reversing it is not reversing their own judgment."

4. "Nor does it prevent the court from setting aside a void judgment at a subsequent term"; "nor from correcting mistakes in matters of form, and setting right clerical errors; nor from reinstating a cause dismissed by mistake".

5. When so set aside "for errors and irregularities" under "the rules of the common law", it is on the principle "that the errors are not errors in the judgment itself. The court, in rendering the judgment, never acted on them."

6. "The same rules should be applied to the vacation of all judgments, whether rendered in, * actions at law or in equity."

—*Aetna Life Ins. Co. v. McCormick*, 20 W. 265, 268.

7. "To warrant the setting aside of a judgment for a mere technical irregularity (in this case failure to give notice of motion for), the party should be prompt in moving so soon as he has actual knowledge of the judgment".

8. He must move to vacate "before he takes any subsequent step in the cause". "Instead of the appeal, therefore, constituting an excuse for the delay, it constituted a waiver of the irregularity".

—*Jenkins v. Esterly*, 24 W. 340, 341.

9. "There can be no doubt of the power of the court to set aside a judgment inadvertently ordered, at the same time at which the judgment was entered; and I have no doubt that the court may exercise that power on its own motion, though perhaps the occasion where it would do so are rare". *Lyon, J.*

—*Hansen v. Fish*, 27 W. 535, 540.

10. The power "to revise and correct errors in the probate court", cannot be exercised to set aside an administrator's sale, "where the statute of limitation (5 years) has run so as to give good title to the land under the deed of the administrator, and where administration of the estate was closed, and third persons had become interested in the property sold".
—*Betts v. Shotton*, 27 W. 667, 670.

11. "Vacating the judgment for irregularity implies that the court has the power to correct the error, or by that means to open the way so that it may be corrected. And the asking of such relief, whether granted or not, is also a submission and waiver of jurisdictional defect, and for the same reason". See APPEARANCE.

—*Alderson v. White*, 32 W. 308, 312.

12. A court of equity cannot set aside the probate of a will on account of fraud practiced on the testator. Query, Can the county court do so?

13. Equity cannot set aside the probate of a will, where the probate was fraudulently obtained by concealing the original fraud on the testator. Whether a court of equity could do so in any or some cases is not determined.

14. The power of probate courts to set aside decrees in "cases of fraud, mistake, irregularity, want of jurisdiction and the like", as set forth in *Campbell v. Thatcher*, 54 Barb. 386, by Dixon, C. J. in a concurring opinion, giving a great variety of adjudged instances. See also EQUITY.

—*Archer v. Meadows*, 33 W. 166, 172.

15. "The case in 20 Wis., 265, (supra) is a leading one upon this subject; and the rule and its exceptions, are correctly stated" in that case and here restated.

—*Scheer v. Keown*, 34 W. 349, 353.

16. "The circuit court has no authority to review, on the merits, orders or judgments made or rendered at a former term, for the purpose of correcting its own errors. This is well settled. (20 W. 265, supra.)"

—*Pinger v. Vancllick*, 36 W. 141, 143.

17. The statute, however, "vests a discretion in courts to grant relief against their own judgments and orders on grounds of mistake, inadvertence, surprise, or excusable neglect within a year after notice of the judgments or orders". 20 W. 265, and 34 W. 349, supra, are approvingly cited as fully stating "the rule and its exceptions".

—*Eaton v. Youngs*, 36 W. 171, 175.

18. It "is well settled in this state and elsewhere, that the court has not power to vacate a judgment, at a subsequent term, for mere error of the court":

—*Loomis v. Rice*, 37 W. 262, 264.

19. "As a general rule, none but the parties to a judgment can have it set aside. Every litigant, if an adult, is presumed to understand his

own interests, and to be fully competent to protect them in the courts." Freeman on Judgts., 91.

20. "This is the general rule, undoubtedly. But this rule has its exception, as the same author shows by the illustrations given in the next section. See *Lowber v. Mayor*, N. Y., 26 Barb., 262. Where the party to the action is only the nominal and not the real one, the person actually interested in the controversy is treated as having a standing in court, and may have control of the cause".

21. A judgment in Wis., based on a N. Y. judgment afterward reversed by the U. S. Sup. Ct., was vacated on motion of the real though not the nominal party in interest. Not determined whether such vacation was necessary to enable a recovery of money paid pursuant to such judgment.

—*Aetna Ins. Co. v. Aldrich*, 38 W. 107, 111.

22. The rule of *Aetna Ins. Co. v. McCormick*, 20 W. supra, is affirmed and it is said that the supreme court "forms no exception to the rule."

—*Pringle v. Dunn*, 39 W. 435, 439.

23. A judgment on a note by default, rendered on the last day for answering, was held "premature", but "merely an irregularity of practice", and that "the motion at a subsequent term to vacate it came too late, and was properly denied", the judgment not being void, and the error "was the error of the court", which the court was "powerless to correct" at a subsequent term.

—*Salter v. Hilgen*, 40 W. 363, 365.

24. A premature judgment on personal service on an order of publication, is held to "be irregular only, not void; and the irregularity, an error of the court below, which it could not correct at a subsequent term"

—*Pier v. Amory*, 40 W. 571, 574.

25. "To relieve a party from a judgment on the ground of mistake or surprise", not only the motion must be made but the hearing had within a year; and actual notice is sufficient, written not being required.

—*Knox v. Clifford*, 41 W. 458, 459.

26. For relief from a judgment within a year, not only the application for, but the order, must be made within the year. *Knox v. Clifford*, 41 W. supra, being approved and followed.

—*McKnight v. Livingston*, 46 W. 356, 360.

27. After the term, "the circuit court had then lost jurisdiction to grant the motion" to vacate an order, "for any error committed by itself at any former term. It could not grant the motion by virtue of sec. 2832", within a year as to surprise, etc.

28. "We do not think the statute (sec. 2832) was intended to relieve against surprise", where "the only surprise suggested is predicated of the rulings of the court on the motions". "Independently of the statute

the court had no power to disturb the judgment, however meritorious the grounds of the action might appear."

—*Breed v. Ketchum*, 51 W. 164, 166.

29. "The general rule" as to not vacating judgments at a subsequent term "is not absolutely inflexible, and has its exceptions. The facts of this case take it out of the general rule".

30. "If a motion to amend or vacate is made at the same term, and that motion is, by consent of counsel, continued to a subsequent term, the court" can "then consider and decide it with like effect as if it had decided it at the first term". (But, see *Comstock v. Boyle*, 134 W. post).

31. An order of allowance for the widow, orally made, but held valid and in force, being revoked by the probate court, there being no fraud or irregularity, was held to be "an abuse of discretion." See *WIDOW*.

—*Baker v. Baker*, 51 W. 538, 543.

32. "This court has several times recognized the power of the judge, on his own motion, to modify or vacate his judgments or orders. (Cases)". It is so held in this case directly. It does not appear whether "notice was or was not given".

33. "In *Hansen v. Fish*, 27 W. supra, it is said in the opinion that the court may, upon its own motion, set aside a judgment inadvertently ordered, at any time during the term at which it was entered", by the present writer, "and all the other members of the court concur therein".

—*Brown v. Brown*, 53 W. 29-30.

34. It was held error, for the court to refuse to vacate a judgment, obtained in the unavoidable absence of the defendant's attorney engaged in the trial of a cause in another circuit, unexpectedly protracted beyond the date set,—the case being debatable, and sharply contested, and such attorney being conversant with the facts and case, and in charge, and though he had able partners.

—*McArthur v. Slawson, Exx.*, 60 W. 293, 294.

35. "This court has often asserted the general rule that the court has entire control over its own orders and judgments, and may modify or vacate them at any time during the term at which they were made or rendered."

—*Turner v. Nachtsheim*, 71 W. 16, 17.

36. When prematurely entered, may be vacated, for irregularity, if unjust or inequitable. See *JURISDICTION*.

—*Marshall & I. Bank v. Milwaukee W. M.*, 84 W., 23, 26.

37. "The summons in the action was properly served, and the court, when it rendered the judgment, had jurisdiction of the subject matter and of the parties. Nothing is better settled than that the motion (at a

subsequent term) to set aside this judgment upon the errors and irregularities here complained of came too late. (Many cases, *supra*).

38. All the errors relied on, worthy of any consideration, relate to matters upon which the mind of the court did act, or must be presumed to have acted, in rendering the judgment, and appear upon the face of the record,

39. And the court is precluded from again acting on the same matters at a subsequent term, and changing its opinion or altering its judgment. This rule is subject to few exceptions, stated in *Aetna L. Ins. Co. v. McCormick*, 20 W., *supra*.

40. After the close of the term the party complaining can obtain relief only by writ of error or appeal, or under the statute which authorizes the court to relieve a party, at any time within one year after notice thereof, from a judgment, order, or other proceeding against him through his mistake, inadvertence, surprise, or excusable neglect. Sec. 2832".

41. "The rule of practice is that an application to set aside a judgment and for leave to answer, is largely addressed to the discretion of the court to which it is made, and unless the default of the party is excused and a verified answer tendered, showing a defense on the merits, the court ought not to interfere. *Seymour v. Chippewa Co.*, 40 W., 62, 65; *Union L. Co. v. Chippewa Co.*, 47 W., 246, 248".

—*Milwaukee M. L. & B. Soc. v. Jagodzinski*, 84 W. 35, 39.

42. The county court may set aside a judgment "obtained through the fraud of parties obtaining the same". See FRAUDULENT ORDERS.

—*Est. of Leavens*, 65 W. 440, 446.

43. Refusal to vacate the final judgment of the county court founded upon fraud, because of "intentional or negligent ignorance" of fact by those seeking such revocation. See FRAUDULENT ORDERS.

—*Thomas v. Thomas*, 88 W. 88, 93.

44. A judgment affirmed by the supreme court cannot be disturbed or vacated. See JUDICIAL DECISIONS.

—*Ean v. C. M. & St. P. R. Co.*, 101 W. 166, 168.

45. It was held an abuse of discretion, not to vacate a foreclosure judgment, on application under sec. 2832, on account of "mistake, inadvertence, surprise, or excusable neglect", by a defendant minor, where a guardian ad litem appointed "neglected to bring to the court's attention a perfectly good defense of which he had full knowledge", and the applicant having made no defense and her conduct "would have been neglect in an ordinary suitor", the application being made "more than a year after the entry" but within "a year of knowledge of the judgment".

—*Bloor v. Smith*, 112 W., 340, 349.

46. "While a trial court has broad powers as to judgments by default, enabling it to relieve a party therefrom for fraud of the one obtaining the judgment, or surprise, mistake or excusable neglect of such party, upon application therefor being seasonably made, it cannot properly act arbitrarily in such a matter.

47. Its action should always be based upon some legitimate ground, the end in view being to promote justice along the lines of those remedies for wrongs which the law affords to litigants."

48. The application must "indicate some injustice", "actual or probable, and some reasonable excuse for" failure to be at the trial, and for not promptly moving to set aside.

—*Field v. Heckman*, 118 W., 461, 465.

49. The rule "that a court possesses inherent authority to set aside any judgment or order entered by it through mistake, inadvertence, or want of proper deliberation at any time during the term, and need not wait to have such power put in motion by the request of any interested party before acting,"

50. Extends "to a judgment or order deliberately entered affirming a prior decision made during the term."

51. Affirmed where "without notice to the parties or their attorneys, the judgment and the previous orders were vacated and a new trial granted", which theretofore had "after due deliberation" been denied and such judgment entered. (Cases, supra).

—*Smith v. Milwaukee E. R. & L. Co.*, 119 W., 336, 339.

52. The "principle of the common law has frequently been affirmed by this court", that the court cannot "against objection set aside either the judgment or the findings on which it was based at a subsequent term merely because error had been committed". *Aetna L. Ins. Co. v. McCormick*, 20 W. supra; (many cases).

53. "Whether it could set the judgment aside by consent of the parties is a question concerning which there may be considerable doubt. Some decisions of this court" so indicating were cases where there was no "question raised, and we express no opinion upon it here as it is not presented. *Baker v. Baker*, 51 W. supra; (other cases)."

54. An oral judgment is effective, though the clerk fails to enter it and is held governed by like vacation rules, though entered by order subsequent to the term, *nunc pro tunc*. See also JUDGMENTS.

—*Comstock v. Boyle*, 134 W. 613, 616.

55. "The rule in reason and by authority is that when the attorney ceases to be such for a party before receiving notice of an adverse proceeding, the year period mentioned in the statute (Sec. 2832) does not commence to run till the party, himself, has notice. *Robbins v. Kountz*, 44 W. 558".

56. "So the decision must be that the motion in the case was timely",

being a motion to vacate a judgment entered four years before "on notice" only to the opposite parties' attorney whose authority had ended. See also DISCONTINUANCE.

—*Wawrzyniakowski v. Hoffman & B. Mfg. Co.*, 137 W. 629, 633.

57. As to the various phases when irregular judgment against minors may be vacated. See INFANTS.

—*Grauman M. & C. Co. v. Krienitz*, 142 W. 556, 560.

58. "It is the settled law of this state that a valid judgment cannot be set aside after the term at which it is entered, except under provisions of sec. 2832.

59. And where relief is asked under this section, not only the motion but the order itself must be made within one year after the moving party has notice of the judgment. (Many cases).

60. In this latter case (*Challoner v. Howard*, 41 W. 355) it is said that the rule does not militate against the power of a court to prevent the inequitable use of a judgment or to restrain the enforcement of a judgment obtained by fraud.

61. A judgment of the clerk entered in pursuance of an order of court made the same day must be regarded as a judgment of the court in session, and a motion to set it aside for irregularity must be made at the same term. *Pormann v. Frede*, 72 W. 226.

62. The circuit court has no jurisdiction to review a judgment rendered at a former term, for the purpose of correcting errors in law or fact committed by the court in rendering it or in the proceedings prior thereto. (Many cases)."

63. The surprise of sec. 2832 is not that "at the decision of the court on the facts before it".

64. "We know of no rule of law that would authorize a court to set aside a final judgment more than three years after it was entered (ordered?) simply because there was a long delay in entering it".

65. After the term and after the year, "the circuit court may correct a mistake in the entry of a judgment so as to make it conform to the judgment actually pronounced by the court.

66. It cannot modify or amend the judgment to make it conform to what the court ought to have adjudged or even intended to adjudge. (Many cases)".

67. "The rule does not permit the setting aside of the judgment first entered and the entry of a new one, but only the correction of it.

68. No power exists to set aside the whole judgment for the purpose of correcting a clerical error. The power to amend does not include the power to wipe out". —*Fischbeck v. Mielenz*, 162 W. 12, 15.

69. (As to points of practice and procedure in the amendment of records in county court, with the statutory provisions and forms applicable,—see Zimmerman's Probate Practice, §§ 408-418.)

VALUE.

See EVIDENCE. EXPERT TESTIMONY. SERVICES.

VARIANCE.

See PLEADINGS.

VENDOR'S LIEN.

See LIEN.

VENUE.

All parties on same side, 8.

Not one of several, 8.

Appeal from county court, 1, 4.

Affidavit of prejudice, 4, 7.

Not determine immediately, 5.

Mandamus not lie, 6.

Order denying; not appealable, 7.

Time to last day of term, 4.

In which to make order, 4.

Appeal, etc.—continued

Probate of will, proceedings, 1.

Unauthorized venue change, 2.

Waiver by appearance, 2.

Order; for jurisdiction, 3.

1. A change of place of trial may be had in circuit court on appeal from the county court, under the general statute, though “the word ‘action’ is generally used” in the statute. “We do not suppose any restricted or technical meaning is to be given to that term (action) as here used. It is broad enough in its significance to include this proceeding for the probate of a will, and the whole reason and object of the statute will be most fully satisfied by holding that it applies to it.”

—*Jackman Will case*, 27 W. 409, 412.

2. On an unauthorized second change of venue, the executor appeared “without objection; took various steps in the cause which implied that that court had jurisdiction; and went to the hearing of the appeal on the merits. This amounted to a general appearance in that court, and waived all objection to the jurisdiction of the circuit court. (Cases)”.

3. (In *Swan v. Porter*, 96 W. 34, it is indicated that such waiver does not confer jurisdiction, without the consent of the court “to surrender such jurisdiction by making an order” to change the venue.)

—*Est. of Carl Schaeffner*, 45 W. 614, 618.

4. On the filing of an affidavit of prejudice in circuit court, as to a guardianship on incompetency, appealed from the county court, and for a change of venue, it is held, that “the court clearly, under the

statute, had at least until the last day of the term at which the application was made to make the orders changing the venue in said actions.

5. The court was not obliged under the circumstances to suspend all proceedings and immediately determine whether he would change the place of trial or call in another judge".

6. "Under such circumstances mandamus will not lie. (Cases)".

—*State ex rel Deeglise v. Goodland*, 128 W. 57, 59.

7. On appeal from a county court order allowing a will, followed by filing in the circuit court "an affidavit of prejudice" and "an application made for a change" of venue, an order denying such application, for lack of jurisdiction, is, under sec. 3069, held to be "simply an order denying a change of venue, which is not appealable".

—*Will of Fraser*, 135 W. 401, 402.

8. "A change of venue is not grantable except upon the application of all upon the same side". "Application for a change of venue by one of several of the same side, or similarly interested, is not within the statute". (Cases).

—*Will of Rice*, 150 W. 401, 454.

VERBAL AGREEMENTS.

See PAROL.

VERDICT.

See JURY.

VERIFICATION.

Affidavit; caption wrong, 2.
 Affidavit of appeal, 9.
 Justice, allowed to sign, 11.
 Otherwise, invalid, 11.
 Defective; valid as oath, 2.
 Not with jurat unsigned, 9.
 Official certificate proof, 12.
 Signatures proved, 12.
 Testimony might rebut, 13.
 Must be convincing, 13.
 Proof of actual making, 10.
 Parol, inadmissible, 10.
 Requires proper caption, 3.
 Complaint: defective, 1.
 Allegations positive, 15.
 Verification by attorney, 15.
 No ground of belief, 15.
 By guardian ad litem, 14.
 As the party, 14.
 Treated as unverified, 1.

Guardian ad litem, 14.
 Jurat:
 Absence; no oath, 5, 9.
 Evidence of the oath, 4.
 Placed there afterward, 6.
 Inadvertent omission, 6.
 Not cure defect, 6.
 Orders not reciting, 6.
 Verified by signature, 5.
 Petition for guardian:
 Duly signed and verified, 7.
 Certificate; by officer only, 7.
 Order recites, verified, 7.
 Petition; dated, signed, 7.
 Not verified by affidavit, 8.
 As in pleadings, 8.
 Verified: proved by oath, 8.
 Not necessarily, affidavit, 8.

1. The verification of a complaint being defective, the defendant "had a right to treat the complaint as unverified, and to put in an answer without oath".
—*Crane v. Wiley*, 14 W. 658, 663.

2. Where the venue in the caption is Fond du Lac county, and "the affidavits (of no answer) were sworn to before the clerk" of court of Pierce county "on the day the judgments were signed, it is manifest that they were sworn to in the latter county"; "the statute does not require an affidavit, and under the decisions of this court the defective affidavits are valid as oaths, and competent proof of the facts stated in them. *Burns v. Doyle*, 28 W. 460; *Ball v. Bowe*, 49 W. 495".

3. "The jurat must be read with the body of the affidavit", and without it the paper is not an affidavit. See SERVICE.
—*Reed v. Catlin*, 49 W. 686, 690.

4. "The jurat, signed by the officer administering the oath, is the usual evidence of the fact that the oath was administered.

5. The rule is general and universal that the person who administers the oath in such case shall verify the fact by his signature to the jurat. It follows, therefore, that in the absence of such signature the presumption is that no oath was administered".

6. In the absence of such jurat, placing it there after judgment, by the county judge, with a memorandum that it had been omitted inadvertently, does not cure the defect in a verified petition, where the orders on the petition do not recite that the petition was verified. See also INCOMPETENTS.
—*Appeal of Royston*, 53 W. 612, 619.

7. A petition to appoint a guardian under sec. 3976, is held to be duly signed and verified, where the petition is dated and signed by the petitioner, and the certificate is not dated or signed by the petitioner, but is officially signed by the officer, "and the order of the county court made on that day recites that it was made upon reading and filing the verified petition".

8. The statute "does not say verified by affidavit, nor in any particular mode or form, as in the case of pleadings. It simply requires the petition to be verified. By this we understand the petition must be proved or confirmed by the oath of the petitioner".

—*State ex rel Hoffmann v. Day, Gdn.*, 57 W. 655, 660.

9. "The jurat not being signed, the legal presumption is that the paper in the form of an affidavit of appeal was not sworn to; in other words, it is not an affidavit. *Royston's App.*, 53 W. supra".

10. "It is not sufficient that the appellant is able to prove by parol that he actually made the required affidavit" signed by him. "No such evidence is admissible. (Cases)".

11. "Had the justice been living, the court might properly have allowed him to sign the jurat, if he could truthfully do so". "But the

justice having died, it is impossible to supply the omission, and the appeal cannot be saved".
—*Kidder v. Fay*, 60 W. 218, 219.

12. "The official certificate, with proof of authenticity of the signatures of the affiant and the officer, was sufficient prima facie proof of the proper execution of the affidavit. (Cases)."

13. "This presumption of fact arising from the certificate may, of course, be rebutted by evidence that the oath was never actually administered, but such rebutting testimony must necessarily be strong and convincing to authorize the court to take the case from the jury".

—*Komp v. State*, 129 W. 20, 23.

14. In an action for damages brought by an infant, by guardian ad litem, as to verification of the complaint "by the guardian ad litem positively and of his own knowledge",—it is held sufficient, and "that the guardian ad litem verifies as a party. Therefore the rules respecting verification by a party (not as agent) apply. (Cases)".

—*Phillips by Gdn. v. Portage Transit Co.*, 137 W. 189, 194.

15. Where the allegations of a complaint are positive, and the verification by attorney under sec. 2666, is as to its being 'true to his own knowledge, except as to those matters therein stated upon information and belief, etc.', with no statement as to "the ground of his belief",—the verification is held defective.

—*Hecht v. Chase*, 158 W. 342, 344.

VESTING OF ESTATES, ETC.

See also AFTERBORN CHILD. CONSTRUCTION OF WILLS. TRUSTS.

"After the death" of daughters, 28.

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Equitable interest only, 31.

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Subject to ripening, 31.

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Fitness to take at thirty, 56, 57.

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Condition valid, failed, 54.

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1. "Of course, the rights of the parties under the will became vested immediately upon the death of the testator. (Many cases).

2. To be effectual, however, in passing title, the statute required that it should be admitted to probate. (Sec. 2294);

3. But, when so admitted, it related back to the death of the testator, and is to be treated as speaking from that moment". p. 552.

4. The testator "tied up during the lives of his daughters, respectively, for his grandchildren, to be distributed to them as indicated, on the death of his daughters", "almost the entire corpus of the estate", real and personal and much "of the net income", and imposing trusts upon the executors by implication, without appointing them trustees, and questions arise as to the vesting of the title, of certain corpus, also certain income, during the lives of the daughters. p. 554.

5. "Of course, the legal title to personal property becomes vested in the executor on the probate of the will. *Melms v. Pfister*, 59 W. 192 (Cited under JURISDICTION), and cases there cited.

6. The office of an executor is in its nature a trust, in the discharge of which he acts as trustee. (Cases).

7. The executor takes such title, therefore, subject to the trust and duties imposed by law, even where none have been specifically designated or declared in the will. Sec. 3785", and other statutes. p. 555.

8. Where "the will contains no express provision as to who shall have the title to any of the property, real or personal, during the lives of the daughters", but imposes certain "trusts and duties" upon them as executors, such executors are "trustees to hold the property, especially the personal estate, in trust for the benefit of" the remainderman, and "as to such personal property they took and are holding the legal title". p. 566.

9. "The executors hold the legal title in trust, not only to the personal estate, but also to such real estate as has been or may hereafter be purchased with the proceeds of the personal property.

10. It would seem that the real estate so purchased must be treated as real estate after it is so purchased. (Cases)."

11. "The authority to convert personal property into real estate, by necessary implication includes the authority to take title to the lands thus purchased in their own names as executors in trust for the survivors"—grandchildren, they being uncertain, "until the death of the daughters".

12. "Since the will expressly, or by necessary implication, imposes upon the executors" the duties of trustees, without naming them as such, or giving "the property to them or any one in trust,

13. We must hold it to be the duty of the executors, and the survivor of them, as such, to administer the estate according to the provisions of the will, notwithstanding the duties thus imposed include such as are usually performed by a trustee. This is the rule indicated by the authorities. (Many cases)". p. 558.

14. "Under the will, the executors and the survivor of them as such trustees, must have the possession of the real estate during life, with

the right to do everything necessary or convenient to carry into execution the duties and trusts imposed by the will.

15. Such possession and rights constitute a legal estate which must continue during the lives of the daughters". p. 562.

16. "But the estate in fee will only be implied to the extent required to carry into execution the trusts imposed. (Cases).

17. A general devise to executors in trust vests no estate in them except for such of the declared purposes as require that the title be vested in them. *Manice v. Manice*, 43 N. Y. 303.

18. The rule at common law, as well as by the statute, (sec. 2073) is that the trustee takes that quality of interest only which the purposes of the trust require and the instrument creating it permits. *Nicoll v. Walworth*, 4 Denio, 388." p. 560.

19. "Where there is nothing to indicate the contrary, a bequest or devise to a class of persons takes effect in favor of those continuing the class at the time of the testator's death. (Many cases)". p. 564.

20. "Where the time of payment or distribution is merely postponed for the convenience of the fund or property, or to let in others, the vesting will not be deferred until that period. (Citations).

21. In such cases the question is whether the time named is annexed to the payment or to the gift itself". p. 565.

22. It is said, according to *Hawkins on Wills*, as to the confused "use of the word 'vested' when applied to personal property" "that originally the word had reference only to real estate. It signified the acquisition of a portion of the actual ownership", and "thus 'vested' is nearly equivalent to 'possessed'. 'All remainders, not vested, are in fact contingent'."

23. "The rules and expressions relative to the vesting of personal estate have been derived in great measure from the civil law".

24. "The only definition that can be given of the word 'vested' in English law, as applied to future interests, other than remainders, is that it means, 'not subject to a condition precedent.' "

25. "From these definitions it may be said with propriety that legacies payable at a future time certain to arrive, and not subject to a condition precedent, are vested. (Citations)."

26. "On the other hand, legacies only payable on an event which may never happen, and hence subject to a condition precedent, are contingent".

27. There is thus "deduced from the authorities, as applicable to both real and personal property, this rule: 'A devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before the period of distribution'. *Hawk, Wills*, 71, 72; and see, also, 2 *Jarm. Wills*. This is certainly the rule in this country as to real property. (Many cases).'" So held in this case, as to both realty and personalty. p. 565.

28. A devise and bequest of "the residue and remainder" to grandchildren, "after the death of my said daughters", is held to vest, both such real and personal estate, "upon the death of the testator", and the decease of the daughters refers "to the time when the grandchildren will come into complete possession and enjoyment." p. 570.

29. "By the word 'vested' we do not mean that the grandchildren have the present title to the personal estate" which "is vested in the executors" during their lives.

30. "We simply mean that such legacies and bequests took effect, in point of right, in the grandchildren living, immediately upon the death of the testator, subject, of course, to their respective interests being divested by dying without issue or diminished in quantity by future births".

31. That is, each became "the owner of an equitable interest" in a share, to "ultimately ripen into and become an absolute legal title". *McArthur v. Scott*, 113 U. S. 340. p. 573.

32. The failure to dispose of a large portion of the income, and "the silence" regarding it, "and the disposition of 'all the residue and remainder' of the estate on the death of the daughters, is, as we think, by necessary implication, a direction to accumulate such undisposed of portion of such net income". *Phelps' Extr. v. Pond*, 23 N. Y. 80. (Followed in *Will of Stark*, 149 W. post). p. 578.

33. And it is held under the statute, sec. 2061, that such income be accumulated as to the realty income; until each grandchild becomes of age, after and at which time it must be paid to each respectively, from and after time each minority ends.

34. But "our statutes do not extend to accumulations from personal property" and though "given by the same clause of the will upon the same trusts, yet they are severable, and the validity of the one does not depend upon that of the other. *Knox v. Jones*, 47 N. Y. 389". p. 583.

35. As to the grandchild H. it is held "the words 'from and after the time when he shall attain the age of twenty-five years', refer to the time when it was designed that he should come into the complete possession and enjoyment of such fractional share of such net income, and not to the time when it became vested in him in point of right (cases)", the accumulation, however, to be continued, only during minority. —*Scott, Extr. v. West*, 63 W. 529, 552.

36. A testator gave all his estate, real and personal, to a trustee, "with power of sale and reinvestment", who "at all times, until A., who is my only child, shall obtain the full age of twenty-one years, shall remain in possession of all the residue and remainder", and to apply the income, "or such part of the whole estate" as necessary for such child, and the remainder "shall be paid and transferred to my said child, the said A., as and when she shall obtain the age of twenty-one years. But, if the said A. shall die under the age of twenty-one years, then all my aforesaid estate" not applied, "shall, immediately after her death be" applied for other purposes named.

37. Such child A. having deceased under the age of twenty-one, leaving a child G. surviving, it is held, under secs. 2086, 2087, 2088, that the vesting of the estate "in the trustee, subject only to the execution of the trust", "refers wholly to the legal estate or title", and that "these sections are consistent with a vested equitable interest in the cestui que trust, and in fact 'a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them'; and especially that would be so as to personal property". *Scott v. West*, 63 W, supra, and *McArthur v. Scott*, 113 U. S. 340, therein cited. (Cited and followed in *Will of Prasser*, 140 W. post).

38. "It may be stated as a general proposition, that in construing wills courts are inclined to favor conditions subsequent rather than conditions precedent, especially when such a construction favors the rightful heir of the testator as against a stranger".

39. "To avoid an obvious absurdity, repugnance, or inconsistency with the declared intentions of the testator as gathered from the whole instrument, however, the ordinary and grammatical sense of the words employed may to that extent be modified, extended, or abridged, but no further. (Cases)".

40. As to "and to his heirs or the heirs of his body", "under our statutes such words are unnecessary in order to convey or devise an absolute or indefeasible estate in lands, much less in personal estate". Sec. 2206.

41. Sec. 2778, "has been rightfully held to dispense with the necessity of words of inheritance in a will, in order to convey an absolute title in fee. *Little v. Giles*, 25 Neb. 313".

42. Considering the statute, sec. 2289, as to issue surviving a deceased legatee, and "independent of that statute", it is held "that, upon the death of the testator, the estate vested in A., subject only to the condition subsequent, if she died under the age of twenty-one years, without issue, then the gift over to R. and the society would become effectual, but that, as she left a child who survived her, such child inherited the estate from his mother".

43. (Approvingly set forth in *In re Donges's Estate*, 103 W. 497, (See AFTER-BORN CHILD), saying "the court held that the plain intent of the testator justified the addition of the words 'without issue'.")

—*Baker v. Est. of McLeod*, 79 W. 534, 540.

44. A will dated, 1874, gives a large estate to the wife for life, except \$10,000 to each of the children, and the remainder equally to the children, and to the issue of any child who may de cease before the wife. A son D. was placed under guardianship as an inebriate in 1880, and a codicil, dated 1883, provides that the "son D. shall not have nor receive any" estate, "unless within five years after my de cease he shall have reformed, and become a sober and respectable citizen", the executors to be sole judge thereof; and then, on such reformation, "I give, devise and bequeath to him, and order paid over to him, one-half of the

property and estate bequeathed to him in my will aforesaid"; and at the end of another such five years, the other half to be so disposed of. Such share was to be held in trust for such disposition and for the care and support of D. and his family, and on failure of such reformation as stated then eventually such "part of my estate bequeathed and devised" to D. shall be paid to his children. The testator died in 1889, and the son D. died a year later, leaving children. Held,—

45. "In so far as the codicil in form gave, devised, and bequeathed such share of the estate to D., it was merely confirmatory of the grant and bequest in the original will, and did not necessarily postpone the vesting of the equitable right to the gifts until the expiration of the time therein specified.

46. Unless he so reformed he was not to have or receive any part" of the estate, but the executors were to hold his share "in trust to be disposed of and paid over as provided in the codicil", "and finally distributed as and at the times therein prescribed".

47. "It is undoubtedly true that 'in the construction of wills the law, in doubtful cases, leans in favor of an absolute, rather than a defeasible, estate; of a vested, rather than a contingent, one; of the primary, rather than the secondary, intent; of the first, rather (than) the second, taker, as the principal object of the testator's bounty; and of a distribution as nearly conformed to the general rules of inheritance as possible'. Smith's Appeal, 23 Pa. St. 9. (Approvingly quoted in Patton v. Ludington, 103 W. post).

48. Upon the principles stated and the authorities cited in Baker v. McLeod's Estate, 79 W. supra, we must hold that D.'s right in equity to his share of the estate vested in him immediately upon the death of his father, subject only to be divested by his failure to perform the conditions subsequent named in the codicil".

49. "The rule of law is well settled, and in fact elementary, that, 'if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law,—the estate of the grantee, being once vested, is not thereby divested, but becomes absolute. (Many cases).

50. (Approvingly quoted in Stark v. Conde, 100 W. post, with the addition that,—“The counterpart of the proposition seems to be equally true when applied to a condition precedent”).

51. The case at bar is clearly within the rule stated. The result is that, the right to the estate in question having become vested in D., the same was not divested by reason of his death prior to the expiration of the time in which he was required to reform, but upon his death descended to his children and widow, as prescribed by the statutes in case of intestate estates". (Followed in Williams v. Williams, 135 W. post). —*Burnham v. Burnham*, 79 W. 557, 565.

52. Where a testator let the residue of his estate to an only son T., whose whereabouts were unknown, and if he "will not be heard from within ten years," devised such residue to nephews and nieces, the will is held "as vesting a present estate in fee in T."

53. "The condition, if valid, is a condition upon which the estate of the nephews and nieces depends for its inception, and not the estate of T. T. thus having a present estate in the land, it was competent for the court in the divorce action" brought by T.'s wife, "to divest him of that estate, and vest" in the wife "all the estate which T. had".

54. She is entitled to the possession of the realty, as against the executor, though the estate is not finally settled, there being sufficient personalty on hand to pay the debts and legacies. (T. not having been heard from the condition was subsequently held valid, and the nephews and nieces given possession, in *Connor v. Sheridan*, 116 W., post).

—*McManany v. Sheridan*, 81 W., 538, 541.

55. As to vesting estate absolutely in the first taker where there are void conditions; and also vesting when subject to a life estate. See CONSTRUCTION OF WILLS.

—*Saxton v. Webber*, 83 W., 617, 630.

56. The will gave to a trustee, a legacy, "in trust for the use and benefit of" C., "upon the limitations and conditions", that when C. "attains the age of 30 years", "if at that time said trustee deems" C. "competent to care for and make prudent and proper use" of the sum, it shall be paid over to him, otherwise to be paid to certain nephews and nieces. C. became thirty years of age about eleven months before the testator's decease about seven years after the date of the will, and the executor did not then or subsequently deem C. competent to care for the fund. The county court adjudged the legacy to the nephews and nieces, and the circuit court that it vested in C.; held,—

57. "By the terms of the will C. was only to receive such bequest on the condition of his fitness so first ascertained. Such fitness so ascertained was a condition precedent to his receiving the bequest."

58. There being no executor with power to determine the question of fitness when C. arrived at thirty, "the court are of the opinion that the circuit court was right in holding, in effect, that the executor had no right or power to determine whether C.'s business habits or personal conduct answered the requirements of the will, for the reason that the time limited by the will for making such determination had expired prior to the death of the testator; and hence the condition was impossible of performance as required by the will.

59. This ruling brings the case within the well-established rules "that where a condition precedent annexed to a devise of real estate or of a charge on realty becomes impossible to be performed, even though there be no fault or laches on the part of the devisee himself, the devise fails". 2 Jarman Wills, 849". *Scott v. West*, 63 W. supra; *Burnham v. Burnham*, 79 W. supra.

60. "The result is that the bequest in the case at bar fails by reason of the nonperformance of the condition, and hence passes to the residuary legatee, under the residuary clause in the will."

—*Stark, Extr.*, v. *Conde*, 100 W. 633, 640-43.

61. Where a will, in general, gave the estate to the executors in trust during the life of the widow, with directions, after paying an annuity to the widow, to distribute the balance of the rents and profits "among all my children equally", "the issue of any deceased child taking by representation", and upon the death of the wife, "to divide my estate equally among all my children", "the issue of any deceased child of mine to take by representation", and a son died after the testator and before the widow, without issue, leaving his widow the sole beneficiary under his will,—it is stated:

62. "There is nothing in the will to indicate that by the use of the words 'deceased child' the testator meant a child who should survive him and then die prior to the death of his widow", and "the testator referred to such of his children as should die before he did";

63. Referring to our statutes of uses and trusts, taken from New York, and as construed there, and noting that the persons are "in being who would have an immediate right to the possession of the estate upon the ceasing of the intermediate or preceding estate (sec. 2037; *Saxton v. Webber*, 83 W. supra)," "we must hold that immediately upon the death of the testator the reversionary and equitable interests in the estate became vested in his six children then living, equally";

64. And as the will does not "anywhere undertake to make any disposition of the share of any such child dying without issue", and upon the death of such son, "his share thereof passed to his widow, as devisee and legatee", and "she thereupon became entitled" to the same share of the income and residue of the estate "as her husband would have been entitled to if he were still living." (Many N. Y. and other cases); *Baker v. McLeod's Est.*, 79 W. supra; *Burnham v. Burnham*, 79 W. supra.

65. "The direction for the trustees to pay over or distribute the net income of the estate", to his children at stated periods, "is evidence of an intent on the part of the testator to vest the equitable estate in them immediately upon the death of the testator. In *re Brown*, 154 N. Y. 314".

—*Patton v. Ludington*, 103 W. 629, 640-650.

66. "The rights of the legatees became vested when the will was probated, and related back to the time of the death of the testator: *Scott v. West*, 63 W. supra".

—*Jochem v. Dutcher*, 104 W. 611, 614.

67. A devise in trust, to be conveyed to issue, if any, of the cestui que trust at his decease, held never to have vested in him. See CONSTRUCTION OF WILLS.

—*Webber v. Webber*, 108 W. 626, 629.

68. A remainder over, suspending conveyance for twenty-one years, is held to vest in fee at the expiration of such time. See CONSTRUCTION OF WILLS.
—*Will of Kopmeier*, 113 W., 233, 238.

69. Following *Patton v. Ludington*, 103 W., supra, in case of a will giving the widow a life estate, “‘if she remains my widow, and at the time of her death to be equally divided between these four children’”, naming them, and the widow having remained unmarried, and three of the children having died before the widow, it is held, referring to sec. 2037 (But see, *In re Albiston's Est.*, 117 W. post),—

70. “That the testator intended that the interests of the four children should vest at once upon his death”;

71. “This question is simply a question of intent, to be gathered from the language of the whole will”, and such intent “is manifest”.

72. There were other children and “there is no provision for survivorship”, nor “for the disposition of the share of” a child “dying before the termination of the mother’s estate”.

73. “While the general rule is that a gift will be deemed contingent when it is found only in a direction to divide at a future time, this is subordinate to the primary rule that the intent, to be collected from the whole will, must prevail”. —*Smith v. Smith*, 116 W., 570, 574.

74. Where title vests in trustees under a will, the beneficiaries cannot confer the title by deed. See TRUSTS.

—*McWilliams v. Gough*, 116 W., 576, 584.

75. Under the facts and law therein, as set forth in *McManany v. Sheridan*, 81 W., supra, it is held, after the ten years that the title vested in the nephews and nieces;

76. The condition subsequent having occurred, the title of fee became divested, and vested in the nephews and nieces, it not being “a condition annexed to the devise which has become impossible by the act of God or the law or the devisor”. (Cases).

77. “There is nothing in the condition annexed to the devise contrary to law or public policy, or good morals, or in terrorem”.

—*Connor v. Sheridan*, 116 W., 666, 671.

78. A will gives a life estate to the wife, and at her death provides,—“I will and direct that all my property”, realty and personalty, “be divided into two equal parts; one part” given “to the brothers and sisters” of the wife “share and share alike; if any of her said brothers or sisters have died or shall die before my said wife, the share which would have gone to him or her shall be equally divided between his or her children”. A brother A., died before the wife, without descendants, testate, leaving a widow; held:

79. “It is plain from the terms of the will before us that it must be treated as bequeathing personal property. While there are no words

directly authorizing the executors to sell real estate, the directions of the will cannot be carried out except upon the basis of the conversion of the entire estate into money or its equivalent after the death of his wife. In no other way would it be feasible or possible to divide the estate into 'two equal parts' and give" it as directed. *Becker v. Chester*, 115 W. 90 (See *EQUITABLE CONVERSION*).

80. "It results from this that sec. 2037, concerning future estates in land, cannot be considered as having any bearing upon the construction".

81. In view of the division to be "after the death of" the wife, and the use of "the phrase 'the share which would have gone to him or her'," "no estate was to vest absolutely in the beneficiaries until the close of the life estate", and therefore, no estate passed to the deceased brother A.

82. "There was an error in" *Smith v. Smith*, 116 W. *supra*, "in referring to sec. 2037, as in any way having a bearing thereon", there being also an equitable conversion there, and "the decision was based principally upon the language and apparent intent of the will".

—*In re Albiston's Est.*, 117 W. 272, 274.

83. A will gives "land and appurtenances" to the wife "during the term of her natural life and after her death to be divided equally among my children who may survive", and "an equal share" to a sister J., "if she survives the death of my wife". The county court decided that "the words of survivorship referred to the death of the" wife, and the circuit court that they referred "to the death of the testator"; the county court's decision is affirmed. (The vesting of estates, common-law and statutory, is considered at length, and classified by Marshall, J., in the syllabus).

84. "The term 'vested' is used in sec. 2037 in a much broader and far different sense than that of the common law", and the statute "deals mainly with limitations upon the right to absolutely suspend the power of alienation."

85. "It seems unmistakable", "that the purpose of the testator was to put his children and his sister J. into one class for distribution of his estate in remainder equally after the death of his wife";

86. "That the members of the class among whom the testator intended his estate in remainder to be divided must remain uncertain until the death of the life tenant", the "vesting in a common-law sense" being postponed until such time.

—*In re Moran's Will*, 118 W., 177, 184.

87. As to vesting of remainder, after decease of life tenant, to "be equally divided between my lawful heirs." See *CONSTRUCTION OF WILLS*.

—*In re Cowley's Will*, 120 W., 263, 265.

88. As to "legacies payable at a future time" on condition, when vested and when contingent. See *CONSTRUCTION OF WILLS*.

—*In re Paulson's Will*, 127 W. 612, 617.

89. A will providing, as to the residue,—‘both real and personal’ ‘I give and bequeath to’ a daughter and grandson in equal shares, and in case the daughter predecease her husband then ‘her share of my estate be paid to her’ four children, and certain debts of the grandson ‘charged to him and deducted from his share’, and ‘at the settlement of my executor’s account’ ‘I desire the said probate judge to appoint my said executor’, ‘trustee, to assume control of all my estate, both real and personal,’—the wife having a life estate in the realty, and an annuity, with the right of the heirs, after ‘claims are liquidated’, ‘to continue receiving the proceeds’, on securing the wife’s annuity,—it is held:

90. “The will plainly contemplates vesting of the legal title” in the grandson and daughter,

91. “With a power in trust in the executor as trustee giving him full control,

92. Including power to sell the property during the lifetime of the widow subject to her right and subject to the right of the heirs,

93. Themselves, to have the income of the property as it was left, upon condition of their giving security for payment of the annuity”.
See also PRECATORY TRUSTS. —*Wolbert v. Beard*, 128 W. 391, 396.

94. A will gives the wife a life estate, and provides,—‘after the death of my said wife I dispose of my property as follows:’ To a son W. a farm ‘upon the express condition, however, that he shall pay to my daughter P. the sum of \$5,000 within one year after the death of my said wife’;

95. ‘And it is further provided that in case of the death of my said son W. without issue, then and in that event’, he gives said realty to grandchildren ‘who may be living at the time of the death of’ W. The widow and “children survived the testator, but at the time of the trial in circuit court the widow died;” held:

96. That W. received, as found by the circuit court, “an estate in fee, defeasible, however, at his death at any time without having issue surviving him”, “and subject to the charge of the legacy of \$5,000”, “and that, upon the death of said W. without issue then surviving, his estate will then cease and the lands will then vest in fee in” grandchildren “then living, and will so vest charged with said legacy” “so far as the same may then remain unpaid”.

97. “The rule, long recognized, that such a phrase as a gift to one with limitation to others in case of his death, or death without issue, ordinarily is to be construed as applying only to the condition of things prior and up to the death of the testator”, (*Patton v. Ludington*, 103 W. supra),

98. “Like all others with reference to construction of wills, is but a rule of probability and yields readily to anything in words or context to indicate a different intention of the testator”. (Cases).

99. The “indicia” “convince us that wherever the expression ‘death of W. without issue’ was used by the testator in this third paragraph he contemplated a death subsequent to his own as much as one before”.

100. "Courts have held that 'death without issue' may mean death without issue born, but that construction has been excluded, except where clearly intended, by our statute (Sec. 2046), which provides that" it means 'issue living at the death of the person named as ancestor.' (As to this case, as to the legacy payment, see also *Steele v. Korn*, 137 W. 51; See LEGACIES. And see also *Hohnbach v. Hohnbach*, 151 W. post).
—*Korn v. Friz*, 128 W. 428, 431.

101. Where the will provided that 'the interest of my property shall be paid' to two sons 'during their lives' and 'after the death of my sons the principal shall go to their living children, at the age of twenty-one', it is held:

102. "That the entire interest shall be" "paid to both sons while living, and thereafter to the survivor until" his decease;

103. "That the title, absolute" did not "vest in any grandchild prior to the termination of both life estates;"

104. "That upon the death of both sons the principal will immediately vest in the then living grandchildren, share and share alike, as tenants in common;

105. That in case of the death of anyone of them thereafter before the arrival at the age of twenty-one years his share will go to his personal representative;

106. That the share of each will be payable to him upon his arrival at the age of twenty-one, if he so survives,

107. And that in the meantime the interest, so long as he lives, will be for his use according to law".

108. "The rule that, nothing appearing convincingly to the contrary, the presumption is that a bequest takes effect and vests absolutely in point of right at the death of the testator, (*Scott v. West*, 63 W. supra),

109. Is displaced by the rule that a bequest in the form of a direction to divide between and distribute to specified persons vests in those in esse answering to the description at the appointed time for division and distribution. *Smith v. Smith*, 116 W.; *In re Moran's Will*, 118 W; supra".

110. "Nothing appearing convincingly to the contrary", "the right to the fund itself" vests in the "person at the time of the vesting of the right to the use", where the principal goes to him on the happening of some event. (Cases). "Only a vested right to principal would reasonably carry interest".
—*Benner v. Mauer*, 133 W. 325, 332.

111. A devise to a son of the residue 'for him and his use during his natural life, and in case of his death without issue and leaving a widow him surviving, then and in that event' to the widow and others;

112. 'Provided, however, if my said son' 'shall die leaving issue of his body him surviving, then in that event' 'all said residue' 'to said issue'. The plaintiff, son, and the wife Eva, survived the testator, but

the wife subsequently died, and the son "remained unmarried and has never had any children".

113. "Held that the testator, by the word 'death' in the clause" 'and in case of his death', "contemplated the death of the plaintiff after the death of the testator when the will went into effect. *Webber v. Webber*, 108 W.; *Korn v. Friz*, 128 W.; *supra*". "To hold" otherwise, "would be to frustrate the whole scheme of the will".

114. The son "still living and unmarried", the disposition of such residue "is dependent upon two alternative conditions, the happening of neither of which is at present ascertainable",—his death "leaving issue", and 'his death without issue and leaving a widow'.

115. If he leaves neither issue nor widow, "in that event the will makes no disposition" and the residue would be "intestate estate".

116. "A wife dying and leaving a husband her surviving can in no sense be regarded as a widow".

—*Chesterfield v. Hoskin*, 133 W. 368, 374.

117. A will gave the widow a life estate, to "C., one-third of all remaining at death of widow"; to P. a like one-third; to trustee 'the other one-third' part" 'remaining at the death of my said wife E., in trust, nevertheless, for my son H., and authorize and direct them to' manage the same and pay H. the income, 'and in their discretion to pay to him from time to time such parts of said one-third as in their judgment is proper for his comfort and support until said one-third part is all paid to him'. The testator died in 1900, the son H. in 1902, intestate, leaving issue, and the widow died in 1904. Held:

118. P. and C. received "a full legal vested estate in remainder", "vested estates, because there were persons in being at the time of the creation of the estate who would have an immediate right to the possession upon the ceasing of the precedent estate of E. Sec. 2037.

119. And for the same reason the trustees took the present vested legal estate in trust for H. *Ford v. Ford*, 70 W. 19. They took this subject to the execution of the trust. Sec. 2086.

120. And the cestui que trust had an estate in lands and personal property as against all persons except the trustees. Sec. 2087; *Scott v. West*, 63 W.; *Baker v. Est. of McLeod*, 79 W.; *Burnham v. Burnham*, 79 W.; *supra*.

121. Estates legal and equitable given by will should always be regarded as vesting immediately, unless the testator had by very clear words manifested an intention that they should be contingent upon a future event;

122. And where the time of payment or distribution is merely postponed for the convenience of the fund or property, or to let in others, the vesting will not be deferred until that period. *Baker v. Est. of McLeod*, *supra*."

123. There is nothing in the will "restricting the vesting in H. of this equitable interest in remainder. The devise is absolutely in trust

for him". "This vested equitable estate upon his death descended to his children and widow" as intestate estate. *Burnham v. Burnham*, supra.

124. As "the trustees should pay over to H.", "it seems to us from the provisions of the will that the testator intended a conversion of this one-third of the real property", which "is necessary" "to carry out such intention. *Becker v. Chester*, 115 W. 90 (See *EQUITABLE CONVERSION*).

125. For the purposes of descent and distribution the property will be considered as all personal property".

—*Williams v. Williams*, 135 W. 60, 65.

126. "None of" the rules "laid down by the courts" "are inflexible, however, and all yield to the cardinal rule that the words of a will are to be construed so as to give effect to the intention of the testator, ...

127. Which intention is to be ascertained from the language of the will itself, in the light of the circumstances surrounding the testator at the time of its execution. *In re Donges's Est.* 103 W. 497 (See *CONSTRUCTION OF WILLS*)."

128. A devise of practically all the estate to a son "with the provision that 'said W. is to pay' " the widow "\$800, to be paid to her as it becomes necessary for her needs", and she having "died about six weeks after the testator; having previously made a will bequeathing the \$800 to her daughters", and "four days before her death", having made a written demand for the entire sum "stating that she was in need of money for her support",—is held,

129. To be "an absolute gift to his wife of \$800", "vested" in her, and "that the intention was to annex the element of time to the payment only. *Patton v. Ludington*, 103 W. supra".

130. "The fact that there are no words of bequest, but only a direction to the son to pay, is a circumstance which makes in favor of the idea that the gift is contingent only; but this is not at all controlling.

131. The gift will be held to vest, if such appears to have been the testator's intention, even though it be expressed in a mere direction to pay. (Citation)".

132. There being no person "appointed" for that purpose, "it would seem that she herself was to determine the character of the needs and the time when payments were necessary to meet them. *Will of Bouck*, 133 W. 161 (See *CONSTRUCTION OF WILLS*).". Claim therefore sustained.

—*Ohse v. Miller*, 137 W. 474, 476.

133. A will gives a life estate to the wife, then to executors "the entire estate in trust for ten years" the net income to be divided equally 'between my children'. "Then follows this provision: "After the expiration of ten years after the death of my said wife, all my estate and property then remaining in the hands of my said trustees I hereby give, devise and bequeath unto all my children in equal parts, share

and share alike". After the decease of the wife, and during the trust ten years, a son T. died "leaving a widow, H., and one minor child C.;" and a daughter A. died "leaving her husband as her sole heir".

134. "In determining the nature of an estate created by will, the will itself is to be first consulted and afterwards the statute. The operations should not be reversed".

135. Quoting *Smith v. Smith*, 116 W. and *Ohse v. Miller*, 137 W., supra, and "applying" the "well settled" "principles" thereof, not "doubted, but rather recognized, in" *In re Moran's Will*, 118 W. supra, "we have no difficulty in concluding that the testator intended the interests of his children to vest at the time of his death,

136. Subject only to the life estate of the widow and the ten-year trust. The words of the devise are words of a present grant, not of mere direction for division at a future date".

137. Applying secs. 2086 and 2087, and citing *Baker v. Est. of McLeod*, 79 W. supra, it is held that the interest of T. the deceased's son, "was vested, subject only to the execution of the trust, and was a 'legal estate' as against all persons except the trustees, whose term was for years only;"

138. And that "his widow" "should have been awarded dower in her husband's vested interest in the real property of the estate", being "of course, only a one-third interest in the net" income during the trust period. See also *DOWER*. —*Will of Prasser*, 140 W. 92, 94.

139. A will "provides that in case of the death of either one of the four children the property, real and personal, willed to either of them be equally divided to the remaining living heirs of the testator, subject to the same rule of descent and be governed by the same rule of property willed directly to the testator's children.

140. This relates to the death of either one of testator's children after the death of the testator. *Korn v. Friz*, 128 W.; *Chesterfield v. Hoskin*, 133 W.; supra.

141. This for the reason that the estate devised to testator's children is a life estate, and because from the whole purview of the will", "the testator intended" that various subsequent legacies should not "take effect" "so long as there was a child or grandchild of the testator living".

142. "The remaining living heirs' of testator would be his surviving children and the children of any such child deceased",

143. But "to harmonize with other provisions of the will", "must be taken to mean the death of either one of the testator's children without issue, and these two words may be supplied". See also *PETUITIES*. —*Will of Harrington*, 142 W. 447, 460.

144. As to devises to children being "a conditional fee terminating at their death" "at any time". See *LIFE ESTATES*.

—*Eggleston v. Swartz*, 145 W. 106, 109.

145. "The term 'residuum' or 'residuary estate' " "means what is left" and "the surplus 'when all the debts and particular legacies are discharged'. 2 Bl. Comm. 514". (Other definitions and citations).

146. "However, if the testator intended that there should be a number of residuums to be distributed from time to time as they occurred, his intention should, of course, be carried out".

147. Contrary to the circuit court's findings, it is held that there was here "a definite time when the residuary clause was to take effect", and that "the words 'then living'", as to residuary beneficiaries referred to such time after the widow's death and the fixing of a hospital bequest within four years thereafter, "at which time the residuary estate becomes vested in the then living beneficiaries".

148. There being no provision as to "accumulated rents and profits resulting from the residuary estate during" the widow's life and four years thereafter, except that it is charged with the upkeep of the homestead, it is held;

149. "That the surplus, if any, of the residuary personal estate, past and future, over and above the sums required to pay the taxes and repairs on the homestead, be added to the general residuary estate;

150. That the net income already derived from the residuary real estate be distributed to the present presumptive residuary legatees at once,

151. And that the future income (except as required on the homestead) be annually distributed to the presumptive residuary legatees until the time when the amount of the residuary estate is determined and the status of the beneficiaries fixed".

152. The testator "must be deemed" "by his silence to have directed that it (the income) accumulate", but the statutes, secs. 2060-63, not permitting it as to the realty, this income, under sec. 2064, in an 'expectant estate', 'shall belong to the person presumptively entitled to the next eventual estate', this being "an estate in expectancy under sec. 2033".

153. The estate of the presumptive beneficiaries is a "future estate" "because it commences at a future day without the intervention of a precedent estate. Such a grant is valid. (Case.)." Sec. 2064. See also *EQUITABLE CONVERSION*. —*Will of Stark*, 149 W. 631, 646.

154. Where "there is a direct specific devise of the estate to the trustees for the purpose of" paying the income to the widow, and the corpus "to the sister upon the death of the widow, should the sister survive, and, if not, to her son", it "vested when the will took effect".

155. "Such devise, in the absence of any language in the will evidencing any intention to postpone or delay the time it is to take effect, must be regarded as vesting the estate in the cestuis que trustent at the time of the death of the testator. *Patton v. Ludington*, 103 W. supra; *Matter of Brown*, 154 N. Y. 313".

156. "There is nothing in the will to make the persons to whom, or

the events upon which, the estates are to take effect, uncertain. Their estates therefore vested at the time of the death of the testator". *Benner v. Mauer*, 133 W. supra; *Ohse v. Miller*, 137 W. supra.

—*Miller v. Payne*, 150 W. 354, 374.

157. "The rule of law which favors vested estates rather than contingent ones at the present time is practically a rule of construction that may have controlling weight in a close or doubtful case,

158. But cannot be evoked to defeat the intent of the testator where that intent is reasonably clear".

159. As to the word "heirs" of a living person referring to vesting in such persons as are heirs at the time of such persons decease. See *HEIRS*.

—*Flint v. Wis. Trust Co.*, 151 W. 231, 238.

160. Where the testator creates a ten-year trust on his residuary estate, directs the conversion of the property before the trust expiration by the trustee, then provides,—and I direct that they shall pay therefrom, and I give and bequeath the said residue', as stated,—it is held:

161. That the "residuary legatees" take "free from conditions or contingencies which might defeat the gift", and "that the testator intended by the words used to make a present grant and to postpone the distribution thereof to the time when the trust expired. *Williams v. Williams*, 135 W.; *Will of Prasser*, 140 W.;" *Ohse v. Miller*, 137 W.; supra. See also *DESCENT AND DISTRIBUTION*.

—*Will of Reynolds*, 151 W. 375, 384.

162. A will, after giving a life estate to the widow who died four days after the testator, gives all the residue to the children and to the children of any deceased child by representation, and then states,—'but' 'in case any of my said children shall die without leaving lawful issue them surviving' their shares 'shall revert to my other surviving children, or' their surviving children. Held:

163. There being a direct devise to the children, and "nothing in the language used" subsequently "which in express terms overrides" this provision,—the will "carries conviction that the testator intended that the children should take an absolute estate after the termination of the life estate given to the widow.

164. The intent being ascertainable with a reasonable degree of certainty, the function of the court is to carry it into effect and not to search for technical rules to defeat it".

165. "Where the intent is reasonably clear, precedents are of little value. They cannot be successfully invoked to override intent".

166. While *Korn v. Friz*, 128 W. supra "recognizes the rule that a 'gift to one with limitation to others in case of death, or death without issue, ordinarily is to be construed as applying only to the condition of things prior and up to the death of the testator'," and "is supported

by an abundance of authority", "the decision" "went far enough and should not be extended.

167. A reading of the will in that case leaves the mind in doubt as to what the testator intended, with the probabilities favoring an intention to give a life estate only to the son",—the case being "at best a close one" with "the decision of the circuit judge" as entitled to "some weight".
—*Hohnbach v. Hohnbach*, 151 W. 487, 490.

168. Where a will gives the wife a life estate, and 'after her death the said property to be divided equally between my children', and a daughter leaving her husband as her heir died subsequent to the testator and before the widow, it is held:

169. "It is not a present devise to the children", did not vest until the widow's decease, and that "the devise" to such daughter "lapsed upon her death prior to that of her mother, and her share went to the other children" "and not to her husband".

170. "When property under a will is to be divided at a specified time in the future among a class, only those thereof who are alive at the time of division can take under the will in the absence of provisions to the contrary. *Moran's Will*, 118 W., *supra*; *Matter of Baer*, 147 N. Y. 348".
—*Cashman v. Ross*, 155 W. 558, 560.

171. The testator first gives a life estate to his daughter, and then,—'unto the children of my said daughter the remainder of said property after the determination of her said life estate, to be equally divided among her said children, share and share alike, and to their heirs forever. It is my intention that said property shall be divided at the death of my said daughter among' children living at her decease, and to the issue of deceased children. Held:

172. "That no interest vested in them (the children) upon the death of the testator, but only upon the death of his daughter", when, only "could the legatees in whom an estate was to vest be definitely ascertained".

173. "We have, therefore, a will that by clear and explicit language postpones the vesting of any interest in the remaindermen until the death of the life tenant. That being so, the statute as to the vesting of estates cannot change its effect. *Moran's Will*, 118 W.; *Cashman v. Ross*, 155 W.; *supra*". See also PARTITION.

—*Greeney v. Greeney*, 155 W. 621, 623.

174. The whole homestead vests in the widow and the "then living heirs", at the death of an intestate. See also HOMESTEAD.

—*Miller v. Hart*, 161 W. 611, 614.

175. Where a testatrix gave her estate 'unto my six children', naming them, 'the share of any deceased child leaving no issue to revert to my other children',—and a daughter died without issue after testatrix'

decease,—it is held, “that the language under consideration must be read thus, ‘the share of any’ child deceasing in my lifetime to go to ‘my other children’.

176. The word ‘revert’ when given the meaning of ‘go to’ pretty clearly indicates a going direct from the testator to the contingent beneficiaries, not from the deceased child, so that the death spoken of is one occurring before that of the testator”.

177. “Superior to all other rules for construing wills is the one that the intention of the testator should prevail so far as that can be read out of the language used to express it. Will of Ehlers, 155 W. 46, 48 (See CONSTRUCTION OF WILLS.)”

178. “In the absence of words showing a contrary intention, the death of a child, in a will where the bequest or devise is, in terms, to such child direct, with a provision, in case of the decease of such child, for the bounty to go to some other person or persons, refers to a death occurring during the lifetime of the testator. Patton v. Ludington, 103 W. supra”.

179. “The law favors the early vesting of estates and, in case of uncertainty respecting the purpose intended to be expressed by a testator, a construction which will accomplish that result is to be preferred to one which will not. (Case)” —Will of Owens, 164 W. 260, 263

VOLUNTARY PAYMENTS.

See PAYMENTS.

WAGES.

See SERVICES.

WAIVER.

See also APPEARANCE. RATIFICATION.

Absence of intent to, 21.

Appeal; irregular judgment, 3.

Accepting judgment condition, 10.

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Appearing and contesting, 5.

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Definition of, 22.

Service of process defect:

Appearing and contesting, 5.

General appearances, 6, 7.

Argued a demurrer, 8.

Or want of service, 7.

Time, all cases generally, 12.

1. Waiver to objection to deposition "on account of any defect or want of notice", is complete if the party "appears and cross examines, or objects to questions, etc." See DEPOSITION.

—*Miller v. McDonald*, 13 W. 673, 674.

2. Parties may waive constitutional rights as to trial of civil matters. See REFERENCE. —*Home Ins. Co. v. Security Ins. Co.*, 23 W., 171, 174.

3. An appeal from a judgment irregularly entered, "constituted a waiver of the irregularity". —*Jenkins v. Esterly*, 24 W. 340, 341.

4. "Vacating the judgment for irregularity", or "the asking of such relief, whether granted or not, is also a submission and waiver of jurisdictional defect". —*Alderson v. White*, 32 W. 308, 312.

5. Appearing and contesting on the merits "was a waiver of any defect in the service of process". See JURISDICTION.

—*Atkins v. Fraker*, 32 W. 510, 517.

6. A general appearance is "a waiver of any defects in the service of the notice of appeal". See APPEAL.

—*Kasson v. Est. of Brocker*, 47 W. 79, 85.

7. "The rule is elementary, that a general appearance to the action by the defendant waives a defective service, or want of service, of the original process.

8. The principle of this rule is applicable here", where the defendant appeared and argued a demurrer, "without objection to the validity or regularity of the proceedings to revive the action", which was "a waiver of the want of notice of such proceeding", to which he was entitled.

9. This failure to give notice "was an irregularity merely, which, like any other irregularity not going to the jurisdiction of the court, may be waived by the opposite party".

—*Brooks v. Northey*, 48 W. 455, 456.

10. By accepting a condition imposed in a judgment, an appeal from such portion of the judgment is waived. See APPEAL.

—*Fiedler v. Howard*, 99 W. 388, 396.

11. Failure to urge "objection on the former appeal", is held a waiver on the same facts, of the "right to do so on a subsequent appeal", "upon the error, if error it is".

—*Richter v. Est. of Leiby*, 107 W., 404, 409.

12. "There are few cases where the time within which an act is required to be done may not be waived by the parties where the rights of others are not affected". See also LEASE.

—*Sheppard v. Rosenkrans*, 109 W., 58, 63.

13. "Waiver, when put forward as a ground of action or as a defense, is affirmative matter to be established by the party alleging it".

—*New Home S. M. Co., v. Simon*, 113 W., 267, 272.

14. Where one claiming to be the heir, files a claim for services, pending the adjudication of the question of heirship, this does not "constitute a waiver of his legal rights as the established heir".

—*In re Marchant's Est.*, 121 W. 526, 533.

15. As to waiver of tender on rescission of contract by an infant. See INFANTS.

—*Jones v. Valentines' Sch. of T.*, 122 W. 318, 320.

16. It is held there could be no consent to waive the disqualification of a county judge "as to the interests of minors". See also COUNTY JUDGE.

—*McIntosh v. Bowers*, 143 W. 74, 76.

17. A guardian ad litem with consent of court, may "waive any irregularity" "either expressly or by conduct", in appeal proceedings. See also PARTIES.

—*Est. of Koch*, 148 W. 548, 571.

18. "A change of position by one, in reliance upon the conduct of another, so that a reversal of such conduct would work prejudice to the former, is essential to estoppel in pais;

19. But, not to waiver, and one is just as effective as a defense as the other".

20. "The underlying facts, upon which to predicate a waiver, as in this case, and the waiver, itself, may be implied from circumstances as well as be established otherwise.

21. Where implied, necessarily, from the circumstances, the mere claim of absence of intent to waive does not overcome such situation". (Many cases).

—*Somers v. Germania Natl. Bank*, 152 W. 210, 219.

22. "It is" "difficult to lay down any hard-and-fast rule as to what constitutes waiver". "Each case must be decided on the facts peculiar to it. Waiver is the intentional relinquishment of a known right, benefit, or advantage. (Many cases)".

23. "It is said in *Swedish Am. Natl. Bank v. Koebernick*, 136 W. 473,

480, that 'where the facts and circumstances relating to the subject are admitted or clearly established, waiver becomes a question of law'.

24. But if different inferences may be drawn from the evidence, a question of fact is presented 'to be determined by court or jury, according as parties see fit to submit the controversy for decision'. *Frazer v. Aetna L. Ins. Co.*, 114 W. 510, 524''.

—*Zwietusch v. Luehring*, 156 W. 96, 113.

25. (As to the policy and practice concerning waiver of notice by guardian ad litem in county court,—see *Zimmerman's Probate Practice*, §§ 472, 473.)

WARDS' SALE OF REALTY.

See INCOMPETENTS' SALE OF REALTY. INFANTS' SALE OF REALTY.

WARRANTY.

Agent's authority to, 5.

Express authority, 5.

Or usual course, 5.

Representation, 6.

Definition of, 3.

Implied warranty of title, 8.

Possession condition, 8.

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Quality of goods, 1.

No implied warranty, 2.

Not particular fitness, 1.

Representation; not the same, 4.

Principal may be liable, 6.

Warranty always is, 4.

Reverse, not necessarily, 4.

Three ways to warrant, 7.

1. "Where there is an express warranty of quality of goods sold, no warranty of fitness for a particular use is implied".

2. "In this case, therefore, there was no implied warranty of fitness of the paper sold for the special use intended, although that purpose was known to the vendor".

Dwight Bros. P. Co. v. Western P. Co., 114 W., 414, 419.

3. "A warranty is a collateral undertaking by which the warrantor contracts that certain facts in relation to the property are or shall be as he represents them. 28 Am. & Eng. Ency. of Law, 728.

4. The same authority, on page 739, says: 'The terms 'warranty' and 'representation' are not synonymous. A warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term'."

5. "An agent's authority to warrant, as said in *Westurn v. Page*, 94 W., 251, must arise from express authority, or proof that the transaction is usually attended with warranty.

6. Cases may and frequently do arise where the agent may have no authority to warrant, and yet, from the character of his agency, his principal may be held liable in court for false representations made by him".
—*Matteson v. Rice*, 116 W., 328, 331.

7. As to a sale of chattels it is said "that a warranty may have been given" "in one or more of three ways;

First, by an express oral warranty; second, by an affirmation of title to be found in the language of the undertaking given by the" sellers "under sec. 1684t-12; third, an implied warranty under the provisions of sec. 1684t-13".

8. "The general rule is well established that there is an implied warranty of title in a sale of chattels in possession of the seller for a fair price where a contrary intention is not shown from the surrounding circumstances. (Cases).

9. By sec. 1684t-13 no such condition of possession by the vendor at the time of sale is required, so that that does not affect the application of the rule of the statute and the decisions to this case".

—*Kirkpatrick v. Kepler*, 164 W. 558, 564.

WIDOW.

See also DOWER. HOMESTEAD. HUSBAND AND WIFE.

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- Will is in lieu of dower, 9.
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1. An allowance to the widow in a reasonable amount paid before "any order authorizing it", is proper to be allowed in an executor's account, and the executors may make such advances though "they would of course do it at their own risk". —*King v. Whiton*, 15 W. 684, 689.

2. Where the widow after the probate of the will, "entered into the possession and enjoyment of the real and (specific) personal estate bequeathed to her for life", she is not entitled to an allowance for support, except "from the time of the testator's death until the will was admitted to probate." —*Golder v. Littlejohn*, 30 W. 344, 354.

3. Receiving an allowance pending administration, "does not destroy or impair rights" as to dower or the mesne profits arising therefrom. See DOWER. —*Farnsworth v. Cole*, *Admr.* 42 W. 403, 405.

4. The selection by the widow of a note "as part of her legal allowance of \$200, in value, of the personal property belonging to the estate", "was strictly her right under the statute, the allowance of which by the

administrator was imperative, and no order of the county court was necessary. Subd. 1, sec. 3935; *King v. Whiton*, Extrs., 15 W. 684’.

—*Tomlinson v. Nelson*, 49 W. 679, 682.

5. Where an order of allowance of \$600 for one year was made, and subsequently on application for \$1,000 annually, a second order (announced orally and inadvertently not entered) was made fixing the allowance of the widow at “\$50 per month until the estate was settled”, and some months later a third order was made “revoking all previous orders of allowance, and providing” an allowance of only “\$800 during the settlement of the estate, in lieu of all other allowances”; and it not “being shown that the condition of the estate had changed, or that the situation and circumstances of the family had changed”, it was held “an abuse of discretion to make the” last order, “revoking all previous orders on the subject of allowance”.

6. Had there been a change in the condition of the estate, or situation of the family, “the probate court, as to the future, might diminish the allowance in its discretion”, but apparently not otherwise in the absence of fraud or irregularity in procuring the order. See also ORDERS.

—*Baker v. Baker*, 51 W. 538, 547.

7. To entitle a widow to a note as part of her \$200 selection under sec. 3935, “she must show that it has been selected by her. In the absence of any proof on that subject, we cannot say that the plaintiff (widow) acquired any title to it under said section”.

—*Wilcox v. Matteson*, 53 W. 23, 29.

8. The common law “put the widow to an election between the provisions made for her by the will of her husband and her right of dower”. “Dower was a legal right which was much favored by the courts”, and “the presumption was that a provision for the widow in the will was a matter of bounty, and was not intended to exclude dower unless it was” so expressed or implied from the will.

9. This rule was changed by statute, and since 1839, “a provision for the widow in the will carried with it the presumption that it was in lieu of dower, and that it had to appear plainly by the will itself that it was in addition to dower, in order that the widow might take both”.

10. The statute as it now exists (secs. 2170-2), and at least since the amendment of ch. 106 L. 1877, is “applicable both to real and personal estate, and excludes the widow from any share or portion of such estate undisposed of by the will, where she does not renounce the provision made for her by the testator.”

11. And it is here held that the widow having made no election, “presumably she chose the provision made for her in the will, and is not entitled to any share or portion of either the real or personal estate left undisposed of by the testator, but is limited to that estate or interest specifically given her in the will”. (Approved and followed in *Chapman v. Chapman*, 128 W. post).

—*Hardy v. Scales*, 54 W. 452, 454.

12. The decision in *Baker v. Baker*, Extr., 51 W. supra, is held res adjudicata, and also approved on its merits.

13. The statute (sec. 3935) is held to authorize a widow's allowance in testate as well as intestate estates, though the will disposed of all the property.
—*Baker v. Baker*, Extr., 57 W. 382, 392.

14. Where the widow was sole legatee and devisee, and because of insolvency elected to take under the law, the title to the realty vested in the heirs. See JURISDICTION.
—*Melms v. Pfister* 59 W. 186, 191.

15. The court construes the clause of Gov. Washburn's will, his widow being incurably insane, following: 'I direct my executors to bear constantly in mind the wants of my wife, and to set aside, use, and expend whatever moneys may be necessary, consistently with her condition, to provide for her comfort and physical health; and I place no limit upon the sums which they may spend for the purposes indicated'.

16. The court holds, under secs. 2171-2, taking the intent either "as collected from the whole will", or "regarding this clause alone", "that the testator therein and thereby intended to make, and did make, provision for his wife which was to be in lieu of dower and one-third of the personal estate".

17. "The direction" to the executors as to the wife, "created a personal trust which was to continue while she lived. This is apparent from the will".

18. "It seems hardly necessary to add that" this "clause creates a personal trust within the strict sense of the term. (Many cases)".

19. "There can be no doubt, if the executors neglect or refuse to expend whatever money may be necessary to execute the trust, that a court of equity will compel them to do so.

20. There is surely no such uncertainty as to the requisite amount as to be incapable of legal ascertainment."

21. "We must hold that the general words in the statute (of election) have a general application, and since there is no exception as to an insane widow, the court can create none. (Cases)".

22. "At common law, where the person entitled to elect was insane and incapable of exercising the right, a court of equity would elect for him".

23. "Independently of the statute", or with the statute, "where the application was in time", it is held that a court of equity has power "to elect for an insane widow", or other incompetent. (By am't. Ch. 264, L. 1903 and Ch. 427 L. 1907, Sec. 2172a, the extr., admr., or gdn. can now make such election).

24. In this case, "in view of the liberal" provision, "and in consideration of all the facts," the court "does elect for her that provision as being on the whole the best and most advantageous for her interest and welfare," i. e. the provision under the will.

25. As "personal property will be governed by the law of the domi-

cile," the election "made will dispose of all questions relating to the personal estate and the real estate situated in this state."

26. The court does not determine the effect of such election on real estate in other states.

—*Van Steenwyck, Extr., v. Washburn*, 59 W. 483, 497.

27. A widow's right to elect either as to dower or personalty, cannot be taken from her either by will, or by her release thereof during coverture. See DOWER.

—*Wilber v. Wilber*, 52 W. 298, 302.

28. A mutual agreement, under seal, between husband and wife, "a few days after their marriage, purporting to release all her interest in his estate, was null and void in law, and not at all binding upon her after his death. *Wilber v. Wilber*, 52 W. supra; *Munger v. Perkins*, 62 W. 504 (See DOWER)".

29. Where the widow elected to take under the law, (Sec. 2171,) and immediately released her interests in the estate for two-sevenths of its value in cash from the executors "and where the trustees were, at the time, fully advised of such value, and all the circumstances indicated that the cestui que trust was not so advised, but ignorant of such value", it is held that such release and deed were voidable as to her, on proceedings instituted by her guardian ad litem, she having become insane.

30. "There can be no question of the right of the defendant, by her guardian ad litem, to contest the validity of the transaction. *Salter v. Krueger*, 65 W. 217."

—*Leach v. Leach*, 65 W. 284, 291.

31. Where the widow, given a life estate under the will, surrendered the estate for the benefit of creditors, including her "exemptions, and reserved nothing for her support or for her infant children, her application does not come within the restriction named in *Golder v. Littlejohn*, 30 W. supra," and she is entitled to an allowance for support.

—*Est. of Henry*, 65 W. 551, 552.

32. A widow, it seems, may settle for the killing of her husband, without the intervention of the personal representative. See DAMAGES.

—*Schmidt v. Deegan*, 69 W. 300, 303.

33. "Neither the contest of the will, nor the stay of proceedings pending the appeal to the circuit court, prevented, or in any way interfered with, the making of such election" of the widow "not to take under the will, but under the statute", and the election made after the expiration of the statutory limit was held of no effect notwithstanding such contest and stay.

—*Albright v. Albright*, 70 W. 528, 532.

34. Where an election "was delivered for filing by a reputable attorney", "in the absence of all proofs to the contrary it must be presumed that he was authorized to file the same on behalf of the widow".

35. "The authority of the attorney filing the same should be presumed until the want of such authority is made to appear by proper evidence. *Shroudenbeck v. Phoenix F. Ins. Co.*, 15 W. 632."

36. If the widow as to election "can bar herself of that right before the expiration of the year, it must be done with a full knowledge on her part that she has given up such right."

37. Her acts must at least be entirely inconsistent with her right to subsequently make such election."

38. The fact that she accepted funds from the executor is held not to estop her from afterward making an election.

39. The widow's right to a "share of the personal property of her deceased husband, belonging to him at the time of his death, cannot be divested by any act of the husband, by his will or otherwise."

40. All he can do is to offer her by his will something in place of the estate secured for her by the law, and if she accepts it she cannot claim the right given her by the law;

41. If she refuses to accept" she takes her share "of the personal estate of her husband by virtue of the law, and not in any way under the will of her husband, and she is entitled to have her share distributed to her by the proper court."

42. After an election, "this interest of the widow is assignable in her life-time, and she may bequeath it by will. (Many cases)". So held in this case where the widow died before or without her share being assigned to her. As to executor being trustee of such share, see ADMINISTRATION.

43. Where the widow elected to take under the law, "the property went to her as her absolute estate", "which she could sell, assign, or bequeath as freely as any other owner."

—*Beem v. Kimberly*, 72 W. 343, 363.

44. As to an order of the county court of Feb. 5th, 1890, cutting off all family allowances after July 18, 1889, it is said: "Under the decision of this court in *Baker v. Baker*, 51 W., supra, it was error for the county court to give to its order a retroactive effect. The most it could properly do was to stop allowances after August 10, 1889, when the petition in that behalf was presented to it".

45. "There can be no legal objection to an allowance" for the maintenance of a minor, where "the estate is solvent and is yet in progress of settlement."

46. "The amount of the allowance is a matter within the sound discretion of the court, and the order therefor may be vacated or changed by the county court at any time hereafter for causes arising since it was made".

—*Ford, Extr. v. Ford*, 80 W., 565, 568.

47. Whether an election under secs. 2171, et al, can be made where no provision is made for the widow in the husband's will, is referred to but left undecided.

48. It is held that the election by the widow was personal, and could not be made after her decease by her executors.

49. (By subsequent amendment to sec. 2172; now, where no provision is made for the widow, "she shall, without doing any act on her part, be entitled to the share of his estate as provided in this section.")

50. And by sec. 2172a, now, provision is made for election by her representative in case of incompetency or decease before the expiration of the year).
—*Church v. McLaren*, 85 W., 122.

51. "The expenses incurred by the widow" in "litigation, much of which she herself commenced", were held "properly disallowed", as administration expenses.

52. "The net personal estate", from which the widow takes her share when she elects under sec. 2172, clearly "was so much personal estate as was left after payment of debts, allowances, and charges, and all the expenses of administration, as well as those expenses which were made necessary by the will as those which would have been incident to the administering of the estate had he died intestate", and include construction and partition action expenses, "before setting apart her" share.

53. As to the net annual income of a one-quarter during life by the will to the widow, it is said that "by the election of the widow to take under the statute, her one-quarter reverted to the estate".

—*Ford v. Ford*, 88 W. 122, 132.

54. The widow being sole legatee and devisee, in an insolvent estate, and having elected to take under the law, secs. 2171-72, following the same principles applied to the other realty, "from the time of the election the homestead also 'must be regarded as though no will had ever been executed' ". *Melms v. Pfister*, 59 W. supra, and see JURISDICTION.

55. "As the result of the election, the homestead descended to the plaintiffs, the children of the testator, subject to the life estate of the widow therein", and she could not, as contended, claim title as devisee of the homestead, and under the law as to the other realty.

56. The widow's grantees, though they purchased from her a fee, only "acquired her estate, and became tenants for life in possession. *Barrett v. Stradl*, 73 W. 385.

57. If such a tenant purchased an encumbrance upon the estate, he cannot set up title under it as against his remainder-man, but is considered as holding it in trust for the joint benefit of himself and of the remainder-man". *Phelan v. Boylan*, 25 W. 679.

58. If the widow's grantees, after purchasing the life estate, "paid the mortgage to protect their estate, they might invoke the rule laid down in *Phelan v. Boylan*," be subrogated, and, "compel the remainder-men to contribute their portion of the encumbrance paid";

59. "But when they paid the mortgage simply as a part of the con-

sideration for the life estate which they purchased, it is wiped out as to all parties", and they are not entitled to be subrogated.

—*Melms v. Pabst B. Co.*, 93 W. 140, 146.

60. Where a testator died prior to the amendment to sec. 2172, by ch. 123, L. 1895, and no provision was made in the will for the widow, being suggested but left undecided in *Church v. McLaren*, 85 W. supra, it is held, that the widow was entitled to no "part of her deceased husband's personal estate over and above the allowances provided for in subds. 1, 2, sec. 3935".

—*Jochem v. Dutcher*, 104 W. 611, 613.

61. Where the widow failed to elect under the statute, and made a contract with trustees and the heirs under inducement and trust, in ignorance and mistake of her legal rights, of much less than her legal right,—the contract was set aside and the trustee and heirs compelled to account as if she had duly elected,—by an action in equity six years later. See TRUSTEES.

—*Ludington v. Patton*, 111 W., 208, 229-261.

62. A widow "was given a quantity of personal property, which, it appears realized \$681. (See this will construed, *Willey v. Clark*, 105 W., 22, CONSTRUCTION OF WILLS). This, she took, and refrained from filing any notice of her election", under sec. 2171, to take by law. Held, to be "a provision for the widow." In re *Donges's Est.*, 103 W., 497 (See AFTERBORN CHILD.) (Other cases).

63. The statute "bars her dower and homestead rights, if any provision is made for her by the will, without regard to whether the will gives her all that the testator in fact intended to". So held as to realty, all construed to be intestate property. See also CONSTRUCTION OF WILLS.

—*Willey v. Lewis*, 113 W., 618, 620.

64. As to widow's proportion of insurance expense on homestead and other realty. See INSURANCE.

—*Ludington v. Patton*, 121 W. 649, 655.

65. As to distribution to widow, on election, not being part of the 'residue'. See DESCENT AND DISTRIBUTION.

—*In re Bradley's Will*, 123 W. 186, 193.

66. "Under the doctrine established in that case (*Hardy v. Scales*, 54 W. supra) and the statutes of this state as they have since existed, the election statute, secs. 2171, 2172, must be strictly, if not literally followed respecting the provisions made for the widow,

67. And where she fails to renounce the provision made by the will she is barred from taking any other portion of her husband's estate, although such estate may not be fully disposed of by will". So held,—that the widow cannot share in intestate residue.

—*Chapman v. Chapman*, 128 W. 413, 418.

68. Under an antenuptial contract, the widow was held not entitled to allowances of personalty and for support, under subd. 1 and 2, sec. 3935. See MARRIAGE CONTRACTS. —*Deller v. Deller*, 141 W., 255, 260.

69. A widow held entitled to election, there being a void antenuptial contract, and a deed deposited in escrow pursuant thereto. See MARRIAGE CONTRACTS. —*Rowell v. Barber*, 142 W., 304, 317.

70. Where a widow was given a specific per cent of the residuum "as a separate quantum of his estate", on her election her per cent became part of the residuum and not intestate estate. See DESCENT AND DISTRIBUTION. —*Will of Reynolds*, 151 W. 375, 382.

71. Under subd. 2, sec. 3935,—there being insufficient personalty and income of realty to pay the full amount of allowance as ordered,—the "income of the real estate", means net income, or what is left after fixed charges of upkeep of the estate are paid", such as repairs, insurance, and taxes, and "the administrator could only pay to the extent of the net income in his hands". —*Niland v. Niland*, 154 W. 514, 518.

72. Where, under sec. 3935, the \$200 allowance was not "selected or claimed by" the widow "during her lifetime", it was held "error to allow it in the accounting" after her decease. (Cases). —*Est. of Hemphill*, 157 W. 331, 339.

73. The widow "has a homestead right in only \$5,000." See also HOMESTEAD. —*Lands of Sydow*, 161 W. 325, 327.

74. Where the widow participated in a fraudulent transfer by her husband to herself, which was set aside, she was held not entitled to reimbursement for debts paid by her, or to a widow's allowance out of the proceeds. See also CREDITORS' ACTIONS. —*Baldwin v. Frisbie*, 163 W. 26, 29.

75. (As to detailed commentaries concerning the practice and procedure as to the various statutory allowances,—see Zimmerman's Probate Practice, §§ 239-251.)

WIFE.

See HUSBAND AND WIFE.

WILLS.

See also CODICILS. CONSTRUCTION OF WILLS. DESCENT AND DISTRIBUTION. EXECUTION OF WILLS. FOREIGN WILLS. LOST WILL. NUNCUPATIVE WILL. POWER. PROBATE OF WILLS. REVOCATION. TESTAMENTARY CAPACITY. TRUSTS. TRUST VARIATION. UNDUE INFLUENCE. VESTING OF ESTATES, ETC.

Agreement not substituted, 62.

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Realty and personalty, 46.

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Oral, void as to realty, 46.

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Since execution; voids it, 3.

Not being explained, 3.

Codicil and will, one, 32.

Construction:

Intrinsic evidence; not vary, 26.

Not enlarge or control meaning, 28.

Place court, testator's position, 27.

To interpret language, 27.

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Not latent ambiguity, 28.

Not issue at probate, 23.

Future consideration, 24, 25.

Paragraph revocation considered, 57.

Separately from the probate, 56.

Definition of will, 32, 36.

"Devisee", takes realty, 14.

Effective after probate, 30.

Immediately on death; title, 31.

Relates back to death, 30.

Speaks from that moment, 30.

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Attorney, reversing names, 38.

Whether set aside for, 7, 11.

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Possible agreement not excluded, 44.

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Witnessed; not contractual, 41.

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Deed: conveying in trust, 50.

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Principles; testamentary deeds, 51.

(1) Clearly deducible, 52.

(2) Ambiguous instrument, 53.

(3) No testamentary indication, 54.

Definition of will, 36.

Note and mortgage, testamentary, 47.

If contractual, enforceable, 48.

Not contractual; will if at all, 49.

Several together may be will, 2.

Each partially disposing, 2.

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Testamentary character, 35.

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Two, last referring to first, 40.

First not properly executed, 40.

Unambiguous lease, 36.

Intention:

Governs: extrinsic circumstances, 4.

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Law; when it takes effect, 22.

Existing at the decease, 39.

"Legatee", takes personalty, 14.

Living person's estate given, 34.

Election to take, binds, 34.

Lucid interval:

Stress on will provisions, 5.

Oral promise by legatee, 13.

Created trust to carry out, 13.

Modifying probate order, 13.

Probate:

Adjudication conclusive; fraud, 12.

Construction; not in issue, 23.

Considered after probate, 25.

Matters for the future, 24.

Nor any other questions, 23.

Paragraph impliedly revoked, 57.

Separately from probate, 56.

Legal effect not involved, 55.

Oral legatee promise, modifying, 13.

Creating trust to carry out, 13.

Whether set aside for fraud? 7, 11.

Concealing fact of fraud, 9.

Conclusive as to no fraud, 12.

Equity; no jurisdiction, 10.

Gross laches ineffective, 8.

Not in county court; laches, 16.

Realty disposition:

May be made in three ways, 6.

Reformed; cannot be, 17.

Revocation:

Later will, a former, 1.

Without revocation clause, 1.

Paragraph void; after probate, 57.

Rights as to:

Agreement not substituted, 62.

Breaking guarded against, 19.

Court's duty to uphold, 21.

Every sane man to make, 18.

Guaranteed by constitution, 61.

Rights as to—continued

Hope of inheritance, 45.

Kin wishes, immaterial, 29.

More sacred than contract, 58.

Court and parties abide by it, 59.

No power to correct, 59.

Not set aside or reformed, 58.

Need not give reasons, 37.

Part of the common law, 60.

Policy, not seek to avoid, 21.

Right to discriminate, 37.

Same right as to contract, 20.

Speaks from the death, 22, 30.

Taking under a will, 33.

Confirms the whole, 33.

Title:

From decease after, probate, 15, 30.

Effect, legally at decease, 31.

Two independent wills, 2.

Cannot have such, 2.

Later revokes first, 1.

Without revocation clause, 1.

1. As to two testamentary instruments offered for probate together, dated respectively in 1844 and 1850, the court says: "Both these papers, it will be observed, appear to be perfect and complete wills, properly executed and duly attested. They both likewise relate exclusively to personal estate, and by specific legacies and residuary clauses, each is entirely adequate to the disposition of all the personal property belonging to the decedent. It is very true that there are no words in the latter will expressly revoking the former, yet I think from the nature of the instrument itself, that it must necessarily operate as a revocation of it"; and the last will alone is admitted to probate.

2. "A man cannot have two independent wills of personal estate at the same time, each acting upon the same subject matter, and each professing to make a distinct and full disposition of such subject matter; although he may have several papers, partially disposing of his property, neither of which in itself, is, or purports to be, a complete will".

—*In re Edward Fisher*, 4 W. 254, 264.

3. "The will has been altered in a material part since its execution, and this alteration not being explained, must avoid the instrument". "If there has been a material alteration by a person claiming under it, the will is thereby invalidated".

—*In re Wilson*, 8 W. 171, 179.

4. The intent governs and extrinsic circumstances are considered. See CONSTRUCTION OF WILLS.

—*Hopkins v. Holt*, 9 W. 228, 230.

5. "In respect to the capacity of a lunatic to make a will, great stress is laid on the nature of its provisions, in determining whether or not it was made in a lucid interval."

—*Ripley v. Babcock*, 13 W. 425, 429.

6. "The owner of land desiring to make disposition of it at his death, has three courses open to him", one of which is by a will. See ESCROW.

—*Prutsman v. Baker*, 30 W. 644, 652.

7. Whether a court of equity has power to set aside the probate of a will procured through fraud, query. See FRAUD.

8. Where there has been gross laches, equity will not give relief or set aside the probate of a will, though the testator did not have testamentary capacity. See EQUITY. —*Holden v. Meadows*, 31 W. 284, 289.

9. A court of equity will not set aside the probate of a will for fraud, where such fraud consists merely in concealing the fact that the will was fraudulently obtained.

10. Equity has no jurisdiction to set aside the probate of a will fraudulently obtained from the testator. See EQUITY.

11. It is not decided whether the probate court could so set the will aside.

12. "The allowance of the will by the county court is an adjudication" of the due execution thereof, "and such adjudication is conclusive of the fact" that the will was not "procured by fraud upon and undue influence over the mind of the testator".

—*Archer v. Meadows*, 33 W. 166, 169.

13. An oral promise by a residuary legatee to the testator, to pay certain sums, is held to create a trust and "modifying to that extent the previous order admitting the written will to probate". See JURISDICTION. PRAYER FOR RELIEF. TRUSTS.

—*Brook v. Chappell*, 34 W. 405, 411, 419.

14. "A legatee is one who takes personal property, and a devisee one who takes real property, under a will".

—*Chandler's Appeal: Est. of McCoy*, 34 W. 505, 509.

15. Title under a will passes from the decease, after the probate. See TITLE.

—*Bridge v. Ward*, 35 W. 687, 692.

16. Probate of will, not set aside in county court; however the question is not determined, laches being shown. See EQUITY.

—*In re Est. of Holden; Meadows' Appeal*, 37 W. 98.

17. A will cannot be reformed. See REFORMATION.

—*Sherwood v. Sherwood*, 45 W. 357, 360.

18. "Every sane man must be allowed to make his own contract as well as his own will", says Gibson, C. J. That great jurist plainly suggests that courts have no more authority to make wills for the dead, than contracts for the living, according to judicial notions of fitness and propriety. *Bash v. Bash*, 9 Pa. St. 260.

19. Breaking a will is very much like making one; imposing upon the testator the statutes of descent and distribution against his solemn wish in dying. Perhaps courts have been quite too willing to do so.

20. There is a vicious notion prevalent that any will not acceptable to the testator's next of kin may be broken in the courts upon very

frivolous grounds. But every one should have the same power to dispose, by will, after his death, in accordance with his own wishes, of whatever he may leave behind him in his own sole right, as he had in life to dispose of it by contract or by gift.

21. And it is as much the duty of courts to uphold and enforce his will after death, as to uphold and enforce his contracts made during life". "It is the policy of the law not to seek grounds to avoid either; but so to deal with both, if it can be done upon sound legal construction, as to uphold and enforce them". Ryan, C. J. See also CHARITABLE TRUSTS.

22. "As a general rule, a will speaks as from the time of the testator's death, and is governed by the law in force at the time it takes effect"; and it is so held here. p. 106. —*Dodge v. Williams*, 46 W. 70, 90.

23. On the issue as to whether a will "should be admitted to probate", "all other questions, such as the construction of that will; whether there was any claim or trust upon the estate to be enforced contrary to its provisions; and as the proper disposition of the property of the testatrix,—did not enter into that issue, and should not be considered in determining the probate of the will".

24. "The construction of the will, and what should be done with the estate, are matters for future consideration".

25. "After the will is probated the court can determine, in a proceeding instituted for that purpose, whether or not the testatrix had put it out of her power to make the disposition of her property she did by the will". —*Farmer v. Sprague*, 57 W. 324, 327.

26. "As a general rule, extrinsic evidence cannot be received either to explain or vary" a will. (Cases). *Morgan v. Burrows*, 45 W. 211.

27. "Of course, such evidence is often resorted to in case of wills (as well as deeds) for the purpose of placing the court in the position of the testator, so as to more intelligently interpret the language used. Redfi. on Wills, 183; *Morgan v. Burrows*, supra; *Messer v. Oestreich*, 52 W. 689".

28. "But where the language of the will is plain and unambiguous, and the object and subject of the testator's bounty is definitely pointed out, and there is no latent ambiguity nor chance for implication, extrinsic evidence is not admissible to enlarge, diminish, or control the meaning of the words employed".

—*Brunn v. Schuett*, 59 W. 260, 262.

29. A will may be probated though written in a language not understood by the testator. See PROBATE OF WILLS.

—*Will of Walter*, 64 W. 487, 493.

30. The devise of land "only became effectual upon the admission of the will to probate; but, when so admitted, it related back to the death

of the testator, and must be treated as speaking from that moment. Sec. 2294; *Scott v. West*, 63 W. 552.

31. In legal contemplation, the devise took effect, and the plaintiff acquired legal title to the land subject to such widow's right (conditional life estate), immediately upon the death of the testator. Sec. 2278; *In re Pierce*, 56 W. 560; *Newman v. Waterman*, 63 W. 616."

—*Prickett v. Muck*, 74 W. 199, 205.

32. Original will and codicil considered "as one instrument in law." See CONSTRUCTION OF WILLS. —*Burnham v. Burnham*, 79 W., 557, 564.

33. One taking under a will is estopped from questioning any other part of the same, but confirms the whole. See ESTOPPEL.

—*Towle v. Towle*, 79 W., 596, 601.

34. Disposition of a testatrix's estate, and also her husband's (living) estate, with an election by the husband to take under her will, binds also his estate. See CONSTRUCTION OF WILLS.

—*Allen v. Boomer*, 82 W., 364, 372.

35. An instrument of testamentary character, not properly executed as a will, but held incorporated and a part of a later instrument, executed and admitted as a will. See EXECUTION OF WILLS.

—*Skinner v. Amer. Bible Soc.*, 92 W. 209, 212-3.

36. An unambiguous lease not probated. "A will is an instrument by which a person makes a disposition of his property to take effect after his decease." See also PROBATE OF WILLS.

—*Est. of Ogle*, 97 W. 56, 58.

37. The right of the testator to dispose of his property, and to discriminate without giving reasons. See UNDUE INFLUENCE.

—*Cutler v. Cutler*, 103 W. 258, 264.

38. Fraud alleged as to attorney reversing the names of beneficiaries in drawing a will, disallowed. See FRAUD.

—*Roberts v. Roberts*, 107 W., 213, 215.

39. A will takes effect, and is governed by the law existing at the decease of the testator. See CONSTRUCTION OF WILLS.

—*Will of Kopmeier*, 113 W., 233, 239.

40. Two instruments, one signed in 1890 with one witness, the other immediately following dated 1899, and referring to the other as his will, signed with two witnesses and such paper "purports to dispose of property of the testator after his death", though ambiguous and uncertain,—are determined a paper "in the form of a will, and was

properly admitted to probate as such," "the question of its construction" not being determined. —*Flood v. Kerwin*, 113 W., 673, 680.

41. A paper, dated, signed, and with two subscribing witnesses, given by father to son, reading,—“this is to certify that the notes held by me against B. (the son) shall be null and void after my death and non-collectible”—, is held to be not dealing “contractually”, and proclaims but “a certain intention”, but,

42. “The writing upon its face presents all the elements of a testamentary instrument; one which declares the present will of the maker as to disposal of property after his death, without attempting to declare or create any rights therein prior to such event. (Many citations)”.

43. So held, but that it was “legally revoked by the will of” later date “disposing of all the testator’s personal property”, without mention of such notes, “and therefore ineffectual as a will;

44. Still it does not exclude the possibility that” “the parties in fact made a binding agreement, upon sufficient consideration, to the effect that the indebtedness evidenced by these notes should become cancelled upon the death of the owner”. Such evidence held insufficient. See also WRITINGS. —*Templeton v. Butler*, 117 W., 455, 456.

45. As to the “right of disposal”, existing with “no duty of equity or conscience to thwart” the will when free, even as against “the hope of inheritance”. See UNDUE INFLUENCE.

—*Vance v. Davis*, 118 W., 548, 550.

46. An agreement to “make a will of the real and personal property”, is held “void under the rule laid down in *Ellis v. Cary*, 74 W. 176, (other cases, see SERVICES), because it was an oral contract to devise real property as well as personal property, and, being indivisible, was contrary to the statute of frauds”. —*Dixon v. Sheridan*, 125 W. 60, 64.

47. As to an ordinary note and mortgage for \$500, no money consideration being passed, and a signed memorandum of the same date, providing that the \$500 was, by the payee, “to be distributed after my death, as follows” (detailing), the memorandum not having been delivered to or signed by the payee, and therefore perhaps not “a part of the transaction”, and to be used only “to refresh” “recollection as to the consideration”,—held, to be not contractual, but of testamentary character.

48. If the transaction “was contractual—that is, if there was a promise on the part of C. (the payee) to expend certain sums for certain definite purposes after her mother’s death, and in consideration thereof a promise by the intestate to repay to her the sums so expended, the performance of which latter promise was secured by the mortgage in question—no reason is perceived why the contract should not be enforced”.

49. “If, on the other hand, the transaction was testamentary—that is,

if the written documents, viewed in the light of the attending circumstances, must be construed not as a present contract, but as a direction that C. should receive \$500 out of her mother's estate after her death and expend the money so received for the purposes named—then the papers cannot be enforced as a contract, but must operate as a will if they operate at all. *Templeton v. Butler*, 117 W. supra'.

—*McCourt v. Peppard*, 126 W. 326, 330.

50. An instrument in the form of a deed conveying property "in trust for certain purposes named therein with power to sell, lease or mortgage" and for distribution of the proceeds to various parties, the deed not having been delivered, is held not testamentary in character.

51. As to holding deeds testamentary, "in *Clay v. Layton*, 134 Mich. 317, the court lays down the principles governing such cases",—and "we think the doctrine laid down" "is sound in principle and in harmony with the great weight of authority",—"namely:

52. '(1) Those in which the testamentary intent is clearly deducible from the writing', "in which it was held "there was no difficulty in holding the instrument a will;"

53. '(2) Those where the instrument is ambiguous, or of doubtful meaning', and held "that it might be interpreted in the light of the circumstances;"

54. '(3) Those where there is nothing to indicate a testamentary intent, but, on the contrary, the instrument in terms plainly a deed',—and held "that the instrument could not be contradicted and shown to be a will".

—*Dexter v. Witte*, 138 W. 74, 81.

55. "The legal effect and the validity of the contents of the writing are not involved" at the probate thereof.

56. "As a matter of practice, such questions are usually considered separately in probate and administration proceedings. *Farmer v. Sprague*, 57 W. supra."

57. And after probate, the court may determine that a paragraph thereof "had been impliedly revoked". See also REVOCATION.

—*Will of Battis*, 143 W. 234, 237.

58. "The right to make a will is more sacred than the right to make a contract. The latter, as evidenced by the writing, may be judicially reformed or set aside upon equitable ground. The former not. *Machem v. Machem*, 28 Ala. 374.

59. The court and parties must take it as they find it and,—if valid, abide by the intent embodied in it so far as that can be discovered. There is no judicial power even to correct a will which extends beyond the field of construction and interpretation. (Citations)". *Dodge v. Williams*, 46 W. supra, approvingly quoted.

60. "At the time of the adoption of our fundamental law no right

was more firmly entrenched in the policy of this country or significantly a part of the common law, than that to make a will.

61. Therefore it was guaranteed by sec. 1, art. 1, of the constitution and was also made fundamental by sec. 13, art. 14." pp. 444, 445.

62. As to lack of power of courts to substitute the agreement of parties for the will of a decedent, and such judgment being void. See PROBATE OF WILLS.
—*Will of Rice*, 150 W. 401.

WITH WILL ANNEXED.

See ADMINISTRATOR WITH WILL ANNEXED.

WITNESSES.

See also CROSS EXAMINATION. EVIDENCE. EXAMINATION OF WITNESSES. EXECUTION OF WILLS. EXPERT TESTIMONY. HUSBAND AND WIFE. IMPEACHMENT OF WITNESSES. LEADING QUESTIONS. OBJECTIONS, PARTIES. TRANSACTIONS WITH DECEASED PERSONS.

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1. After testifying as to general reputation a witness can state whether "he would believe him under oath". See also IMPEACHMENT OF WITNESSES.
 —*Wilson v. State*, 3 W. 798, 804.

2. The cross examination in the discretion of the judge may show the friendship or enmity of the witness to the parties. See CROSS-EXAMINATION.
 —*Kellogg v. Nelson*, 5 W. 125, 131.

3. As a general rule a witness is entitled to be examined without interruption from the opposite party. See EXAMINATION OF WITNESSES.
 —*Howland v. Jenks*, 7 W. 57, 58.

4. As to correct practice for examination when a criminal charge made against witness. See EXAMINATION OF WITNESSES.
 —*Kirschner v. State*, 9 W. 140, 144.

5. A party cannot recover witness fees for himself.
 —*Grinnell v. Denison*, 12 W. 402.

6. A wife may be a witness for her husband or a third party when acting as agent. See HUSBAND AND WIFE.
 —*Birdsall v. Dunn*, 16 W. 235.

7. The husband is a competent witness when agent of the wife, "within the scope of his agency." See HUSBAND AND WIFE.
 —*Hobby v. Bank*, 17 W. 167, 169.

8. A witness may refresh his memory with memoranda, otherwise defective as accounts. See ACCOUNTS. —*Schettler v. Jones*, 20 W. 412.

9. When parties, husband and wife may be witnesses for and against each other. See HUSBAND AND WIFE.

—*Terrell v. Ledwell*, 21 W. 182.

10. A divorced wife is a competent witness as to agency and matters not confidential during coverture, "after she had been divorced". See **DIVORCE**.
—*Crook v. Henry*, 25 W., 569, 573.

11. Witnesses are held entitled to full fees, though attending in "another cause at the same term". See **COSTS AND FEES**.

—*McHugh v. C. & N. W. Ry. Co.*, 41 W. 79, 82.

12. When witness refuses to answer at the taking of a deposition, proceeding outlined. See **CONTEMPT**.

—*State ex rel. Lanning v. Lonsdale*, 48 W. 348, 370.

13. "Any party to an action is entitled to the testimony of any person who is cognizant of facts material to his case, and when the party procures the testimony of a witness, such witness should not be discredited merely because he is engaged in some particular avocation, if it be a lawful one.

14. Whether the witness be a mechanic, a merchant, a farmer, a lawyer or a clergyman, unless his credibility be impeached by some of the methods sanctioned by law, he is to be believed." See also **ATTORNEY AND CLIENT**.

—*Connolly v. Straw*, 53 W. 645, 651.

15. A husband as a nominal party to the action is a competent witness for his wife in an action as to her separate estate. See **HUSBAND AND WIFE**.

—*Snell v. Bray*, 56 W. 156, 160.

16. Rules as to husband and wife fully stated. See **HUSBAND AND WIFE**.

—*Carney v. Gleissner*, 58 W. 674, 675.

17. Where the examination and cross-examination of a witness was concluded without objection as to his competency, held that it was too late to object "on the ground of his intoxication", on a motion for a new trial.

—*Dickinson v. Buskie*, 59 W. 136, 138.

18. "The rule that the majority of equally credible witnesses ought to prevail is not recognized in this state. *Bierbach v. Goodyear Rubber Co.*, 54 W. 208."

—*Shekey v. Eldredge*, 71 W., 538, 540.

19. "Ordinarily a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury." See also, as to experts and non-experts, **EXPERT TESTIMONY**.

—*Andrews v. Youmans*, 82 W., 81, 83.

20. "The attendance of such witnesses having been regularly proved," it is held that, properly, "costs are allowed for travel and attendance of witnesses for defendant who were not sworn at the trial."

—*Charles Baumbach Co. v. Gessler*, 82 W., 231, 233.

21. A testator's attorney signing as a subscribing witness to the will drawn by him, is competent to testify to all the necessary facts as such witness. See *EXECUTION OF WILLS*.

22. "As the circuit court heard the witnesses testify, and had opportunities for judging of their intelligence, fairness, and candor which we do not possess, we do not feel that we could interfere with the finding of that court unless we are able to say that there is quite a preponderance of evidence against its conclusion". See also *TESTAMENTARY CAPACITY*.
—*McMaster v. Scriven*, 85 W. 162, 168.

23. Attendance as a witness without the state, which could not be compelled by subpoena, "is sufficient consideration to support a promise to pay additional compensation".

—*Armstrong v. Prentice*, 86 W. 210, 212.

24. As to the presumption of capacity of a child over seven years of age and under fourteen. See *INFANTS*.

—*Molaske v. Ohio Coal Co.*, 86 W. 220, 226.

25. A party called by the other side, or other person, "being present in court, he must testify without the payment of his fees", as by such attendance he "waived their payment or tender in advance".

—*Rozek v. Redzinski*, 87 W. 525, 529.

26. "Ordinarily, the testimony of one competent witness is sufficient to sustain a conviction," though there are crimes in which not.

27. As to competency of child over four years of age as a witness. See *INFANTS*.

—*State v. Juneau*, 88 W. 180, 183.

28. Credibility is not affected by the party calling the witness.

29. As to a party being a witness for the adverse party, and showing the facts different from what a party's witness testified to. See *IMPEACHMENT OF WITNESSES*.

—*Garny v. Katz*, 89 W. 230, 231.

30. Held proper to be shown, that the adversary's principal witness "was intoxicated at the time of the transaction to which he testified".

—*Mace v. Reed*, 89 W. 440, 443.

31. "Preponderance may not go with numbers". See *IMPEACHMENT OF WITNESSES*.

—*O'Brien v. C. & N. W. R. Co.*, 92 W. 340, 343.

32. "A court is not bound to accept" the uncontradicted statement of a witness. See *IMPEACHMENT OF WITNESSES*.

—*Zimmerman v. Bannon*, 101 W. 407, 412.

33. An heir, with no provision for him in a will, "was a competent subscribing witness." "Beneficial interest under the will is the test. In re Lyon's Will, 96 W. 339" (See *EXECUTION OF WILLS*).

—*Will of Hoppé*, 102 W. 54, 55.

34. "The effect of our statutes is to require all persons to obey the subpoena of a court, and their compensation for such obedience is fixed at \$1.50 per day, with mileage. Secs. 4063, 4064, 4067.

35. In a civil action between private parties those fees must be paid in advance, if demanded. Sec. 4057". Not so in criminal cases. Sec. 4058.

36. "The duty of every witness is to attend as long as commanded and to testify to all material facts within his knowledge", "notwithstanding the knowledge thereof may be due either to his learning or his expert faculties".

37. "The expert, be he mechanic, physician, engineer, or chemist, must obey the subpoena of the court and must testify to such facts as are within his knowledge,

38. Whether these facts may have required professional learning, study, or skill to ascertain them or not. If, when placed on the witness stand, he has such knowledge, he must testify to it".

39. "However", "the subpoena under statutes like ours does not compel the expert nor other witness to equip himself by labor with ability to testify either to an opinion or to any other fact which might be ascertained by special services,

40. And hence" "from the mere subpoena and compulsion to testify as a witness results no implied contract upon anyone to pay the expert anything in excess of the statutory fees,

41. Recognizing, however, that, if he does perform work in preparation and qualification to enable him to testify at the request of any person, implied contract for reasonable compensation may arise, or an express contract will be valid. (Many cases)".

42. "Liability cannot be imposed upon counties or other governmental subdivisions of the state except in accordance with statute law".

—*Philler v. Waukesha Co.*, 139 W. 211, 213.

43. "A person is not necessarily incompetent to testify because of" "his impaired mental condition".

44. "Whether he is so infirm by reason of insanity, or otherwise, as not to be entitled to testify at all, is generally in the field of competency.

45. Therefore the decision of the trial court in favor of receiving the evidence for what it is worth, cannot be disturbed unless manifestly wrong.

46. Ordinarily such infirmity goes to the weight of the witness's evidence, not to competency to testify,

47. Unless the impairment is substantially total or such as to render the person wholly unconscious of the obligations of an oath. (Citation); *Cannady v. Lynch*, 27 Minn. 435". —*Burns v. State*, 145 W. 373, 384.

48. A wife is a competent witness for a co-defendant of her husband whose interest is merely representative or nominal. See also PARTIES.

—*Robinson v. McGinnis*, 145 W. 476, 477.

49. Competency of executor to testify to declarations of his testate, is undetermined. See TRANSACTIONS WITH DECEASED PERSONS.

—*Will of Klehr*, 147 W. 653, 656.

50. The owner "of a building and other common articles of personal property, was competent to give his opinion of the value" the property having been destroyed by fire. (Cases).

—*Farley v. Spring Garden Ins. Co.*, 148 W. 622, 627.

51. "A party asking a witness an immaterial question on cross-examination is bound by the answer given and it is error to permit the witness to be impeached relative thereto". (Citations).

—*Freeman v. Dells P. & P. Co.*, 150 W. 93, 102.

52. Under sec. 2374, stats. 1913, "the decree of divorce did not, for one year following its entry, affect the status of the parties", and the woman "for all purposes of giving testimony was still the wife of the" man, during such year.

—*Hiller v. Johnson*, 162 W. 19, 23.

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(See also Appropriate General Titles for Constructions, Definitions, Etc.)

1. "Cases at law", under the constitution do not include a proceeding to appoint guardian, so as to require a jury trial in county court. See also GUARDIAN AND WARD. —*Gaston v. Babcock*, 6 W. 503.

2. In a contract for the sale of lands the phrase "for value received" is a sufficient expression of the consideration to take the case out of the statute of frauds. —*Cheney v. Cook*, 7 W. 413, 423.

3. "Words susceptible of different applications are to be limited or extended so as to subserve the object which the legislature had in view". —*Lawrence v. Vilas*, 20 W. 381, 386.

4. "Unless is equivalent to except, and is here used (Sec. 2272) to introduce an exception to the right of the halfblood." —*Est. of Kirkendall; Cramer's Appeal*, 43 W. 167, 178.

5. "Claim or demand", in the city charter, is held not to include action for personal torts. The words "certainly would include interest as well as principal upon a liquidated demand against the city." —*Kelley v. City of Madison*, 43 W. 638, 644.

6. "The general rule as stated by the authorities is, that a merger takes place whenever a legal and equitable estate in the same land come to one person, in the same right, without an intervening interest outstanding in a third person. Then, it is said, the equitable merges in the legal estate, the latter alone subsisting." —*Scott v. Webster*, 44 W. 185, 193.

7. "Pay over and deliver", construed to mean in personalty; and realty so devised with power of sale is held to be "personalty". See CONSTRUCTION OF WILLS.

8. "The words, institution and organized, appear to imply an incorporation". See CHARITABLE TRUSTS. —*Dodge v. Williams*, 46 W. 70, 97, 100.

9. "Grant as used in" sec. 2340, includes "a deed of bargain and sale to a married woman, executed by a stranger".

10. "Dr. Webster defines 'earnings' to be that which is earned; that which is gained or merited by labor, services or performances; wages or reward".
—*Dayton v. Walsh*, 47 W. 113, 115.

11. "Promissory note" is defined as a written engagement to pay money. See PROMISSORY NOTES, ETC.

12. A certificate of deposit is "in law a promissory note".

13. Money includes coin and paper, etc. See MONEY.

14. "Currency means money—coined money and paper money equally."

15. Current funds has the attributes of currency when "used in the legal sense of money".
—*Klauber v. Biggerstaff*, 47 W. 551, 555.

16. While the word "as", before "administrators, etc." has a significance showing representative capacity, in contracts, the rule does not apply "to a bond required by statute to be given to them in their representative capacity in a judicial proceeding." See EXTRS. AND ADMRS.
—*Kasson v. Est. of Bocker*, 47 W. 79, 86.

17. "Receipts in full" are held explainable and not conclusive. See SETTLEMENT.
—*Catlin v. Wheeler*, 49 W. 507, 523.

18. "We hold that a subsisting mechanic's lien, for which a petition was filed, is an incumbrance within the ordinary meaning of the word".
—*Redmon v. Phoenix F. Ins. Co.*, 51 W. 292, 303.

19. "To inquire in a summary manner", is "certainly not a mode of trial known to the common law, but rather an inquiry to which the common law was a stranger. It is an examination in which the ancient established course of legal proceedings is disregarded. It dispenses with oral examination", "allows affidavits, inspection and other methods of proof".
—*Schafer by Gdn. v. Luke*, 51 W. 669, 675.

20. 'Subscribed' does not mean 'written signature', as to a summons. See HANDWRITING.
—*Mezchen v. More*, 54 W. 214, 215.

21. 'In good faith' includes lack of knowledge of an unreported conveyance.

22. 'Conveyance' is construed to include 'mortgage', under sec. 2441. See DEEDS.
—*Rowell v. Williams*, 54 W. 636, 639.

23. "The term 'next friend' ", is held to be "broad enough to include the mother of the minor.

24. It is, or rather was, by the common law the legal designation of the person by whom an infant brought and prosecuted an action either at law or in equity. When these proceedings were had such person was, and now is, designated a guardian ad litem."

—*McKinney v. Jones*, 55 W. 39, 46.

25. 'Proper residence', is an abode "with the present intention of remaining". See DOMICIL.

—*State ex rel. Wood Co. v. Dodge Co.*, 56 W. 79, 86.

26. "Testimony is the declaration of a witness under oath or affirmation". 'Testifying is the giving of evidence'. 2 Burrill's Law Dict. 525.

27. 'To testify is to make a solemn declaration on oath or affirmation for the purpose of establishing or making proof of some fact'. Webster".

—*Nash v. Hoxie*, 59 W. 384, 388.

28. "Circumstantial evidence" defined. See EVIDENCE.

—*Bouck v. Enos*, 61 W. 660, 663.

29. "The word 'surviving'," is held here to include, not only grand-child, but "the legal issue of any deceased grandchild".

30. "The word 'surviving', or survivor or survivors, is often used in this broad, comprehensive sense as including 'others', as well as a particular class. *Wilmot v. Wilmot*, 8 Ves. Jr. 10". (Many other cases).

—*Scott, Extrs. v. West*, 63 W. 529, 593.

31. For the rule of preponderance of evidence. See MISTAKE.

—*Parker v. Hull*, 71 W. 368, 371.

32. Taking of a deposition by a notary is held not to be "a judicial act in a legal sense." See HOLIDAYS.

—*Green v. Walker*, 73 W. 548, 550.

33. The term "good moral character," especially as to attorney defined. See ATTORNEY AND CLIENT.

—*In re O*——, 73 W. 602, 618.

34. "In a legal parlance, a 'duplicate application' is not simply a copy of the application". "In Burrill's Law Dic. 'duplicate' is defined as 'an original instrument repeated'".

—*State ex rel. Fenelon v. Graffam*, 74 W. 643, 647.

35. "Acceptance is the receipt of the thing with an intention to retain it indicated by some act or words sufficient for that purpose."

—*Schmidt v. Thomas*, 75 W., 529, 532.

36. "Words 'debt' and 'indebtedness'", "do not always import a legal obligation." See CONSTRUCTION OF WILLS.

—*Scott v. Neeves*, 77 W., 304, 310.

37. "Suitable" as to welfare of child's custody in guardianship statute, construed. See PARENT AND CHILD.

—*Sheers v. Stein*, 75 W. 44, 51.

38. The legal meaning of an accord set forth. See ACCORD AND SATISFACTION.

—*Sieber v. Amunson*, 78 W. 679, 682.

39. As to "void" in the statute, sometimes meaning "voidable." See **SALE OF REALTY.** —*Melms v. Pabst Brewing Co.*, 93 W., 153, 164.

40. "A contingent remainder" is held to be either 'a provision', or the giving it indicates an intention not to make a provision. See **AFTERBORN CHILD.** —*Verrinder v. Winter*, 98 W. 287, 291.

41. The word "children", defined and held in the instant case to include remote descendants. See **CONSTRUCTION OF WILLS.** —*Will of Scholl*, 100 W. 650, 655.

42. "Bequeath" is used as personalty, and "devise" as to realty; income of realty is "real estate." See also **NUNCUPATIVE WILL.** —*In re Davis's Will*, 103 W. 455, 457.

43. A "remainder in the real estate" constitutes a "provision." See **AFTERBORN CHILD.** —*In re Donges's Est.*, 103 W., 497, 512.

44. "In order to constitute a family, the persons composing it must be under one management or head. *Poor v. Hudson Ins. Co.*, 2 Fed. Rep., 432." "Families may be separate, though living under the same roof". —*Heinemann v. Pier*, 110 W., 185, 188.

45. "'In law', the word 'inheritance' is defined to be 'the estate cast upon the heir by law immediately on the death of the ancestor; in a more general sense, any property passing by death to those entitled to succeed'. Cent. Dict."

46. "The word succession is defined to be: 'The act or right of legal or official investment with a predecessor's office, dignity, possessions, or functions; also the legal or actual order of so succeeding, or that which is or is to be vested or taken'. Standard and Century Dicts." —*Glascott v. Bragg*, 111 W., 605, 608.

47. As to meaning of "balance", distinction between "account" and contract, and as to "paid in full today". See **ACCOUNT BOOKS.** —*Prairie G. C. M. Co. v. Luder*, 115 W., 20, 24.

48. "Face value", as used in sec. 664, concerning tax certificates, follows "the common meaning", and "is the amount named in the paper, not including interest or anything determinable by computation or evidence aliunde, especially where the right to interest does not appear upon the face of the paper".

49. "We see no reason for holding that 'face' means any less than 'face value' ". —*Olson v. Tanner*, 117 W., 544, 547.

50. "Lawful heirs" held to mean survivors at "the period fixed for distribution", of those who were heirs at the decease of the testator. See **CONSTRUCTION OF WILLS.** —*In re Cowley's Will*, 120 W. 263, 265.

51. "Residue", where widow elects, is balance after she is paid her share. See DESCENT AND DISTRIBUTION.

—*Bradley's Will*, 123 W. 186.

52. The word "survivors" as to the benefit certificate, "does not include one who 'was neither a relative of the deceased, nor a member of his household, nor connected with him by marriage'"; held here, not to include one who "had nursed and cared for the insured for several weeks prior to his death". —*Grand L. H. S. v. Lemke*, 124 W. 483, 486.

53. As to meaning and effect of 'death without issue'. See VESTING OF ESTATES, ETC.

—*Korn v. Friz*, 128 W. 428, 437.

54. "The word 'consent' is sometimes treated as synonymous with 'assent', 'acquiesce,' and 'concurrence'". Other definitions. See also HOMESTEAD.

—*Bartle v. Bartle*, 132 W., 392, 398.

55. In a contract for large proceeds for sales of land, with a very small consideration, "the term 'expenses' as used in the agreement", is held to include "all outlays," "whether of money or labor", and the value of the party's services in making such sales.

—*Rust v. Fitzhugh*, 132 W., 549, 559.

56. "Ditto marks" "are to be read as a representation of what appears written above them and as meaning 'the same as above'."

57. "Abbreviations commonly in use in the English language may be used in general writing and legal documents and records as part of the English language. (Cases)".

—*Chase v. Maxey*, 134 W. 435, 436.

58. "The word 'purchaser'", in sec. 2108, converting a life estate into a fee to purchaser, on execution of a power, "is not used in its technical sense". See also LIFE ESTATES.

—*Perkinson v. Clarke*, 135 W. 584, 592.

59. "The market value of land at any time is the price that would in all probability result from fair negotiation, where the seller is willing to sell and the buyer desires to buy. (Cases)."

60. The expressions 'actual value', 'market value', or 'market price', when applied to an article, mean the same thing. *Sanford v. Peck*, 63 Conn. 486".

—*Maxon v. Gates*, 136 W. 270, 289.

61. "A clear preponderance" of evidence, defined. See JUDICIAL DECISIONS.

—*Ott v. Boring*, 139 W., 403, 407.

62. "By 'seisin' is meant a fixed vested right of enjoyment of the estate," etc. See also DOWER.

—*Will of Prasser*, 140 W., 92, 96.

63. "'Or' is usually disjunctive; occasionally, to avoid absurdity, it is construed as a conjunctive and equivalent to 'and', but it is also used in the sense of 'alias'."

—*Menominee R. B. Co. v. Augustus Spies L. & C. Co.*, 147 W. 559, 569.

64. "Intention is usually a question of fact, and it is always a question of fact where, from other uncontroverted facts relative to intention, contradictory inferences may be drawn".

—*Hoff v. Hackett*, 148 W. 32, 34.

65. The word 'mother' in a benefit certificate held to include step-mother. See also INSURANCE.

—*Jones v. Mangana*, 151 W. 215, 223.

66. As to meaning of words 'living together' as to married parties. See HUSBAND AND WIFE.

—*Northwestern I. Co. v. Ind. Com.*, 154 W., 97, 102.

67. "Usually the term 'value' means market value, and in the absence of circumstances showing that another meaning shall be given it, such customary meaning will control".

—*Burroughs v. Joint S. D.*, 155 W., 426, 429.

68. "Plow land in such connection",—the sale of farming lands,—“means tillable land, not arid land which might be plowed without any beneficial results”.

—*Govier v. Brechler*, 159 W. 157, 163.

69. "The words 'more or less' are intended to cover a reasonable excess or deficit". Such phrase is held to cover "three acres less than the amount named in the contract", being seventy-five acres "at the rate of \$135 an acre", and not to diminish such price, there being no fraud. In *Richards v. Millard*, 146 W. 552, it was held to cover "land sold as about 160 acres more or less and there was in fact 152.81 acres".

—*Frey v. Etzel*, 160 W. 311, 314.

70. "Liability is 'the state of one who is bound in law and justice to do something which may be enforced by action'. (Citations)."

—*State ex rel Quinn v. Thompson's M. F. Co.*, 160 W. 671, 675.

71. It being "necessary to effect a testator's intention", "the word 'revert' was" held "used in the sense of 'to go'". See also VESTING OF ESTATES.

—*Will of Owens*, 164 W. 260, 265.

72. The "ordinary meaning" of the word "pay", "is to discharge an indebtedness by the use of money". (Cases). See also BOND FOR MAINTENANCE.

—*Krahn v. Goodrich*, 164 W. 600.

WRITINGS.

See also **CONTRACTS. HANDWRITING. PAROL.**

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Production of—continued

- Not duplicates of originals, 50.
- Notice at trial, insufficient, 1.
- Writing not in court, 1.
- Order to deposit with clerk, 11.
- Proper discretion, 11.

Production of—continued

- Private books and papers, 52.
- Of a third party, 52.
- Receipts in full, 12.
- Telegram:
- Varying offer in writing, 22.

1. "Notice to produce the original" writing, given at the trial only is insufficient, the writing not being in court in the possession of the party notified. See also EVIDENCE. —*Barker v. Barker*, 14 W. 131, 150.

2. Memoranda are "not admissible as evidence" but may be used to assist the memory. See ACCOUNT BOOKS.

—*Schettler v. Jones*, 20 W. 412.

3. "We think the rule is correctly stated" by "Cowen, J., in *M'Crea v. Purmort*, 16 Wend. 460: 'Whenever a right is vested or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common sense construction of the instrument;

4. But any writing which, neither by contract, the operation of law nor otherwise, vests or passes or extinguishes any right, but is only used as evidence of a fact, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts.

5. Thus, a will, a deed or a covenant in writing, so far as they transfer or are intended to be the evidences of rights, cannot be contradicted or opposed in their legal construction by facts aliunde.

6. But receipts and other writings which only acknowledge the existence of a simple fact, such as the payment of money, for example, may be susceptible of explanation and liable to contradiction by witnesses' "

7. In this case letters written some weeks after the making of the contract were put in evidence and were allowed to be explained by parol.

—*Clifford v. Baessman*, 41 W. 597, 600.

8. Where a witness made a memorandum "at the time of the facts or occurrences it refers to", and then a copy of the same, and then dictated another copy from the last copy, the original and first copy being defaced, and testified that the last copy was "a true copy from the original" which "was correct when" he made it, and that "he resorted to the paper to refresh his memory, and in resorting to it his memory was refreshed", held, that a specific "objection to the witness testifying from the paper", was properly overruled.

9. "It is true, this kind of evidence is open to more or less suspicion because of the unconscious effect which the memorandum may have upon the mind of the witness, and which may lead him to suppose he recalls facts when he really does not. But this affects the credibility rather than the competency of the testimony".

—*Folsom v. Apple River L. Co.* 41 W. 602, 606.

10. "It is well settled in England and this country, that where a proposal for a contract is made by letter, sent by mail, the deposit of a letter of acceptance in the post office by the person to whom the proposal is made, addressed to the person making it, at the proper place, completes the contract, even though the latter never received the letter accepting his offer. *Vassar v. Camp*, 11 N. Y. 441, and cases cited'.

—*Washburn v. Fletcher*, 42 W. 152, 166.

11. Under the statute requiring the production for inspection by the opposite party of writings, and an order directing deposit thereof for two days with the clerk, it is said: "The power exercised by the court under this section is quite analagous to that formerly exercised by the court of chancery in compelling a discovery of books and papers"; and it was held a proper exercise for the discretion of the court.

—*Phelps v. Atlantic & F. Tel. Co.*, 46 W. 266, 268.

12. "Receipts in full" are not conclusive and may be explained. See SETTLEMENT.

—*Catlin v. Wheeler*, 49 W. 507, 523.

13. A "medical examination signed by the examiner alone" is not such a writing as will exclude oral evidence as independent evidence by the examiner, in an action where the patient is plaintiff.

14. It is not "within either of the three classes" given by Greenleaf, "to which the rule is applicable that oral cannot be substituted for written evidence: first, where the law requires a written instrument; second, where the parties to a contract have put it in writing; and third, where one party asserts the existence of a writing material to the issue, and it is disputed by the other party. Vol. 1, 85 to 88 inc.

15. In section 90 the learned author says: 'But where the writing does not fall within either of the three classes already described, there is no ground for its excluding oral evidence;

16. As, for example, if a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it.

17. Thus, also, the payment of money may be proved by oral testimony, though a receipt be taken. * * *.

18. And any writing inadmissible for the want of a stamp or other irregularity may still be used by the witness who wrote it, or was present at the time, as a memorandum to refresh his own memory, from which alone he is supposed to testify, independently of the written paper.' "

19. "A witness cannot be asked on cross-examination" as to a writing, without placing it in his hands. See CROSS-EXAMINATION.

—*Teegarden v. Caledonia*, 50 W. 292, 295.

20. As to letters written by plaintiff asking payment of a balance due, "and reiterating the contract" upon which based, and failure of defend-

ant to "reply to any of them, or deny the truth of what they contained", it is held, as to the statements therein, that such failure "is a tacit admission of them, and to that end the letters of the plaintiff were admissible.

21. They were dunning letters", "and presented to the defendant the plaintiff's account for services according to the contract. By his silence the defendant admitted the claim of the plaintiff. *Hinton v. Wells*, 45 W., 268".
—*Murphey v. Gates*, 81 W., 370, 372.

22. As to varying effects of an offer in writing and by telegram, in detail. See CONTRACTS.
—*Sherley v. Peehl*, 84 W., 46, 52.

23. Where a memorandum of a contract of sale of personalty was written in the ledger of the vendee S., by his book-keeper, being his wife, at his dictation and "direction, in presence of both parties"; and testified to by witness M., and "that he heard the contract made"; "that she read it after she wrote it down; and that he stood where he could see it, though not close enough to read it";—it is held:

24. "It is very clear that it was not admissible as a book of account under the statute, because it is neither a charge nor a credit nor an entry that properly belongs to an account.

25. A memorandum otherwise incompetent cannot be made admissible by being written in a book of account".

26. It was not admissible on the evidence of the book-keeper, merely, as to her authority and acts relating thereto;

27. Nor could she "tell what the contract was", being incompetent as the wife of the party, as "she had not made it, nor taken any part in making it", as "agent of her husband";

28. But the witness M. "was entirely competent to testify as to anything that took place"; though "it was not his memorandum and he did not read it", "he could certainly use the memorandum to refresh his recollection, though not made by himself, if he could identify it upon inspection and testify that he recollected it as the one made at the time of the transactions. *Hill v. State*, 17 W. 675.

29. We think, also, in the present case, that, if he could so identify it, the memorandum would itself become substantive evidence".

30. It having been so read over "in the presence of both parties, at the time, and without dissent", "it became, if properly identified, not the mere memorandum of the witness, but an admission of the parties, and entitled to be introduced as such". *Eby v. Eby's Assignee*, 5 Pa. St. 435.
—*Hazer v. Streich*, 92 W. 505, 508.

31. Minutes of former trial may be used by the scrivener to refresh his recollection, in testifying as to evidence given by deceased party. See EVIDENCE.
—*McGeoch v. Carlson*, 96 W. 138, 140.

32. "Proof of the mailing of a letter in time to reach the person to whom it was addressed, in the regular course of the mails, prima facie

establishes the fact that it was received. Jones Ev. Sec. 46, and cases cited." Testifying that "he did not remember having received it", "did not weaken" this *prima facie* effect.

—*McDermott v. Jackson*, 97 W. 64, 75.

33. Letters between husband and wife are held privileged. See PRIVILEGED COMMUNICATIONS. —*Lancot v. State*, 98 W. 136, 137.

34. As to a memorandum to refresh memory, "unless the witness needed it to aid his memory, it has no place in the case," there being no proper foundation laid, and its admission is held error.

—*Cox Bros. & Co. v. Milbrath*, 110 W., 499, 505.

35. "Writings by which the owner's rights to his property are affected or rights in or to such property are conferred on others fall into one or another of three broad classes;

36. First, conveyances—those which evidence a presently completed and executed devolution of the property, or some right thereto;

37. Second, executory contracts—those which evidence a promise or agreement that some rights shall arise in another at some future time;

38. And, third, those which merely declare a present will or intent as to a future disposition.

39. Of these the second" requires a consideration, and the third is enforceable only when "testamentary" and "completed by his death without formal" revocation. See also WILLS.

—*Templeton v. Butler*, 117 W., 455, 457.

40. "One may refer to a memorandum made by himself for the purpose of preparing to give testimony in regard to the fact involved, even if he has no present recollection independent thereof, so long as he knows that, when he made it, it was in accordance with the truth. (Cases).

41. The mere fact that the memorandum is not produced in court at the time the witness' testimony is given may go to the credibility of such testimony.

42. But does not go to the competency thereof or justify the court in rejecting it unless the witness unreasonably refuses to comply with the order of the court to produce the memorandum". See also BIRTH.

—*Loose v. State*, 120 W. 115, 122.

43. Orders for the sale of merchandise, taken at W. by "the plaintiff's (seller's) agent were by their terms only to become binding if approved and accepted by the plaintiff company" of M.

44. "Up to the time of such approval and acceptance they could be withdrawn or cancelled by the defendant".

45. Where a "countermanding letter was received as early as 2 o'clock p. m.", by the plaintiff, "while the postal card of acknowledgment (acceptance of the orders) bears the stamp of (Milwaukee) Station

A. at 4 p. m.", it is held that no contract was made. *Washburn v. Fletcher*, 42 W., supra. —*Mueller F. Co., v. Meiklejohn*, 121 W. 605, 607.

46. Where an attorney, being a party, as a witness on cross-examination, disclosed the possession of letters at his office, and on being asked to produce them, "objected on the ground that they were" privileged, and there being no ruling,—it is said that while they might "have been received", "counsel did not go far enough" "to present the question.

47. He should have given formal notice to produce, or at least should have demanded their production, basing such demand on a statement of what he expected to prove, and then he would have obtained a ruling of the court and an exception". —*Winn v. Itzel*, 125 W. 19, 29.

48. "Letter-press copies of letters" are held improperly admitted, where "there was nothing to show that the originals were not in existence and that they could not have been produced if proper steps for their production had been taken",

49. Though the party "shows that they were not in his possession or under his immediate control",—when the custodian might have been subpoenaed. (Cases).

50. "The original letters and letter-press copies are not regarded as being duplicates. (Citations)".

—*Menasha W. W. Co. v. Harmon*, 128 W. 177, 181.

51. Evidence of a witness to "the contents of a letter which he claims to have received from the defendants", was held proper, there being "evidence to the effect that the letter could not be produced—that it had been burned or destroyed". —*Bazelon v. Lyon*, 128 W. 337, 339.

52. As to compelling production of private books or papers of a third party. See INHERITANCE TAXES.

—*State ex rel Pabst B. Co. v. Carpenter*, 129 W. 180, 189.

53. "It is the settled law of this state that a valid and binding contract for the sale of real estate may be made through the medium of letters";

54. And that, in case of breach by the other party, "the vendee may enforce specific performance", and "the vendor may maintain an action to recover the purchase price.

55. The promise to pay on the part of the vendee is a sufficient consideration for the agreement to sell by the vendor. (Many cases)".

—*Curtis L. & L. Co. v. Interior L. Co.*, 137 W. 341, 345.

56. A letter "was on one of the regular letterheads used by the" addressors "and the addressee testified that it was received directly from them. Under these circumstances it seems the paper, though

marked 'Copy' and though signed with a stamp instead of in writing, was competent as" evidence.

—*Stumm v. Western U. Tel. Co.*, 140 W. 528, 534.

57. A memorandum in plaintiff's presence as to an agreement "made by the defendant in his own interest and not brought to the knowledge of the plaintiff at the time", "was mere self-serving memorandum", and does "not constitute substantive evidence of the facts as against the other party to the transaction".

—*Haueter v. Marty*, 150 W. 490, 494.

58. "A witness should not be allowed to use a writing to refresh his memory which was made by another person unless he knows it to be correct. (Citation)".

—*Toepfer v. Sterr*, 156 W. 226, 229.

59. As to actions depending on lost writings to establish a written contract requiring clear and satisfactory evidence. See LEGACIES.

—*Dilger v. Est. of McQuade*, 158 W. 328, 332.

60. "Maps and diagrams are frequently received in evidence with very slight proof of accuracy or authenticity when they constitute merely a picture or a summing up of evidence otherwise legitimately in the case.

61. But where they are used to establish an independent relevant fact"—as here, "a railroad right of way" as being near lands,—“they are subject to the same rules as other documentary evidence”.

—*Govier v. Brechler*, 159 W. 157, 163.

WRIT OF CERTIORARI.

Appealable orders or judgments, 9.

Common-law writ not apply, 11.

Court not review, 9.

Appear wrong has been done, 4.

Nature to be corrected, 4.

Common law rule prevails, 6.

Issued to inferior courts, 1.

Acting judicially, 1.

Judicial nature only, 3.

Officer or municipality, 3.

Not ministerial or unlawful acts, 2.

Jurisdictional errors only, 12, 14.

Has no other use, 13.

Except to bring record up, 13.

Not postponement denial, 14.

Jurisdictional, etc.—continued

Not weight or credibility of evidence, 15.

Test validity of proceeding, 12.

Notwithstanding supersedeas, 8.

Judgment pleaded in estoppel, 8.

Other proceedings taken, 8.

Reaches record, not body, 13.

Record must show, 5.

Parol testimony not allowed, 5.

Superintending control, 10.

Not lightly exercised, 10.

When ordinary remedies suffice, 10.

Suspends the execution, 7.

Does not vacate, 7.

1. "It is well settled that the writ of certiorari at common law can only be issued to the inferior courts or bodies acting in a judicial or quasi judicial character,

2. And not for the purpose of reversing ministerial or unlawful acts not done in the discharge of some judicial or quasi-judicial duty. (Citations).

3. 'It is only acts of a judicial nature that can be reviewed on certiorari; and this, too, whether the act is that of a judicial officer or a municipal corporation, or otherwise'. *People ex rel Van Voast v. Van Slyck*, 4 Cow. 297; (many cases).

4. 'It is also a rule of law that, before allowing or acting upon the writ of certiorari, it must be made satisfactorily to appear to the court that a wrong has been done, and that the error is of a nature that can be corrected by the issuing of the writ'. *People ex rel Moore v. Mayor*, 5 Barb. 43; (other cases)".

5. "Upon a writ of certiorari nothing can be inquired into except what appears of record in the inferior court or body, and upon the return no parol testimony is allowed to establish any issues made by the return to the allegations contained in the petition for the writ. *State ex rel Manitowoc v. County Clerk*, 59 W. 15, 23".

6. It is assumed, without being stated, that the rule of the common law as to this writ prevails, and the proceedings as to a schoolhouse sale are quashed. —*State ex rel Wiesmann, v. Kemen*, 61 W. 494, 496.

7. "A writ of certiorari suspends the execution of the judgment or order challenged thereby. It does not vacate such judgment or order."

8. "Notwithstanding the supersedeas or stay, the judgment or order may be pleaded or given in evidence in bar or as an estoppel," "or any other proceedings be taken not inconsistent with the dormant status of the judgment so far as its enforcement is concerned. *Neuman v. State*, 76 W., 112; *Richter v. Leiby*, 99 W., 512; *State v. Madison*, 63 Me., 546."

—*State ex rel C. & N. W. R. Co., v. Burnell*, 102 W., 232, 234.

9. "This court has repeatedly declared its policy to refuse to review by certiorari appealable orders or judgments. *State ex rel C. & N. W. R. Co., v. O. A. & B. W. R. Co.*, 100 W. 538; *Harris, Certiorari*, 44, 87".

10. This is because "its powers of superintending control over other courts, like the powers of original jurisdiction, are 'not to be exercised upon light occasion, or when other and ordinary remedies are sufficient', as expressed by Mr. Justice Winslow in *State ex rel Fourth Nat. Bank v. Johnson*, 103 W. 591."

—*State ex rel Meggett v. O'Neill*, 104 W. 227, 229.

11. "A common-law writ of certiorari will not issue where there is an adequate remedy by appeal or otherwise. (Case)".

—*In re Hammer*, 113 W., 96, 97.

12. "A writ of certiorari reaches only jurisdictional errors, when sued out to test the validity of some judicial or quasi-judicial proceeding.

13. It has no other use, except to bring before the court a record material to be considered in exercising jurisdiction in deciding a matter presented by some other writ. (Citation)". It "reaches the record but not the body". See also HABEAS CORPUS.

—*State ex rel Gaster v. Whitcher*, 117 W., 668, 671.

14. "On certiorari the circuit court could only consider jurisdictional matters, and the denial of a postponement does not reach the question of jurisdiction. (Cases)".

15. Nor can "the weight or credibility of" the evidence, "be reviewed on certiorari".

—*State ex rel Spritka v. Parsons*, 153 W. 20, 23.

WRIT OF ERROR.

According to common law, 11.

After judgment, law action, 10.

Some supposed mistake, 10.

Civil actions; final judgments, 6.

Triable by jury only, 6, 7.

As a matter of right, 7.

Except divorce actions, 6.

Constitution preserved common law, 4.

Cannot be taken away, 8.

Where existing before, 8.

Criminal as in civil cases, 5.

Not issue of insanity, 9.

Not decree in equity case, 3.

Not to review order, 2.

Statute not enlarged it, 4.

Not restrictive effect, 11.

Upon final judgments only, 1, 7, 12.

Not bring up subsequent orders, 12.

1. "At common law, such writ could only be brought upon a final judgment, or an award in the nature of a final judgment. (Many cases.)

2. A writ of error does not lie to review an order (cases.)

3. It does not extend to a decree or judgment in an equity case. (Cases).

4. Such was the writ which was preserved by the constitution. Sec. 21, Art. 1. The statute has not enlarged the functions of the writ. (Cases)."

5. Under the statute, such writs in criminal cases are issued as "provided by law in civil cases. Sec. 4724.

6. And in civil cases it provides that writs of error may issue to review final judgments in actions triable by jury, except actions for divorce. Sec. 3043."

7. "The statutory provision that the writ 'may issue to review final judgments in actions triable by jury,' clearly means actions so triable as a matter of right. Secs. 5, 7, Art. 1. Const.

8. Since the constitutional right must 'remain inviolate', it cannot be taken away in any class of cases where it existed when the constitution was adopted. (Cases)".

9. The right to trial by jury under the constitution, does not extend

to the trial of the issue of insanity in criminal cases, under section 4700. See also JURY. —*Crocker v. State*, 60 W. 553, 555.

10. "A writ of error lies after judgment in any action at law in a court of record, to correct some supposed mistake in the proceedings or judgment of the court. (Citations)."

11. In *Crocker v. State*, 60 W., supra, it was not intended to give a "restrictive effect to the statute", sec. 3043, which "does not attempt to restrict the functions of the writ", "but only to assert the rule that the writ can be brought only on a judgment given in a court of record proceeding according to the course of common law."

—*Buttrick v. Roy*, 72 W. 164, 165-6.

12. "Writ of error runs only to final judgment, and not to an order. Sec. 3043; (cases). Writ of error to judgment does not bring up subsequent orders. *O'Toole v. State*, 105 W., 18".

—*J. L. Gates Land Co. v. Olds*, 112 W., 268, 269.

WRIT OF NE EXEAT.

Ancillary to an action, 9.
Application of complainant only, 7.
Not against plaintiff, 7.
Functions as common law, 3.
Obtain equitable bail, 3.
Issued by court of equity, 4.
Against a debtor party, 4.
Not against third person, 4.
Nature of equitable bail, 9.
Party about to leave, 9.
To make decree ineffectual, 9.

Provisional remedy, 8.
Issued at summons, or after, 8.
Recital of ancient writ, 5.
Statute not change, 6.
Special order of court, 9.
Statute, not create or define, 1.
Common law recognized, 2.
Scope not enlarged, 2.
"Sufficient grounds", means, 6.
As at common law, 6.

1. "The writ of ne exeat is not created, nor are its functions defined, by statute.

2. Secs. 2784-6, recognize the common-law writ and make certain provisions regulating the practice, but do not pretend to enlarge its scope.

3. As to the general functions of the writ and the grounds upon which it may issue we must turn to the principles of the common law. *Bonesteel v. Bonesteel*, 28 W. 245. At common law it was simply a writ to obtain equitable bail.

4. It was issued by a court of equity" "only against a debtor who was a party to the suit, not against a third person not a debtor whether he be a party to the suit or not.

5. The ancient writ always recited that it appears that the defendant is indebted to the complainant and designs quickly to go to parts beyond the seas. *Beames, Ne Exeat* 18.

6. Nor is this latter rule in any wise changed by the terms of sec. 2784." "Sufficient ground means" "grounds sufficient" under the common law, and it must appear "that the party is a debtor".

7. It issues only "on application of the complainant and against the defendant", and not "against the plaintiff".

—*Davidor v. Rosenberg*, 130 W. 22, 24.

8. "A writ of ne exeat is a provisional remedy" "to be issued" "at the time of issuing the summons or at any time afterward before judgment".

9. It "is in the nature of equitable bail, issued only by the special order of the court when the party is about to leave its jurisdiction and make its decree ineffectual. *Dean v. Smith*, 23 W. 483. It is ancillary to the action in which it is issued".

—*State ex rel Cazier v. Turner*, 145 W. 484, 485.

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